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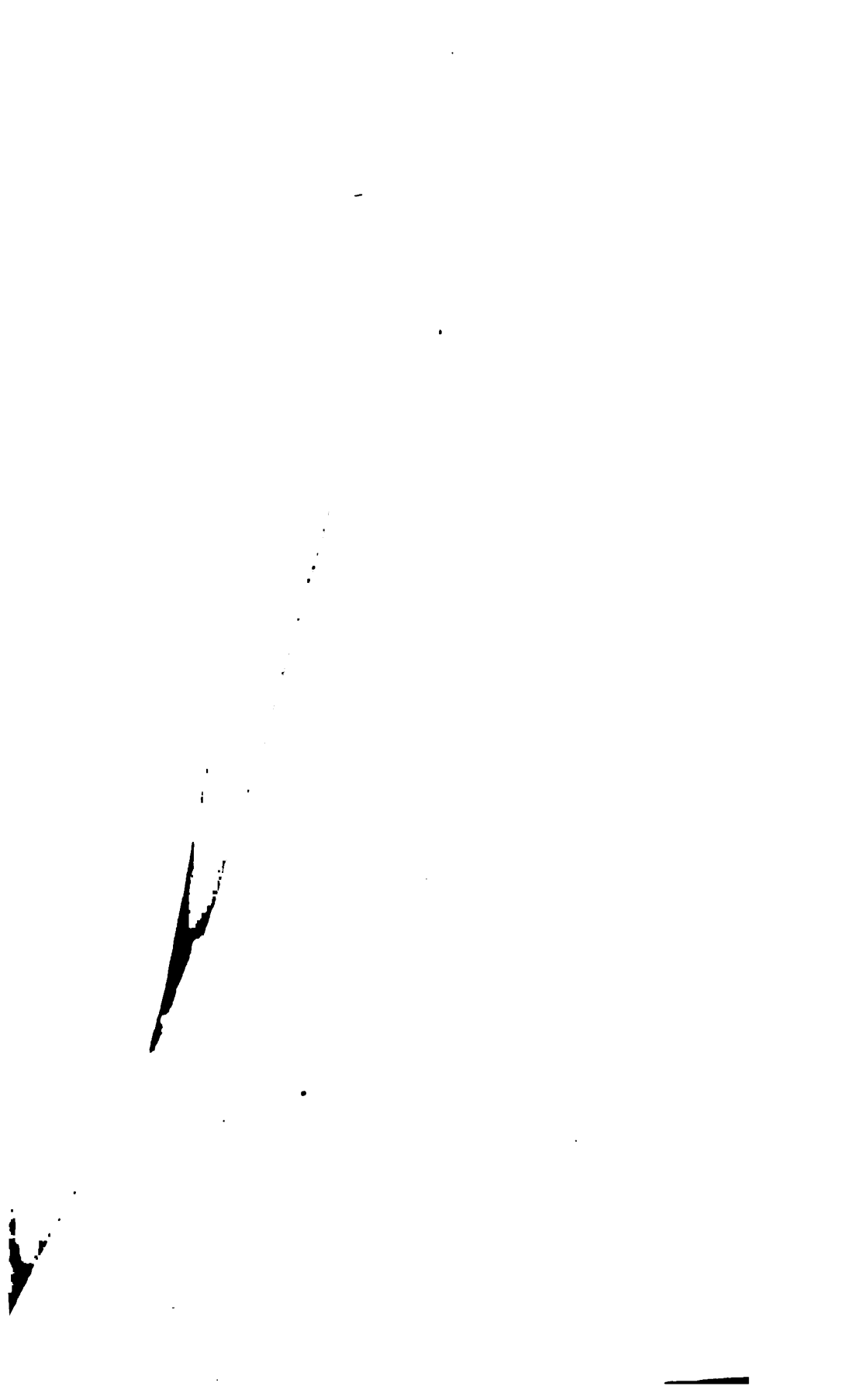
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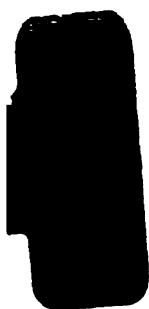
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CASES

DECIDED IN

THE COURT OF SESSION, COURT OF JUSTICIARY.

AND

HOUSE OF LORDS,

FROM AUGUST 5, 1891, TO AUGUST 9, 1892.

REPORTED BY

MIDDLETON RETTIE, JAMES PATTEN MACDOUGALL,
H. J. E. FRASER, GEORGE R. GILLESPIE, AND
JOHN DAVID SYM, ESQUIRES, ADVOCATES.

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OF THE
COURT OF SESSION
DURING THE PERIOD OF THESE REPORTS.

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INDEX OF NAMES

IN

VOLUME XIX.

For Index of Names in Registration Appeal Cases, see p. xii.,—
Lands Valuation Appeal Cases, see p. xii.,—
Court of Justiciary, see p. xiii.,—House of Lords, see p. xiv.

I.—COURT OF SESSION.

	Page
"Abertawe," The - - - - -	209
Advocate, Lord, v. Clyde Navigation Trustees, - - - - -	174
Advocate, Lord, v. Dunlop's Trustees, - - - - -	461
Advocate, Lord, Lanarkshire County Council v. - - - - -	617
Aitken, Second Edinburgh and Leith 493d Star-Bowkett Building Society v. - - - - -	603
Aitken, &c. (Baird's Trustees) v. Duncanson, - - - - -	1045
Aitkenhead v. Bunten & Co., - - - - -	803
Alexander, Yule v. - - - - -	167
Allan v. Johnstone, - - - - -	364
Allan's Trustee v. Allan & Sons, - - - - -	15
Allan's Trustee v. Allan & Sons, - - - - -	215
Anderson v. Anderson's Trustee, - - - - -	684
Anderson (Davidson's Trustee) v. Urquhart, - - - - -	808
Arbuthnott, Rait v. - - - - -	687
"Archdruid," The - - - - -	364
Arizona Copper Company v. Surveyor of Taxes, - - - - -	150
Baillie's Trustees v. Baillie, - - - - -	220
Baird & Stevenson v. Malloch, - - - - -	1061
Baird's Trustees v. Duncanson, - - - - -	1045
Balfour, M'Duff v. - - - - -	440
Bankier Distillery Co. v. Young & Co., - - - - -	1083
Barony, Inspector of, v. Inspector of Bothwell, - - - - -	417
Batchelor's Trustees v. Honeyman, - - - - -	903
Beatson, &c. (Mackinnon's Trustees) v. Official Receiver in Bankruptcy in England, - - - - -	1051
Beattie v. Muir, - - - - -	417
Beattie & Sons, Macfarlane v. - - - - -	953
Begg, &c. (Trustees of Moffat Working-Men's Institute), Simpson v. - - - - -	389
Bell, Forfar and Brechin Railway Co. v. - - - - -	786
Benhar Coal Company, Liquidators of, - - - - -	108
Beresford's Trustees, Lucas's Trustees v. - - - - -	943
Bhagvat Sinhjee, Roes v. - - - - -	31
Birnie v. Christie, - - - - -	334
Board of Trade, Watson v. - - - - -	1078
Bothwell, Inspector of, Inspector of Barony v. - - - - -	417
Bothwell, Inspector of, Flannigan v. - - - - -	909
Bowers v. Pringle Pattison's Curator Bonis, - - - - -	941
Bowman v. Russell's Trustees, - - - - -	205
Brand v. Scott's Trustees, - - - - -	768
British Publishing Co. v. Hedderwick & Sons, - - - - -	1008
Brotch v. Dodds, - - - - -	855
Brown, Webster v. - - - - -	765
Brown, Sinclair v. - - - - -	780

	Page
Bruce v. Leisk, - - - - -	482
Bryan v. Butters Brothers & Co., - - - - -	490
Buchanan, Houstoun v. - - - - -	524
Bulloch, Lade, & Co., Robb v. - - - - -	971
Bunten & Co., Aitkenhead v. - - - - -	803
Butters Brothers & Co., Bryan v. - - - - -	490
Byng and Another (Lucas's Trustees) v. Scott and Another (Beresford's Trustees), - - - - -	943
Cain v. M'Colm, - - - - -	813
Caledonian Insurance Co. v. Gilmour, - - - - -	64
Caledonian Railway Co., Cramb v. - - - - -	1054
Caledonian Railway Co. v. M'Bride, - - - - -	255
Caledonian Railway Co., Magistrates of Glasgow v. - - - - -	874
Caledonian Railway Co., Port-Glasgow and Newark Sail Cloth Co. v. - - - - -	608
Callander and Oban Railway Co., Town-Council of Oban v. - - - - -	912
Cameron, Fraser v. - - - - -	564
Cameron, M'Kercher v. - - - - -	383
Campbell v. Magistrates of Edinburgh, - - - - -	159
Campbell, Malcolm v. - - - - -	278
Campbell v. A. & D. Morrison, - - - - -	282
Campbell v. Falconer, - - - - -	563
Campbell, National Bank of Scotland v. - - - - -	885
Cannon & Co., Patmore & Co. v. - - - - -	1004
Carnegie Park Orphanage, Trustees of, - - - - -	605
Carswell, Collard v. - - - - -	987
Carter's Trustees v. Carter, - - - - -	408
"Cassia," The - - - - -	38
Chaplin's Trustee v. Hoile, - - - - -	237
Chapman v. Sulphite Pulp Co., - - - - -	837
Cheyne, Mitchell & Baxter v. - - - - -	324
Christie, Birnie v. - - - - -	334
Clark, Sawers v. - - - - -	1091
Clidero v. Scottish Accident Insurance Co., - - - - -	355
Clyde Coal Co., Hughes v. - - - - -	343
Clyde Navigation Trustees, Lord Advocate v. - - - - -	174
Collard v. Carswell, - - - - -	987
Colquhoun v. Colquhoun's Trustees, - - - - -	946
Coustonholm Paper Mills Co., Liquidators of, Stocker v. - - - - -	17
Cowan v. Scottish Publishing Co., - - - - -	437
Coyle, Reid v. - - - - -	775
Coyle and Others (Paterson's Trustees), Walker (Paterson's Trustee) v. - - - - -	91
Crabb v. Fraser, - - - - -	580
Craik v. Penny, - - - - -	339
Cramb v. Caledonian Railway Co., - - - - -	1054
Crichton, Duncan v. - - - - -	594
Crum, Dalglish's Trustees v. - - - - -	170
Culross Special Water Supply District Committee v. Smith-Sligo's Trustees, - - - - -	58
Culter Paper Mills Co., Wallace v. - - - - -	915
Dalglish's Trustees v. Crum, - - - - -	170
Davidson, Forbes' Trustees v. - - - - -	1022
Davidson's Trustee v. Urquhart, - - - - -	808
Dawson v. M'Kenzie, - - - - -	261
Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge, - - - - -	8
Den (Inspector of Meldrum) v. Lumsden, - - - - -	77
Dick, Thomson v. - - - - -	804
Diverall, Governors of Strichen Endowments v. - - - - -	79
Dodds, Broatch v. - - - - -	855

INDEX OF NAMES.

vii

	Page
Duff & Co. v. Iron and Steel Fencing and Buildings Co.,	199
Duncan v. Crighton,	594
Duncan & Co., Sweeney v.	870
Duncanson, Baird's Trustees v.	1045
Dunlop & Co., Letricheux & David v.	209
Dunlop's Trustees, Lord Advocate v.	461
Dunsmore's Trustee v. Stewart,	4
Duthie, Johnstone v.	624
Duthie Brothers & Co. v. Duthie,	905
Edinburgh and Leith Children's Aid and Refuge, Directors of, Delaney v.	8
Edinburgh Employers, &c. Company, Liquidators of, v. Griffiths,	550
Edinburgh, Magistrates of, Campbell v.	159
Edinburgh Northern Tramways Co. v. Mann,	24
Ellis (Fleming's Trustee) v. M'Hardy,	542
Falconar Stewart v. Wilkie,	630
Falconer, Campbell v.	563
Ferguson's Trustees, Martin v.	474
Flannigan v. Inspector of Bothwell,	909
Fleming, Jack v.	1
Fleming and Others (M'Culloch's Trustees) v. M'Culloch,	777
Fleming's Trustee v. M'Hardy,	542
Forbes and Others (Forbes' Trustees) v. Davidson,	1022
Forfar and Brechin Railway Co. v. Bell,	786
Fraser, Crabb v.	580
Fraser v. Cameron,	564
Fraser v. Magistrates of Rothesay,	817
Fraser's Judicial Factor,	500
Gaffney, Rowan v.	62
Galashiels, Inspector of, v. Inspector of Melrose,	758
Gallagher v. Pattison,	79
Galloway Saloon Steam Packet Co. v. Wallace,	330
General Accident Assurance Corporation, Sickness and Accident Assurance Association v.	977
Gilmour, Caledonian Insurance Co. v.	64
Glasgow, Magistrates of, v. Caledonian Railway Co.,	874
Gordon (Dunsmore's Trustee) v. Stewart,	4
Govan, Police Commissioners of, v. Mickel,	670
Granite City Steamship Co. v. Ireland & Son,	124
Grant and Others (Low's Trustees) v. Whitworth,	431
Gray v. Smart,	692
Gray v. Weir,	25
Great Britain Steamship Premium Association v. Whyte,	109
Great North of Scotland Railway Co. v. Mann,	1035
Greenock, Magistrates of, Peters v.	643
Greer v. Turnbull & Co.,	21
Grierson, Mavor & Coulson v.	868
Griffiths, Liquidators of Edinburgh Employers, &c. Co. v.	550
Haddington, Inspector of, Inspector of North Berwick v.	6
Hall's Trustees v. Macdonald,	567
Halvorsen, Napier, Shanks, & Bell v.	412
Hedderwick & Sons, British Publishing Co. v.	1008
Henderson v. Watson,	954
Henry v. Scott,	545
Hermand Oil Co., Young v.	867
Heron Maxwell, &c. (Maxwell Heron's Trustees) v. Maxwell Heron,	922
Hewat's Trustee v. Smith,	403
Highland Railway Co., Louttit v.	791

	Page
Hill v. Thomson, - - - - -	377
Hillhouse v. Walker, - - - - -	47
Hoile, Chaplin's Trustee v. - - - - -	237
Honeyman, Batchelor's Trustees v. - - - - -	903
Houstoun v. Buchanan, - - - - -	524
Howat, Lowenfeld (Liquidator of Universal Stock Exchange Co.) v. - - - - -	128
Hughes v. Clyde Coal Co., - - - - -	343
Hutchison, Molleson v. - - - - -	581
Imrie v. Imrie, - - - - -	185
Inglis v. M'Neil, - - - - -	924
Ingram, Tully v. - - - - -	65
Inland Revenue v. Royal College of Surgeons of Edinburgh, - - - - -	751
Inveraray, School Board of, Smith v. - - - - -	247
Ireland & Son, Granite City Steamship Co. v. - - - - -	124
Iron and Steel Fencing and Buildings Co., Duff & Co. v. - - - - -	199
Irvine v. M'Hardy, - - - - -	458
Jack v. Fleming, - - - - -	1
Jackson v. MacDiarmid, - - - - -	528
Jamieson v. Russell & Co., - - - - -	898
Johnstone v. Duthie, - - - - -	624
Johnstone, Allan v. - - - - -	364
Kay's Trustee v. Stalker, - - - - -	1071
Keillor, Mackenzie v. - - - - -	963
Kemp (Inspector of Haddington), Lees (Inspector of North Berwick) v. - - - - -	6
Kilmuir Easter, Inspector of, v. Inspector of Lochbroom, - - - - -	396
Knight & Co. v. Stott, - - - - -	959
Lanark, County Council of Lower Ward of, Neilson v. - - - - -	311
Lanarkshire County Council v. Lord Advocate, - - - - -	617
Lang's Trustee v. Steel, - - - - -	488
Laurencekirk, Inspector of, Inspector of St Nicholas v. - - - - -	233
Lawrie v. Lawrie's Trustees, - - - - -	675
Lees (Inspector of North Berwick) v. Kemp (Inspector of Haddington), - - - - -	6
Leisk, Bruce v. - - - - -	482
Leith (Anderson's Trustee), Anderson v. - - - - -	684
Leslie, Middleton v. - - - - -	801
Leslie's Trustee, Rattray v. - - - - -	853
Letricheux & David v. Dunlop & Co., - - - - -	209
"Linn o' Dee," The - - - - -	124
Lochbroom, Inspector of, Inspector of Kilmuir Easter v. - - - - -	396
Louttit v. Highland Railway Co., - - - - -	791
Low v. Low, - - - - -	115
Low's Trustees v. Whitworth, - - - - -	431
Lowenfeld v. Howat, - - - - -	128
Lucas's Trustees v. Beresford's Trustees, - - - - -	943
Lumsden, Den (Inspector of Meldrum) v. - - - - -	77
M'Alpine, M'Ginty v. - - - - -	935
M'Bride, Caledonian Railway Co. v. - - - - -	255
M'Colm, Cain v. - - - - -	813
M'Culloch's Trustees, - - - - -	777
M'Cusker, Sproul v. - - - - -	539
MacDiarmid, Jackson v. - - - - -	528
Macdonald, Hall's Trustees v. - - - - -	567
M'Dowall & Neilson, Thorsen v. - - - - -	743
M'Duff v. Balfour, - - - - -	440
M'Ewan, &c. (Carter's Trustees) v. Carter, - - - - -	408
M'Fadyen v. Spencer & Co., - - - - -	350
Macfarlane and Others (Dunlop's Trustees), Lord Advocate v. - - - - -	461

INDEX OF NAMES.

ix

	Page
Macfarlane v. Beattie & Sons, - - -	953
Macgillivray v. Mackintosh, - - -	103
M'Ginty v. M'Alpine, - - -	935
M'Hardy, Irvine v. - - -	458
M'Hardy, Fleming's Trustee v. - - -	542
Mackay (Inspector of Kilmuir Easter) v. Munro (Inspector of Lochbroom),	396
M'Kenzie, Dawson v. - - -	261
Mackenzie v. Keillor, - - -	963
Mackenzie's Trustee, Macrae v. - - -	138
M'Kercher v. Cameron, - - -	383
Mackinnon, &c. (Russell's Trustees), Bowman v. - - -	205
Mackinnon's Trustees v. Official Receiver in Bankruptcy in England, -	1051
Mackintosh, Macgillivray v. - - -	103
M'Kinven v. M'Millan, - - -	369
M'Knight & Co. v. Montgomerie, - - -	501
M'Langhlin, Nicholson's Trustees v. - - -	49
M'Laurin v. North British Railway Company, - - -	346
M'Lean, - - -	1043
Maclellans, Taylors v. - - -	10
Macleod, Stuart & Stuart v. - - -	223
Macleod & Co., Stephens, Mawson, & Goss v. - - -	38
M'Millan, M'Kinven v. - - -	369
M'Neil, Inglis v. - - -	924
M'Quillan v. Smith, - - -	375
Macrae v. Mackenzie's Trustee, - - -	138
Malcolm v. Campbell, - - -	278
Malloch, Baird & Stevenson v. - - -	1061
Mann, Great North of Scotland Railway Co. v. - - -	1035
Mann, Edinburgh Northern Tramways Co. v. - - -	24
Martin v. Ferguson's Trustees, - - -	474
Mavor & Coulson v. Grierson, - - -	868
Maxwell Heron's Trustees v. Maxwell Heron, - - -	922
Meldrum, Inspector of, v. Lumsden, - - -	77
Melrose, Inspector of, Inspector of Galashiels v. - - -	758
Mickel, Police Commissioners of Govan v. - - -	670
Middleton v. Leslie, - - -	801
Middleton (Hewat's Trustee) v. Smith, - - -	403
Milligan v. Muir & Co., - - -	18
Milne v. Townsend, - - -	830
Mitchell and Others (Moir's Trustees), Orr v. - - -	700
Mitchell and Others (Whittet's Trustees) v. Whittet, - - -	975
Mitchell & Baxter v. Cheyne, - - -	324
Moffat Working Men's Institute, Trustees of, Simpson v. - - -	389
Moir's Trustees, Orr v. - - -	700
Molleson v. Hutchison, - - -	581
Molleson (Pringle Pattison's Curator Bonis), Bowers v. - - -	941
Montgomerie, M'Knight & Co. v. - - -	501
Moray, Earl of, Taylor v. - - -	399
More (Chaplin's Trustee) v. Hoile, - - -	237
Morrison, Stewart v. - - -	1009
Morrison, A. & D., Campbell v. - - -	282
Morrison & Co., - - -	1049
Muir (Inspector of Bothwell), Flannigan v. - - -	909
Muir & Co., Milligan v. - - -	18
Muir, Smyth v. - - -	81
Muir (Inspector of Bothwell), Beattie (Inspector of Barony) v. - - -	417
Muir (Muir's Executrix), Shaw v. - - -	997
Munro, Mackay v. - - -	396
Murdoch, Royal Burgh of Renfrew v. - - -	822

	Page
Napier, Shanks, & Bell v. Halvorsen, - - -	412
National Bank of Scotland v. Campbell, - - -	885
Neilson v. County Council of Lower Ward of Lanark, - - -	311
Nelson v. Scott, Croall, & Sons, - - -	425
Nicholson's Trustees v. M'Laughlin, - - -	49
North Berwick, Inspector of, v. Inspector of Haddington, - - -	6
North British Railway Company, M'Laurin v. - - -	346
North of Scotland Steam Navigation Co., Walker v. - - -	386
Niddrie and Benhar Coal Company, - - -	820
Oban, Town Council of, v. Callander and Oban Railway Co., - - -	912
Official Receiver in Bankruptcy in England, Mackinnon's Trustees v. - - -	1051
Oliver, Turnbull v. - - -	154
Oncken's Judicial Factor v. Reimers, - - -	519
Orr v. Moir's Trustees, - - -	700
Paterson's Trustee v. Paterson's Trustees, - - -	91
Patmore & Co. v. B. Cannon & Co., - - -	1004
Pattison, Gallagher v. - - -	79
Pearson (Reeve's Executor) v. Reeve's Judicial Factor, - - -	1013
Penny v. Penny Craik, - - -	334
Penny, Craik v. - - -	339
Peters v. Magistrates of Greenock, - - -	643
Petrie, Smith v. - - -	405
Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co., - - -	608
Powrie & Pitcaithley, Ross v. - - -	314
Prestonpans, Kirk-Session of, v. School Board of Prestonpans, - - -	193
Pringle Pattison's Curator Bonis, Bowers v. - - -	941
Pringle v. Pringle, - - -	926
"Queen," The - - -	386
Rait v. Arbuthnott, - - -	687
Rattray v. Leslie's Trustee, - - -	853
Reeve's Executor v. Reeve's Judicial Factor, - - -	1013
Reid v. Coyle, - - -	775
Reimers, Oncken's Judicial Factor v. - - -	519
Renfrew, Royal Burgh of, v. Murdoch, - - -	822
Renwick v. Stamford, Spalding, and Boston Banking Co., - - -	163
Robb v. Bulloch, Lade, & Co., - - -	971
Robertson v. Ross & Co., - - -	967
Robertson v. Robertson's Trustees, - - -	849
Robinow, Sim v. - - -	665
Ross v. Bhagvat Sinhjee, - - -	31
Ross (Inspector of Laurencekirk), Wallace (Inspector of St Nicholas) v. - - -	233
Ross v. Powrie & Pitcaithley, - - -	314
Ross (Fraser's Judicial Factor), - - -	500
Ross & Co., Robertson v. - - -	967
Rothsay, Magistrates of, Fraser v. - - -	817
Rowan v. Gaffney, - - -	62
Royal College of Surgeons of Edinburgh, Inland Revenue v. - - -	751
Russell & Co., Jamieson v. - - -	899
Russell's Trustees, Bowman v. - - -	205
St Nicholas, Inspector of, v. Inspector of Laurencekirk, - - -	233
Sawers v. Clark, - - -	1091
Scott, Henry v. - - -	545
Scott and Another (Beresford's Trustees), Byng and Another (Lucas's Trustees) v. - - -	943
Scott, Croall & Sons, Nelson v. - - -	425
Scott's Trustees, Brand v. - - -	768
Scott's Trustees v. Shaw, - - -	895

INDEX OF NAMES.

xi

	Page
Scottish Accident Insurance Co., Clidero v. - - -	355
Scottish Publishing Co., Cowan v. - - -	437
Second Edinburgh and Leith 493d Starr-Bowkett Building Society v. Aitken, - - -	603
Seddon, - - -	101
Shaw, Scott's Trustees v. - - -	895
Shaw v. Muir's Executrix, - - -	997
Sickness and Accident Assurance Association v. General Accident Assur- ance Corporation, - - -	977
Sim v. Robinow, - - -	665
Simpson v. Trustees of Moffat Working-Men's Institute, - - -	389
Sinclair v. Brown, - - -	780
Smart, Gray v. - - -	692
Smith, M'Quillan v. - - -	375
Smith v. School Board of Inveraray, - - -	247
Smith (Allan's Trustee) v. Allan & Son, - - -	215
Smith v. Petrie, - - -	405
Smith v. Wilson, - - -	428
Smith, Hewat's Trustee v. - - -	403
Smith-Sligo's Trustees, Culross Special Water Supply District Committee v. -	58
Smyth v. Muir, - - -	81
Spencer & Co., M'Fadyen v. - - -	350
Spröul v. M'Cuaker, - - -	539
Stafford, Marquess of, Duke of Sutherland v. - - -	504
Stamford, Spalding, and Boston Banking Co., Renwick v. - - -	163
Stalker, Kay's Trustee v. - - -	1071
Steel Co. of Scotland v. Tancered, Arrol, & Co., - - -	1062
Steele, Lang's Trustee v. - - -	488
Stephens, Mawson, & Goss v. Macleod & Co., - - -	38
Stewart v. Morrison, - - -	1009
Stewart, Gordon (Dunsmore's Trustee) v. - - -	4
Stewart, Falconar, v. Wilkie, - - -	630
Stewart v. Stewart, - - -	310
Stocker v. Liquidators of Coustonholm Paper Mills Co., - - -	17
Stott, Knight & Co. v. - - -	959
Strathie (Lang's Trustee) v. Steele, - - -	488
Strichen Endowments, Governors of, v. Diverall, - - -	79
Stromness, Town-Council of - - -	207
Stuart & Stuart v. Macleod, - - -	223
Sulley v. Royal College of Surgeons of Edinburgh, - - -	751
Sulphite Pulp Co., Chapman v. - - -	837
Surveyor of Taxes, Arizona Copper Co. v. - - -	150
Sutherland, Duke of, v. Marquess of Stafford, - - -	504
Sweeney v. Duncan & Co., - - -	870
Tancered, Arrol, & Co., Steel Co. of Scotland v. - - -	1062
Taylor v. Earl of Moray, - - -	399
Taylor v. Maclellans, - - -	10
"Theodor Korner," The - - -	743
Thomson v. Dick, - - -	804
Thomson, Hill v. - - -	377
Thomson v. M'Dowall & Neilson, - - -	743
Townsend, Milne v. - - -	830
Tudhope, Weir v. - - -	858
Tully v. Ingram, - - -	65
Turnbull & Co., Greer v. - - -	21
Turnbull v. Oliver, - - -	154
Universal Stock Exchange Co., Liquidator of, v. Howat, - - -	128
Urquhart, Davidson's Trustee v. - - -	808

	Page
Valentine (Oncken's Judicial Factor) v. Reimers, -	519
"Victoria," The -	987
Walker, Hillhouse v. -	47
Walker (Paterson's Trustee) v. Coyle and Others (Paterson's Trustees), -	91
Walker v. North of Scotland Steam Navigation Co., -	386
Wallace, Galloway Saloon Steam Packet Co. v. -	330
Wallace v. Culter Paper Mills Co., -	915
Wallace v. Ross, -	233
Watson v. Board of Trade, -	1078
Watson, Henderson v. -	954
Webster v. Brown, -	765
Weir, Gray v. -	25
Weir v. Tudhope, -	858
Whittet's Trustees v. Whittet, -	975
Whitworth, Low's Trustees v. -	431
Whyte, Great Britain Steamship Premium Association v. -	109
Wilkie, Falconar Stewart v. -	630
Wilson, -	219
Wilson, Smith v. -	428
Yeaman (Leslie's Trustee), Rattray v. -	853
Young v. Hermand Oil Co., -	867
Young & Co., Bankier Distillery Co. v. -	1083
Yule v. Alexander, -	167

REGISTRATION APPEAL CASES.

Burns v. Cassells, -	287
Cassells, Burns v. -	287
Comrie, M'Kenzie v. -	292
Falconer, Lindsay v. -	290
Falconer v. Macleod, -	291
Falconer v. M'Guffie, -	295
Lindsay v. Falconer, -	290
M'Guffie, Falconer v. -	295
M'Kenzie v. Comrie, -	292
M'Kenzie v. Watt, -	297
Macleod, Falconer v. -	291
Neilson v. Robertson, -	301
Robertson, Neilson v. -	301
Watt, M'Kenzie v. -	297

LANDS VALUATION APPEAL CASES.

Edinburgh, Assessor for, Ferrier v. -	882, 1074
Ferrier v. Assessor for Edinburgh, -	882, 1074
Hughes v. Assessor for Stirling, -	840
Lanarkshire, Assessor of, Steel Co. of Scotland v. -	847
Steel Co. of Scotland v. Assessor of Lanarkshire, -	847
Stirling, Assessor for, Hughes v. -	840

II.—COURT OF JUSTICIARY.

	Page
Advocate, Her Majesty's, v. Scott,	63
Auld, Phillips v.	29
Batchen v. Morrison,	25
Blain v. Rankin,	96
Board of Trade, Simpson v.	66
Boyce v. Shaw,	13
Brown v. Renton,	22
Cadenhead, Hutcheon v.	32
Donald v. Hart,	88
Duff, M'Donald v.	1
Duffie v. M'Cormick,	89
Duncan v. Neilson,	43
Eastburn v. Wood,	100
Halliday v. Wilson,	3
Hart, Donald v.	88
Henderson, Rodgers v.	40
Houghton v. Phyn,	37
Howman v. Ross,	19
Hutcheon v. Cadenhead,	32
Hutton v. Main,	5
Irving v. Phyn,	7
Lamb, Walker v.	50
Lamb v. Threshie,	78
Lamont, Macdonald v.	41
Lang v. Munro,	54
M'Cormick, Duffie v.	89
M'Donald v. Duff,	1
Macdonald v. Lamont,	41
M'Hattie v. Wyness,	95
M'Leod, Ross v.	18
Main, Hutton v.	5
Malcolm, Robertson v.	18
Miller, Torrance v.	85
Miller v. White,	104
Morrison, Batchen v.	25
Munro, Lang v.	54
Murray, Russell & Co. v.	61
Neilson, Duncan v.	43
Phillips v. Auld,	29
Phyn, Houghton v.	37
Phyn, Irving v.	7
Rankin, Blain v.	96
Rattray v. White,	23
Renton, Brown v.	22
Robertson v. Malcolm,	18
Rodgers v. Henderson,	40
Ross v. M'Leod,	18
Ross, Howman v.	19
Russell & Co. v. Murray,	61
Scott, Her Majesty's Advocate v.	63

	Page
Sharp v. Todd, - - - - -	47
Shaw, Boyce v. - - - - -	13
Simpson v. Board of Trade, - - - - -	66
Threshie, Lamb v. - - - - -	78
Todd, Sharp v. - - - - -	47
Torrance v. Miller, - - - - -	85
Walker v. Lamb, - - - - -	50
White, Rattray v. - - - - -	23
White, Miller v. - - - - -	104
Wilson, Halliday v. - - - - -	3
Wood, Eastburn v. - - - - -	100
Wyness, M'Hattie v. - - - - -	95

III.—HOUSE OF LORDS.

Anglo-American Brush Electric Light Corporation v. King, Brown, & Co.,	20
Buccleuch, Duke of, Johnstone v. - - - - -	39
Darling v. Gray & Sons, - - - - -	31
Edwardes, Hughes v. - - - - -	33
Gray & Sons, Darling v. - - - - -	31
Heritable Reversionary Co. v. Millar (M'Kay's Trustee), - - - - -	43
Hughes v. Edwardes, - - - - -	33
Johnstone v. Duke of Buccleuch, - - - - -	39
King, Brown, & Co., Anglo-American Brush Electric Light Corporation v.	20
Kirkcudbright, Magistrates of, Renney v. - - - - -	11
M'Kay's Trustee, Heritable Reversionary Co. v. - - - - -	43
Millar (M'Kay's Trustee), Heritable Reversionary Co. v. - - - - -	43
Pickard & Curry v. Prescott, - - - - -	56
Prescott, Pickard & Curry v. - - - - -	56
Renney v. Magistrates of Kirkcudbright, - - - - -	11
Smith, Tennant v. - - - - -	1
Tennant v. Smith, - - - - -	1

ERRATA.

P. 128, line 6 from end of rubric, *for* "company," *read* "jobber."
P. 941, line 1, *for* 1887, *read* 1877.

CASES

DECIDED IN

THE HOUSE OF LORDS,

1892.

ALEXANDER TENNANT, Appellant.—*Sir Horace Davey, Q.C.—*
C. J. Guthrie.

No. 1.

ROBERT SINCLAIR SMITH (Surveyor of Taxes), Respondent.—*Lord Adv.*
Sir C. Pearson—Sol.-Gen. Murray.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

Revenue—Income-tax—Abatement—Bank-agent residing in bank premises—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), Schedules D and E—Income-Tax Act, 1853 (16 and 17 Vict. c. 34), sec. 51—Customs and Inland Revenue Act, 1876 (39 and 40 Vict. c. 16), sec. 8.—The Customs and Inland Revenue Act, 1876, sec. 8, provides for an abatement of income-tax in the case of any person whose "total income from all sources" is less than £400.

A bank-agent, who had an income of £374 and occupied rent free a house forming part of the bank premises, which was of the annual value of £50, was disallowed the abatement by the Assessor of Income-Tax, on the ground that the value of the house fell to be reckoned as part of his income, and that his income was thus not under £400. The bank-agent objected, on the ground that it was part of his duty as bank-agent to occupy the house for the protection of the bank, and that he could not sublet the house or vacate it even temporarily without consent of the directors and without another bank official being appointed to occupy it in his absence, and that he was liable to be removed at any time. The house was suitable for the bank-agent, and if it had not been provided he would have required another of the same annual value.

Held (rev. judgment of the Second Division and three consulted Judges) (1) that in ascertaining total income from all sources with a view to the exemption enacted by sec. 8 of the Inland Revenue Act, 1876, no income arising in this country can be taken into account which is not chargeable under one or other of the income-tax schedules;

(2) That the advantage of free residence which the appellant derived from the discharge of his duty of residing in the bank premises for the purposes of the bank was not a subject of assessment in any of the schedules of the Income-Tax Act, and therefore was not to be taken into account in calculating his total income under sec. 8 of the Income-Tax Act, 1876.

Observations on the construction of the Income-Tax Acts.

(In the Court of Session, Jan. 21, 1891, 18 R. 428.)

Ld. Chancellor
(Halsbury).
Lord Watson.
Lord Mac-
naghten.
Lord Morris.
Lord Field.
Lord Hannen.

At a meeting of the General Commissioners of Income-Tax for the district of Brechin Alexander Tennant, agent at Montrose for the Bank of Scotland, appealed against an assessment made on him under schedules D and E of the Income-Tax Act, for the year ending 5th April 1890, on £317 of income, less £22 of insurance premiums, on the ground that he was entitled to a further abatement from his income of £120 allowed on incomes under £400.*

* The Act 39 and 40 Vict. c. 16 (Customs and Inland Revenue Act, 1876), enacts (sec. 8) that "the exemption granted by the Act 5 and 6 Vict. c. 35, to persons whose respective incomes are less than £150 a-year is hereby restored,

No. 1. The appellant stated that his whole income was £374, but that the assessor had improperly taken his income as above £400 by adding £50 as the value of a house in the bank occupied by him.

Mar. 14, 1892. Tennant v. Smith (Inland Revenue). The Commissioners of Income-Tax sustained the appeal, and allowed the abatement.

The Surveyor of Taxes took a case for appeal.

The facts as stated in the case were as follows:—

Mr Tennant had a stated income from the bank of £300 per annum, from commissions, &c., £17, making together £317, besides an income from invested capital, from which tax had been deducted, £57. These three sums amounted to £374.

With respect to the house the case bore:—"1. The appellant is bound, as part of his duty, to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours. He is not allowed to vacate the house even for a temporary period unless with the special consent of the directors, who, in that case, sanction the occupation of the house by another official of the bank during the absence of the agent. It is imperative that in the absence of the agent some responsible person should occupy the house and attend to the carrying on of the bank's business, so far as that may be necessary, after bank hours, and to the due locking up of the premises, and specially to the security of the cash and books in the bank's safe, communicating with which there is a night bolt from the agent's bedroom. The annual value of the house so occupied is £50. 2. The appellant is not entitled to sublet the bank house or any part thereof, and is not entitled to use it for other than the bank's business, but the appellant, with the tacit consent of the bank, carries on insurance business in the bank's premises. 3. By bond of fidelity granted by the appellant on his appointment as agent at Montrose, dated 17th February 1888, he agreed that he should be liable to removal at any time, and in case of his removal from office, that he should be obliged forthwith to fit and remove from the whole premises occupied by him. 4. If the appellant were to desire not to occupy the bank house, the sanction of the directors would be necessary for any arrangement which he might propose. In other cases where a bank-agent has desired not to occupy the bank house, the directors have agreed to his not doing so, and have made arrangements for its occupation by a subordinate official at the branch. In such cases the bank-agent's salary has not been affected by the change, and the subordinate officer of the bank who was appointed to occupy the house did not pay the agent any rent for the bank house, and the said officer's own salary was not affected by the change. In some special cases the bank have increased the salary to the official required to occupy the house on account of their requiring him to do so. In such cases the bank house was unsuitable for his use. 5. The general rule of the bank is that the bank-agent must occupy the bank house, and no case has ever occurred in which they have asked the agent to give up his house, and they have accordingly never had to consider whether any increase of salary would

and . . . any person . . . who shall claim, and prove in the manner prescribed by the Acts relating to income-tax, that his total income from all sources, though amounting to £150 or upwards, is less than £400 shall be entitled to be relieved from so much of the said duties assessed upon or paid by him as an assessment or charge of the said duties upon £120 of his income would amount unto, and the relief shall be given either by reduction or abatement of the assessment upon such person, or by the repayment to him of so much of the excess as he shall have paid, or by both of those means as the case may require."

be given to the agent if such a case ever arose. 6. The bank house is suitable in respect of size and accommodation for the appellant. If a dwelling-house were not provided by the bank, he would require to provide a house for himself of similar size to the bank house. . . .”

No. 1.

Mar. 14, 1892.

Tennant v.

Smith (Inland

Revenue).

Mr Tennant's contentions against the annual value of the house being reckoned as part of his income were thus stated in the case :—“(1) That the occupancy of the house is imposed upon him as part of his duty. (2) That the premises are not a dwelling-house in the sense of the Act, but are truly bank premises occupied by him specially in connection with the bank's business. (3) That his occupancy of the premises does not fall under schedule E and the rules applicable thereto. (4) That the premises come under the exemption of section 51* of 16 and 17 Victoria cap. 34, as being a necessary expense incurred in the performance of the duties of his office.”

On 4th June 1890 the Second Division, in respect of the difficulty and importance of the question submitted for decision, appointed the cause to be argued before them and three Judges of the First Division.

The case was advised on 21st January 1891, when a majority of the Judges (the Lord President Inglis, the Lord Justice-Clerk, Lord Rutherford Clark, and Lord M'Laren, *diss.* Lord Young, Lord Adam, and Lord Trayner), held that the assessment should be sustained.

Mr Tennant appealed.

LORD CHANCELLOR.—To put this case very simply, the question depends upon what is Mr Tennant's income. This is an Income-Tax Act, and what is intended to be taxed is income. And when I say “what is intended to be taxed,” I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed.

Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in *In re Micklethwait*,¹ “It is a well-established rule that the subject is not to be taxed without clear words for that purpose, and also that every Act of Parliament must be read according to the natural construction of its words.”

Now, it is certainly true that the occupation of a house rent free is not income.

* Section 51 of the Act 16 and 17 Victoria, cap. 34, enacts,—“In assessing the duty chargeable under schedule E of this Act, in respect of any public office or employment where the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment, the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act, the amount of all such expenses and disbursements necessarily incurred and defrayed in manner aforesaid.”

¹ 1855, 11 Exch. (Hurlston and Gordon), p. 456.

No. 1. Of course the possession of a house which may be used for purposes of profit is property, and taxable as such. But the bald dry proposition that the mere fact of occupying a house, which house as property is already taxed, is not income in any sense, could, I think, hardly be disputed. For my own part I doubt very much whether a house could ever properly be described as part of a man's income, though, doubtless, the rent for it when received would be income in the hands of the person receiving it.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

Another observation that occurs to me is, that in dealing with real property the whole framework of the statute seems to point to a peculiar kind of assessment while treating the things themselves as the subjects of assessment; and the provisions which give effect to that peculiarity of assessment are entirely distinct from the provisions as to income.

Now, Mr Tennant occupies this house without paying any rent for it. It may be conceded that if he did not occupy it under his contract with the bank rent free he would be obliged to hire a house elsewhere, pay rent for it, and *pro tanto* diminish his income. And if any words could be found in the statute which provided that besides paying income-tax on income, people should pay for advantages or emoluments in its widest sense (such as I think the word "emoluments" here has not, for reasons to be presently given), there is no doubt of Mr Tennant's possession of a material advantage, which makes his salary of higher value to him than if he did not possess it, and which upon the hypothesis I have just indicated would be taxable accordingly.

But, upon the principles to which I at first referred, your Lordships are to ascertain not whether Mr Tennant has got advantages which enable him to spend more of his income than if he did not possess them, but whether he has got that which any words in the statute point out as the subject on which it imposes taxation.

Now, I agree with Lord Adam in his very lucid judgment, that what Mr Tennant is to be assessed upon must be assessed under schedule E, and I agree with the criticisms which he applies to the words within which, if at all, this advantage of occupying a house rent free must be brought, and none of the words, either "perquisites," "profits," or "emoluments," are properly applicable, inasmuch as by the rule in which those words are used or explained the word "payable," as applied to them, renders it to my mind quite impossible to suppose that the mere occupation of a house is reconcilable with the just application of that word.

I come to the conclusion that the Act refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable.

The illustration given in the argument of the mode of arriving at a trader's profits, and the mode of treating his stock in trade, suggests that money's worth may be treated as money for the purposes of the Act in cases where the thing is capable of being turned into money from its own nature.

I have designedly avoided considering the question whether in any sense the occupation of this house is a benefit or a burden to the recipient of the advantage or disadvantage, whatever it may be, though I doubt very much whether such considerations on the one side or the other are relevant to the question which your Lordships have to determine. I am aware that their relevancy has the high authority of the late Lord President, and his Lordship undoubtedly treated the

question as, if it were established to be a clear pecuniary profit it would be taxable, whereas, if it were a heavy burden, it would not. Nor did his Lordship shrink from suggesting that this occupation of a house rent free would be taxable or not, according as it was unsuitable for the occupant's domestic arrangements or the reverse. It followed, therefore, that in every case where such a question arose it would be necessary to examine the particular circumstances of each man's family. If he had a large family that could not be accommodated in the house, and he must hire a house elsewhere, one result would follow. If he was a bachelor, and the house was appropriate to his wants, then another result would follow.

No. 1.
Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

I cannot think that the Legislature ever contemplated such an examination or discrimination of persons subject to taxation as such a system of assessment would imply. Nor do I understand upon what principle the inquiry could properly be directed. The money a man has been compelled to spend for the maintenance of his wife and family, if he has them, has not the less formed part of his income. The fact that he is compelled to spend on this or that subject of expenditure does not make the money that he has had to spend the less his income because he has had to spend it. The example given by Lord Young, on the other hand, of a man who is saved by the form of his occupation as a sea captain from the necessity of hiring a house, is a very cogent and striking illustration to what extreme views such an interpretation of the Act would lead.

I observe both the Lord President and the Lord Justice-Clerk used the phrase "gains" as applicable to the advantage which Mr Tennant derives from the occupation of the house. That seems to be a reference to schedule D, whereas, as I have already said, I concur with Lord Young and Lord Adam that Mr Tennant's income must be assessed under schedule E. And further, it appears to me impossible to contend that it can be assessed under both D and E, each being in terms exclusive of the other. Nor do I think that a different class of emolument can be intended to be reached under schedule D, though the words "emoluments or gains" in schedule D do not receive exposition from the words that occur in schedule E.

For these reasons, I am of opinion, in the words of Lord Young, that the thing sought to be taxed is not income unless it can be turned into money. Accordingly, I think that the determination of the commissioners was right, and that the order appealed from ought to be reversed, and I so move your Lordships.

LORD WATSON.—(After stating the facts)—In ascertaining total income from all sources, with a view to the exemptions enacted by section 8 of the Act of 1876, I am of opinion that no income arising in this country can be taken into account which is not chargeable with duty under one or other of the income-tax schedules. What may be the rule with respect to income arising in another country and not assessable here, I do not consider it necessary for the purposes of this case to determine. Accordingly, it appears to me that the case was decided in the Court below, as it has been argued at your Lordships' bar, upon the true legal issue—namely, whether the appellant's residence is income, within the meaning of the statutes, which must be valued and assessed for income-tax.

Schedule A, which assesses property according to its annual value, includes

No. 1. all lands, tenements, hereditaments, and heritages capable of actual occupation. Schedule B imposes an additional assessment in respect of occupancy upon some of the lands and others comprehended in schedule A, the occupation of which in itself constitutes a trade or business. The appellant is not a proprietor, neither is he an occupier within the meaning of schedule B. The bank are the only occupiers, being, as Lord Herschell said in *Russell v. Town and County Bank*,¹ "in the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank." The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

The Legislature has made elaborate provision for ascertaining the yearly value of lands, tenements, hereditaments, and heritages assessable under schedule A, and also the yearly value of occupation falling under schedule B; but there is no machinery to be found in any of the Income-tax Statutes for arriving at the annual value of residence as distinguished from such occupation. Yet it is manifest that the ascertainment of annual value in the latter case may be attended with greater difficulty and nicer considerations than are involved in the application of the rules for assessing and charging duties under schedules A and B. Even according to the respondent's argument, the assessable value of a servant's residence, in premises which he does not occupy, is not the price which other persons might be prepared to pay for the privilege, but the benefit which he personally derives from it, estimated in money.

In the present case the learned Judges of the majority have assessed the value of the appellant's residence at £50, upon the somewhat speculative footing that, if his duty did not require him to reside in the bank, he would be compelled to pay that sum for suitable accommodation for himself and family elsewhere. In that view, the so called benefit may in some instances prove a heavy burden, as in the case of a bank-agent who, but for the service required by his employers, would continue to reside, free of charge, in his parent's house. I entertain very serious doubt whether, according to the scheme of the Income-Tax Acts, it was intended to assess in any shape mere residence, either in performance of duty to the actual occupant or by licence from him. But I do not find it necessary to decide the point, because I am satisfied that the appellant is not liable to duty under any schedule.

I agree with your Lordships that income arising from employment as a bank-agent is assessable under schedule E in all cases where the bank which employs him is a company or society, whether corporate or not corporate, as specified in the third rule of that schedule. The Bank of Scotland being a corporation, the appellant's office is undoubtedly within the schedule. Neither is it doubtful that the appellant is liable to pay duty in respect of all "salaries, fees, wages, perquisites, or profits whatsoever," accruing to him by reason of such office, as provided by the first rule.

It is clear that the benefit, if any, which a bank-agent may derive from his residence in the business premises of the bank is neither salary, fee, nor wages.

¹ April 26, 1888, 13 App. Cas. 418, at p. 426, 15 R. (H. L.) 51.

Is it then a perquisite or a profit of his office? I do not think it comes within the category of profits, because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money—or that which can be turned to pecuniary account. If the context had permitted, it might have been possible to argue that a benefit of that kind was a perquisite. But the fourth rule of schedule E defines perquisites, for all purposes of the Act, to be “such profits of offices and employments as arise from fees and other emoluments, and payable either by the Crown or by the subject in the course of executing such offices or employments.”

No. 1.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

It was argued, however, that, if not liable under schedule E, the appellant was, at all events, liable under schedule D. I do not think it can be reasonably maintained that a public office or employment assessable under schedule E is also liable to assessment as an employment or vocation within the meaning of schedule D. No doubt that schedule also includes all “other profits and gains not charged by virtue of any of the other schedules contained in this Act.” But it appears to me that everything in the shape of profit or gain arising from a public office or employment, which the Legislature intended to be chargeable with duty, is ascertainable and assessable under the rules of schedule E, and under these rules only. The profits and gains arising from public offices and employments are in no sense profits and gains not charged by virtue of schedules other than schedule D.

There is a clause in the Act of 1842 (section 188) which enacts that “every provision in this Act contained, and applied to the duties in any particular schedule, which shall also be applicable to the duties in any other schedule, and not repugnant to the provisions for charging, ascertaining, or levying the duties in such other schedule shall, in charging, ascertaining, and levying the same, be applied as fully and effectually as if the application thereof had been expressly and particularly directed.” The respondent did not rely in argument upon the terms of that clause, the construction of which is by no means free from difficulty. Thus far its terms are clear enough. The provisions of schedule D with respect to employments and vocations are not to be applied to offices and employments under schedule E, unless they are in the first place “applicable” to such offices and employment, and, in the second place, not repugnant to the rules of assessment enacted for schedule E. Assuming for the sake of argument that the rules of assessment for employments and vocations under schedule D differed in material respects from the rules for assessing public offices and employments under schedule E, I do not think they would be applicable to cases falling under schedule E, or could be applied without repugnancy, or, in other words, without abrogating *pro tanto* the rules of schedule E.

I think it right to add that, in my opinion, the result would not be different if the rules of schedule D were applied to the appellant’s so-called benefit of residence.

In that case the appellant would be chargeable upon the full balance of “the profits, gains, and emoluments” accruing to him from his employment as bank-agent. Having regard to the general scheme and context of the Act, I am unable to come to the conclusion that these words “profits, gains, and emoluments” of a private employment as bank-agent under schedule D were meant by the Legislature to include more than the “salaries, fees, wages, perquisites, or profits whatsoever,” accruing to a similar employment by a public company.

No. 1. In my opinion, the word "emolument" occurring in the rules of schedule D means some more tangible benefit than a servant's residence in his master's house, or a meal or a suit of livery supplied by the master.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN.—My Lords, I agree.

The appellant, who is the agent at Montrose for the Bank of Scotland, being assessed for income-tax, claims an abatement. The question is whether his "total income from all sources" is or is not less than £400. That depends upon whether he has to bring into account the value of a free residence provided for him by the bank in the bank premises.

Notwithstanding the opinion of one of the learned Judges of the Court of Session, I think it is perfectly clear that nothing is to be brought into account on a claim to relief except what is chargeable for the purpose of assessment.

The first point for consideration is what is the meaning of the expression "total income from all sources." It certainly means more than income properly so described—it includes more than "profits and gains" chargeable under the last three schedules of charge. It includes the annual value of property chargeable under schedule A, and the annual value of the occupation chargeable under schedule B. The Income-tax Code (5 and 6 Vict. c. 35, sec. 167, and 16 and 17 Vict. c. 34, sec. 28) contains express directions for estimating and calculating these values for the purpose of ascertaining the title to abatement when relief by way of abatement is claimed. But it contains no directions for estimating or bringing into account any benefit, or advantage, or enjoyment derived from lands, tenements, hereditaments, or heritages, which does not come under schedule A or schedule B.

The next point to be considered is what is the nature of the appellant's occupation of the residence provided for him in the bank premises. From the case stated for the opinion of the Court of Exchequer in Scotland it appears that "the appellant is bound, as part of his duty, to occupy the bank house as custodian of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours." He is not entitled to sublet the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear therefore that the appellant is not chargeable under schedule A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay.

Then this question suggests itself, Has not the Crown got all that it is entitled to in respect of this house when it has received the duty on its full annual value? Is not the notion of finding some subject for taxation in lands, tenements, hereditaments, or heritages, over and above the full annual value chargeable under schedules A and B, a fanciful notion and foreign altogether to the scope and intent of the Income-tax Code? The learned counsel for the Crown say no. Their case is that the benefit derived by the appellant from his occupation of the bank house is chargeable under schedule E, or, at anyrate, under schedule D.

I do not doubt that the occupation of the bank house rent free, though not unattended with some inconveniences, is, on the whole, a considerable advantage to the appellant. It is a gain to him in the popular sense of the word. Whether such a benefit or gain comes under the head of "profits and gains" chargeable for income-tax purposes is the question submitted to your Lordships. I use the expression "profits and gains" because that is the term which the Legislature uses as applicable to both the schedules of charge under which it is said the appellant is chargeable.

No. 1.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

In the course of the argument the learned counsel for the Crown admitted that there was a difficulty in maintaining their claim under schedule E. On examining that schedule it became obvious that it extends only to money payment or payments convertible into money. And so they took their stand on schedule D.

For the purposes of this case I am willing to assume that, in assessing a person holding an office chargeable under schedule E, the Crown may resort to schedule D in order to reach gains or profits arising or accruing from his office which, for some reason or another, do not come within the letter of schedule E. The third paragraph of schedule D imposes the duty in respect of all profits and gains not charged by virtue of any of the other schedules. It seems to me, therefore, that if the privilege of occupying the bank house rent free is really a profit or gain within the meaning of the Income-tax Code, and if it is not chargeable under schedule E, it might be caught by schedule D—not, I think, under case 2, rule 2, on which the Crown mainly relied, but under case 6. Case 2, rule 2, is, I think, inapplicable because it only extends to the duty to be charged in respect of employments not contained in any other schedule. Case 6 goes much further. It gives effect to the third paragraph of schedule D, and extends to the duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules and not charged by virtue of any of the other schedules.

In my opinion the answer to the claim of the Crown does not depend on any minute criticism of the language of the different schedules. The real answer is, that the thing which the Crown now seeks to charge is not income, nor is it required to be taken into account as income for the purpose of ascertaining title to relief by way of abatement. It falls neither under schedule A nor under D or E. I have already dealt with schedule A. Under that schedule the duty is payable on the "annual value." The duty under schedules D and E is payable on the "annual amount." It is a tax on income in the proper sense of the word. It is a tax on what "comes in"—on actual receipts. Take, for example, the 6th case of schedule D, which sweeps in all profits or gains not otherwise chargeable. What the person liable to be assessed is required to do under schedule G is to return "the full amount" of annual profits "received" (5 and 6 Vict. c. 35, sec. 190, schedule G, xii.). No doubt if the appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for income-tax under schedule D, as well as under schedule E, not on what saves his pocket, but on what goes into his pocket. And the benefit which the appellant derives from having a rent-free house provided for him by the bank, brings in nothing which can be reckoned up as a receipt or properly described as income.

For these reasons I am of opinion that the appeal must be allowed.

LORD MORRIS.—I concur in the judgment which has been moved.

No. 1.

Mar. 14, 1892.
Tennant v.
Smith (Inland
Revenue).

LORD FIELD.—I also concur in the judgment that the appeal should be allowed and the decision of the Commissioners restored. For the reasons which have been so fully indicated to your Lordships, it appears to me that the residence of the appellant upon the bank premises, which although rent free could not in any way be converted by him into money or money's worth, cannot be held to be either a gain, profit, perquisite, or emoluments within the meaning of the statutes.

LORD HANNEN.—The question for consideration is whether the appellant is entitled under the Customs and Inland Revenue Act, 1876, sec. 8, to an abatement on the amount of income on which he has been assessed, on the ground that his total income from all sources is under £400. His undisputed income is £374; if to this should be added the annual value of the house he resides in rent free, his assessable income exceeds £400, otherwise not.

The appellant is agent for the Bank of Scotland at Montrose. He is bound as part of his duty as such agent to live in the bank house as custodian of the whole premises, and to transact business there after bank hours. He cannot temporarily vacate the house without special consent of the directors, and he cannot sublet or use the premises for other than bank business. Is such an occupation as this to be regarded as a part of the appellant's income? It certainly does not come within the natural meaning of the word "income." It saves the appellant from the expenditure of income on house rent, but it is not in itself income. That it is a suitable residence for the appellant is an accident which ought not to affect the determination of a question of principle as to the incidence of taxation. The income-tax is imposed, not on the personal suitability of a man's surroundings, which must vary with each man, and with the same man in different circumstances, but on his income capable of being calculated. The appellant occupies the bank house as a part of his duty, and I do not see how the case can be distinguished from that, so aptly put by Lord Young, of the master of a ship who is spared the cost of house-rent while afloat. His cabin does not on that account become a part of his income.

Different considerations would apply to the case of an agent who as part of his remuneration has a residence provided for him which he might let. That which could be converted into money might reasonably be regarded as money—but that is not the case before us.

Although the question raised on this occasion is on a claim for abatement, I think it would equally arise on an assessment under either of the schedules D and E. For the reasons given by Lord Adam, I am of opinion that the occupation of this house does not fall within the description of "salaries, fees, wages, perquisites, profits, or emoluments" in the sense in which those words are used in the Act.

I think, therefore, that the judgment appealed from should be reversed, and that of the Commissioners affirmed.

INTERLOCUTOR of the 22d of January 1891 appealed from reversed, and the determination of the Commissioners reversed by that interlocutor restored; cause remitted to the Court of Session; the respondent to pay the appellant the costs both in this House and in the Court of Session.

LOCH & GOODHART—TODS, MURRAY, & JAMIESON, W.S.—W. H. MELVILL, Solicitor for Inland Revenue, England—DAVID CROLE, Solicitor for Inland Revenue, Scotland.

JAMES RENNEY, Pursuer (Appellant).—*W. R. Kennedy, Q.C.*—
J. G. Witt, Q.C.

No. 2.

THE MAGISTRATES OF KIRKCUDBRIGHT, Defenders (Respondents).—
Sol.-Gen. Murray—G. L. Crole.

Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

Ship—Harbour—Powers of harbourmaster—Reparation.—A schooner sailing up the River Dee to Kirkcudbright harbour was steered by the master, with the assistance of two local fishermen acting as pilots.

On the vessel reaching a point within the harbourmaster's jurisdiction, one of the pilots hailed the harbourmaster, who was standing at the head of the west pier, for instructions when to drop the anchor. The harbourmaster made signs for the vessel to come on. The master thereupon changed his course from the mid-channel to one leading directly to the head of the pier. The harbourmaster, after the course was changed, continued to make signs for the vessel to advance. The vessel continued in her course till she grounded on a bank near the pier. The harbourmaster in giving the orders was in the belief that the tide was full, while in fact it had ebbed three inches.

In an action of damages brought by the owner of the vessel against the harbour trustees, the First Division held that the harbourmaster was in fault, but that there was contributory negligence on the part of those in charge of the vessel in changing its course.

In an appeal *held (rev. the judgment)* (1) that the accident was caused by the fault of the harbourmaster in directing the vessel to take a wrong course; and (2) that the shipmaster was not in fault in following that course, as he was bound to obey the harbourmaster's orders.

(In the Court of Session, Dec. 19, 1890, 18 R. 294.)

The sailing vessel "Janets and Ann," of Chester, of 175 tons gross measurement, arrived in the River Dee, off Kirkcudbright, on the afternoon of Friday, 23d March 1889.

Ld. Chancellor
(Halbury).
Lord Watson.
Ld. Herschell.
Lord Morris.
Lord Field.

On her way to the harbour, and when within the jurisdiction of the harbourmaster, she struck upon a bank, and sustained considerable damage, amounting to, as alleged, £300, for which Mr James Renney, the owner of the vessel, brought an action against the Magistrates of Kirkcudbright, as trustees of the harbour.

The pursuer averred that the accident was occasioned by the faulty directions of the harbourmaster, which those in charge of the vessel had obeyed, as they were bound to do.

The defenders averred that if those in charge of the vessel had steered a proper course, and had obeyed the orders of the harbourmaster, no accident would have happened.

The pursuer pleaded;—The pursuer having suffered the loss and damage sued for through the fault of the defenders, or those for whom they are responsible, is entitled to decree as craved.

The defenders pleaded, *inter alia*;—(2) The alleged injury to the said vessel the "Janets and Ann" not having been caused by any fault or negligence on the part of the defenders, or of those for whom they are responsible, they are entitled to absolvitor, with expenses. (3) Those in charge of the said vessel having disobeyed, or not timeously obeyed, the orders of the harbourmaster, the owner is not entitled to recover damages for any injury sustained by the said vessel. (4) The grounding of the vessel having been caused, or materially contributed to, by the fault of those in charge of the vessel on the occasion in question, the defenders ought to be assolizied.

The following were the facts proved:—The River Dee flows in a westerly direction past the town of Kirkcudbright on the south bank. The entrance to the harbour is between two piers running northward. When the schooner in sailing up the river on the afternoon of 23d March

No. 2.

Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

1889 had reached a point about 130 to 140 yards below the west pier she was in mid-channel, or nearly so. Here a man named Smith, one of two local fishermen, who had been taken on board to assist the master in the navigation of the vessel, there being no licensed pilots, hailed the harbourmaster, who was standing on the west pier-head, and asked him to let them know when to drop the anchor. The schooner was at this time within the harbourmaster's jurisdiction. The harbourmaster heard Smith hailing, and in reply waved his arm, and cried out "Come on," which Smith interpreted to mean that the schooner was to come on towards the pier-head where the harbourmaster was standing. To do this the master ported the helm, and the vessel went out of the mid-channel, taking a straight course towards the pier-head. Very soon afterwards Smith, who knew that the vessel was approaching a dangerous bank or beach extending from the west pier, hailed the harbourmaster, calling out, "Be sure to tell us when we are to anchor," the reply to which was the continued waving of the harbourmaster's arm, and another call to come on. Smith saw the waving, but did not hear the call which the harbourmaster admitted that he gave. Almost immediately after the harbourmaster gave orders to drop the anchor, and at the same moment the schooner struck. The tide had then ebbed 3 inches, but the harbourmaster did not know that it had begun to ebb. It appeared that in ebb tides a vessel in order to get into dock should have come on in the channel, which at low water was only from 30 to 40 yards wide, and been warped into the harbour by lines. The harbourmaster admitted that he intended the vessel to sail into the harbour without warping. If the tide had been flood tide, the operation of the tide would have kept the vessel away from the shore even although she was under a port helm. The master, who was at the helm the whole time, had no knowledge of the locality.

The Lord Ordinary (Trayner), on 11th June 1890, gave decree against the defenders in terms of the conclusions of the summons.

The defenders having reclaimed, the First Division pronounced the following interlocutor:—"Recall the said interlocutor: Find that the fault of the harbourmaster, for which the defenders are responsible, directly led to the stranding of the 'Janets and Ann,' the vessel in question, on the occasion libelled; but find further that the persons in charge of the navigation of the said vessel were in fault in porting the helm when it should have been starboarded, and that this fault directly conduced to the stranding of the said vessel: Therefore sustain the fourth plea in law for the defenders: Assolzie them from the conclusions of the summons, and decern."

The pursuer appealed.

LORD CHANCELLOR.—The facts of this case are extremely clear, and I entertain no doubt as to the party upon whom the responsibility for the accident rests. This vessel, as I understand the matter, was hindered in her approach to the dock to which she was intended to proceed by reason of going over a bank which is not obvious to anybody not familiar with the place, but which was perfectly familiar to the harbourmaster. We start with this concession, about which there can be no doubt, because it is proved by the person who is principally interested in denying it, that the harbourmaster was under the impression that the tide was either flood tide or slack water. The next proposition which is established by the harbourmaster is that the manœuvre which he had intended the vessel to execute was not to anchor at all but to come straight into the dock. Now, that immediately raises this question. It is clear that if the tide had been flood tide the operation of the tide would have kept the vessel

away from the shore, even although she was under a port helm. The question is a question of yards, so that a yard or two one way or the other would make the whole difference.

No. 2.

Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

The harbourmaster's own account of the transaction is that he saw the vessel, and he would therefore know that she was under a port helm. He says,—“I intended her to be in the middle channel, and to keep her so that she would be perfectly safe, and therefore what I intended to do was to tell her to keep off, and I afterwards intended to give her further directions when she should be sufficiently level with the entrance to the dock—my intention was to make her keep off.” He carries out that intention by directing her to come on. I omit, for the moment, the particular direction which he gave. I do not think that anybody is able to give a proper verbal description of the way in which the harbourmaster's hand waved—whether it was right or left or backwards or forward,—but that everybody on board understood it to be a direction and an obligation to them to come on, to come nearer to the dock, is certain—in fact there is no denial of it at all. The result was, as a matter of fact, that the vessel, being steered by the master, who knew nothing of the particular obstruction which was ultimately caused to the vessel, was steered in the appropriate and proper way to bring her into the dock, assuming that no such obstruction existed, and the accident happened by reason of the vessel grounding on the bank through that wrong steering.

It is said, in the first place, that the two persons who were on board (whom I decline to dignify by the name of “pilots,” for that is not an appropriate description of them, inasmuch as they were merely fishermen who came on board to assist the captain by their local knowledge) knew of the difficulty. Then comes this question. The original blunder was on the part of the harbourmaster, who did not know what the state of the tide was, it being admitted that the state of the tide makes a considerable difference in the direction which ought to be given by the person in charge of the operation. He gave directions which would have been appropriate to one state of the tide, in which the tide was not, but which were perfectly inappropriate to the state of the tide at that time. It is said that the two local pilots (I give them their dignified appellation) ought to have seen that there was danger. Now, we must see upon what hypothesis the two local pilots were proceeding. One was under the impression (there can be no doubt about it, not only because they say so, but also because the acts of the persons at the time shew what was thought to be intended) that so far from the vessel being sailed straight into the dock, the vessel was being brought up as near as she could be safely got to the pier-head, and was then to drop her anchor, so as to keep the vessel in a proper position for afterwards entering the harbour. Smith called out twice, and the last time in a tone which indicated some anxiety or impatience, I think, “Tell me when I am to drop my anchor.” Now, upon what hypothesis was the harbourmaster acting? If, as he says himself, he was under the impression that the vessel was to sail straight in, what was his duty then? Surely, when these local men (upon whom the Solicitor-General for Scotland relied, and as to whom he urged that we were entitled to consider that they would know what the difficulty was) called out to the harbourmaster, the harbourmaster must have known from their words that the idea in their minds, and in respect of which they must be supposed to have been acting, was first anchoring and then warping the vessel in. Instead of acting upon that idea he twice used the words “Come on.” I do

No. 2.

Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

not care with what gesture they were accompanied, for everybody concerned was under the impression that he meant the vessel to come on, and she did come on.

Under these circumstances there appears to me to be no doubt as to what was the cause of the mischief and as to who was responsible for it. The harbour-master gave the direction which he did, as he was entitled to do, but I do not think that his evidence and that of another witness are a model of candour. It is admitted that the vessel at that time was under the order of the harbour-master. The effort of the harbourmaster is to shew that until the vessel has actually got into the dock his authority does not arise, and that all the functions up to that time belong to those who are on board the vessel. It is not necessary to shew (because it is admitted on the record, and even if it were not admitted on the record, it is quite manifest) that the harbourmaster was then, in the exercise of his duty and vocation, giving directions to the vessels which were coming into the harbour—he did give directions to this particular vessel—and, as it appears to me, those directions were implicitly obeyed. I do not understand what direction is supposed to have been disregarded or what negligence is supposed to have been committed. The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port helm. What was the thing which was being done? If it was what anybody might suppose, from the harbourmaster's statements and directions, was intended to be done, I do not see any negligence. The witness said that the place where he expected to anchor, and which was within a few yards of where they did actually anchor, was the usual place to anchor. But, as the Lord President very pertinently observes, if the harbourmaster had even then called out in time and had ordered the vessel to be anchored, no accident would have happened. I think that the judgment of the Lord President is confirmatory of the view which I take, because in his judgment he says that the harbour-master eventually gave that direction, but that he ought to have given it sooner than he did. My Lords, if that be the true view of the facts, there does not seem to me to be room for the defence of contributory negligence. The Solicitor-General, with the candour which distinguishes him, rather repudiated the notion of the matter being decided upon the question of contributory negligence at all. In truth there is no question here of contributory negligence. The question is, Who is responsible for what was ordered? Taking one view, the cause of it was the negligence of one set of people, and, taking the other view, the cause of it was the negligence of the other set of people, there being no contributory negligence upon either hypothesis.

Under these circumstances, it appears to me that the cause of the accident is abundantly clear; and the only proposition made here on the other side is a sort of suggestion that the harbourmaster had a limited authority by reason of his being aware that those persons who were on board the vessel were more familiar with the local circumstances of the place, and with the navigation, as being fishermen, than he was. My Lords, I think that that would be a very dangerous proposition to lay down. Of course, no one supposes that this is a case of wilfully running against an obstruction; but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbourmaster (who has by law power to give orders) because that person may have the idea in his mind that the harbourmaster is making a mistake, would be, to my mind, a most dangerous principle to establish. A

double authority would probably in many cases be fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would, to my mind, be a very strong thing to say that a particular direction of the harbourmaster, in reference to what a vessel shall do, and who is within his right in giving it, should be disobeyed.

No. 2.
Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

I therefore move your Lordships that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored.

LORD WATSON.—I also am of opinion that the judgment of the Inner-House in this case must be reversed, and the decision of the Lord Ordinary restored. The mistake which caused damage to the ship arose from the vessel porting her helm, in consequence of which she ran on the bank and there stranded. The question is, Who is responsible for that mistake?

Now, when the vessel stranded she was confessedly within the harbourmaster's jurisdiction, her own captain being in charge. In the performance of his duty he was assisted by two local fishermen. It seems to me to be clearly proved, and to have been assumed by the learned judges in both Courts below, that the line upon which the vessel was steered by her captain was the very course which the harbourmaster by his words and gestures had invited her to pursue. It was suggested in argument by the Solicitor-General that, although the captain was ignorant of the danger which following that course as far as the pier would necessarily entail, yet it was known to two persons on board, namely, the fishermen to whom I have referred; and he further argued, that the owner of the vessel was affected by the knowledge of these men. My Lords, I consider that (to say the least of it) to be a very doubtful and dangerous proposition. But I do not think it necessary to consider that point, because these two men were not in charge of the vessel at the time. If they had known or understood that the harbourmaster intended the vessel to sail straight along the course which I have indicated into the harbour, I think it would have been their duty, seeing the knowledge which they had, to take some steps to prevent that order being followed out. Although they were not in charge, I think it would have been their duty to inform the captain. I do not suggest that their failure of duty in that respect, the captain being in charge, would have absolved the harbourmaster, or the respondents in this appeal, whose servant he was, from the consequences of his neglect. But these two fishermen were under the impression (a very natural one) that the captain of the vessel had been directed as to the course which was meant to be pursued; but that the vessel would be ordered to come to anchor before reaching the pier, in order that she might subsequently be warped into the harbour. Accordingly, when they reached that point, they made an earnest appeal, or rather, a series of earnest appeals, to the harbourmaster, to give them directions, and to let them know when they were to drop their anchor. The harbourmaster made no response to these appeals, for this very obvious reason, that at the time when they were made it was his intention that the vessel should proceed and enter the harbour under her own sail. He did entertain that intention, and intended to give directions to that effect, because he was negligently ignorant of the state of the tide at the time. He discovered his own ignorance just a moment too late, and then he changed his plan and gave the order, which he should have issued before, to drop anchor; and the consequence of his having been too late is one for which I think the respondents are clearly responsible.

No. 2.

Mar. 31, 1892.
 Renney v.
 Magistrates
 of Kirkcud-
 bright.

LORD HERSCHELL.—I am of the same opinion. According to the account which the harbourmaster himself gives, for whom the defenders are responsible, he was on the occasion in question inviting this vessel to enter the harbour. He was so inviting her under the impression that the tide was a flood tide, or at all events in ignorance that it was an ebb tide; and it appears clear upon all hands, that for a vessel to enter the harbour otherwise than upon a flood tide is a dangerous operation, and one which ought not to be attempted. According, therefore, to the shewing of the harbourmaster himself, he was giving an invitation which, under the circumstances, he ought not to have given, because it was one which could not be followed without danger.

Now that is the case put forward by the defenders' own main witness, on whose action everything turned so far as they are concerned. It seems to me impossible to doubt that the learned Judges in the Court below were right in thinking that there was ample evidence to warrant the conclusion (indeed that only one conclusion was possible) that there had been negligence on the part of the harbourmaster, and that for that negligence the defenders were responsible. This was the conclusion of the Lord Ordinary at the close of his judgment in favour of the appellant. But the learned judges in the Inner-House came to the conclusion, that although that negligence was established the defenders must be assoilzied because there was contributory negligence on the part of the appellant, without which this accident would not have happened. Now, that contributory negligence is alleged to have been the contributory negligence of those in charge of the ship. I think that expression is an unfortunate one, because it seems to me that when negligence is sought to be imputed to the owner of the vessel, it is necessary to inquire who is the particular person for whose negligence you seek to make him responsible. To speak in this way, "of those in charge of the ship," is calculated to lead to misunderstanding, and, I think, to mistake.

At the critical time, according to the view which I take, the person in charge of the ship was the master of the ship. These fishermen (local pilots if you will) who had been taken on board by him for his assistance and guidance, were not at that time in fact in charge of the ship. The evidence is this, that when a vessel comes to a certain point she must from that point obey the instructions of the harbourmaster. The master was himself at the helm, and so far from these men assuming any command or control of the vessel, they were looking for instructions, as is clear from the request which they made to the harbourmaster to direct them what to do. Therefore, if they had ever had charge of the ship they had abandoned it; and there was no obligation that they should have charge of her. The master himself was steering the ship, and was looking to the harbourmaster for directions. I am, therefore, quite unable to take the view that these two men were in any sense in charge of the ship—the master was in charge of her. It may still be that if there had been any failure to give information which the captain ought to have received from them, they might have been to blame, and a question would then have arisen, whether that blame could under the circumstances be imputed to the master of the vessel. But it is unnecessary to give any opinion upon that point.

Now, who was guilty of the contributory negligence which is alleged? Was it the master? The master of the vessel, no doubt, was the person who ported the helm, which is said to have been a wrong manœuvre. But it appears to me obvious that the master of the vessel was led to port the helm by the act of

the harbourmaster; and if the tide had been a flood tide, as the harbourmaster supposed that it was, my impression is that the accident would not have happened, and that the vessel would have passed this bank in safety. The witnesses all say that the set of the ebb tide was towards the bank, and that the set of the flood tide was from the bank, and that in flood tide there would have been no danger in the manœuvre. The porting of the helm, though no doubt erroneous in an ebb tide, was erroneous only to a person who knew the condition of the river. There was nothing in the state of the river, as far as it could be seen, to indicate to a person not acquainted with it any danger in coming on in the course which the "Janets and Ann" was taking. The master was ignorant of the state of the river—he had only been there once before, I think nine years before. How is it possible to say that the master was guilty of any negligence, with a direction from the harbourmaster to come on, whatever the gesture connected with it may have been, and to come on as the master of the vessel says (and there is no contradiction of it so far as I can see) in a course which was appropriate for entering the harbour, according to ordinary navigation, but for the existence of a bank of which he was ignorant? How it can be said that under such circumstances he was guilty of any negligence at all, I am entirely at a loss to see.

No. 2.
Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

But then it is said that there was negligence on the part of the two pilots, and that their negligence may be imputed either to the master or to the owner of the vessel,—I do not quite know in which way the case is put. I think that there is very great difficulty in imputing the negligence of these fishermen either to the master or to the owner of the vessel. But was there any negligence on their part at all? They, it is quite true, knew of the bank; but because they knew of the bank they very naturally interpreted the manœuvre suggested by the harbourmaster in a different way from that in which it was interpreted by the captain. He, not knowing of the danger, understood that he was to make the best of his course into the dock. It was natural enough that they, knowing of the danger which there would be if the vessel came too near in towards the pier, should understand that she was merely being brought near the pier for the purpose of anchoring in order to be warped in. Therefore they called out to the harbourmaster, "Let us know when we are to let go our anchor," imagining that he would give that order so as to save her from going on the bank; and if he had given that order in time no accident would have happened. Was there any negligence on their part in doing so? It is quite true that he let them go on too long. It is quite true that they were apprehensive that if he let them go on too long danger would ensue. But when did the time come at which these men ought to have disregarded the orders of the harbourmaster, and to have taken upon themselves to anchor, instead of obeying his orders? It is obvious that by disregarding his order danger might have followed. If it had followed, that would have thrown the entire responsibility upon them. I fully agree with my noble and learned friend, the Lord Chancellor, in his statement that when a vessel is within the jurisdiction of the harbourmaster, and he is giving his orders as to the place of anchorage, it is only in the last resort, and when the danger is fully obvious, that any rational man would think that the harbourmaster's orders should not be strictly attended to. I very much doubt whether the negligence of these men could, under the circumstances, be treated as negligence of the person in charge of the ship for which the owner was responsible; but, even assuming that it could, I cannot see that there was any negligence at all.

No. 2.

Mar. 31, 1892.
Renney v.
Magistrates
of Kirkcud-
bright.

I should add this further, that the harbourmaster saw the vessel coming under a port helm, which is said to have been a wrong manœuvre, and seeing her coming under a port helm, he called out again, "Come on." That was not done in a way which would unmistakably and unequivocally indicate to her that she was in the direction of danger, and must change her course, and carry out an entirely different manœuvre.

Under these circumstances, I think that the defenders are responsible for the negligence of the harbourmaster, and that there was no contributory negligence negating that responsibility.

LORD MORRIS.—In the view which I take of this case, I consider that the pursuer is affected by the knowledge of Smith and Poland, the pilots, and that if contributory negligence could be brought home to Smith and Poland, it would affect the pursuer. The captain took those two men on board as pilots. I see that at the trial it seems to have been the object of the defenders to disparage Smith. It was suggested that he was rather a poacher than a pilot. Now, it would appear that it was rather the object of those on the part of the pursuer to shew that Smith was only a fisherman. He was accepted by the captain as a pilot. The captain in his evidence says that because of this he took these men on board. He took their directions right through. He allowed Smith to hail the harbourmaster while he was standing on the deck. The answer of the harbourmaster was to the hailing of Smith, who was the pilot, at all events, on that particular occasion. He was accepted by the captain, and an observation was made by the harbourmaster by which he was really as much affected as the captain himself. I am therefore clearly of opinion that the captain must be affected by the knowledge of Smith and Poland, and if so, the pilot was in the place of the owner of the ship on that occasion; and if contributory negligence is brought home to Smith and Poland, I think that the case ought to be decided in favour of the defenders.

But on the assumption that that is so, I am still of opinion that the judgment which has been moved is the proper one. What exactly did the harbourmaster say? "Come on" was admittedly his phrase. I leave out of consideration his gesture or the wave of his hand; but at the time when he was asked, "When are we to anchor?" he said, "Come on." Ordinarily speaking to one who is not a nautical person that means "come on" in the direction of the person who is making the observation—that is to say, "come on" in the course that you are going. The harbourmaster saying that, whoever is in charge of the vessel is under the impression that "come on" means that he is to port his helm and come in the direction of the speaker—that is, a distance of 150 yards. The case now of the harbourmaster is, that by "come on" he intended that the vessel should sail right through into port. In answer to the question, "When shall we anchor?" which appears to be a very natural question, the harbourmaster says, "Come on." Anchoring is not a mode of progression. Even taking the most favourable view of it, it appears to me, looking at the captain's story, that he was never under the impression at that time, when this observation was addressed to him in answer to the question, "When are we to anchor?" that the vessel was to sail right through into port. Those words would bear to him a totally different character. The question being, "When are we to anchor?" the reply would not convey to him the idea that "come on" meant "come right on into port." I am under the impression that the harbourmaster,

it being a flood tide, thought that the vessel could advance with safety under a port helm. They did not see the danger until one of the pilots, Smith, again hailed the harbourmaster, and said, "Be sure to tell us when we are to anchor." Smith said that seeing the approaching danger; but neither Smith nor the harbourmaster, who had as much knowledge of the bank as these two pilots had, could have come to the conclusion that they were tilting up against the bank, or why should they have pursued a course which led them towards the bank? Both Smith and the harbourmaster, in my opinion, thought the vessel was approaching the bank. Smith seems to have been more wary than the harbourmaster, and to have seen that the vessel was getting into danger. The harbourmaster, as it appears to me, did not at first think so; but at last he said, "Now let go the anchor." That would not have been the observation of a man who intended the vessel to sail right through and not to port her helm. In addition to that, it seems to me, that seeing the vessel going along that river about 150 yards (because the accident took place at about 50 yards, and it would occupy three or four minutes), if the harbourmaster had seen that to be the wrong course he would have remonstrated, instead of which, he encourages those on board to keep their course.

No. 2.

Mar. 31, 1892.

Renny v.

Magistrates

of Kirkcud-

bright.

In my opinion, my Lords, there is no contributory negligence established against Smith. He hailed the harbourmaster twice at least, and put the question to him which I have stated; and he acted under the impression that, although he might have apprehended danger, that danger was not of a manifest and plain character, and he thought that he might stop in time to avoid actual danger, he taking the course which was prescribed to him.

LORD FIELD.—I am also of opinion that this appeal should be allowed. The question is one of fact. Now, the Lord Ordinary and the learned Lords of Session have all been of opinion that the act of porting the helm, when and where the helm was ported, was directly due to the act of the harbourmaster, and I see no reason whatever to differ from that conclusion. The only point which seemed to me capable of being argued at your Lordships' bar, with any prospect of success, was whether or not the master, and those on board the ship, were guilty themselves of such negligence, directly conducing to the accident, as to absolve the defenders from blame.

Now, I have followed with great care the observations which have been made by both of my noble and learned friends who have preceded me, and I cannot help concurring in the view which has been expressed by my noble and learned friend opposite (Lord Herschell) upon the question, whose negligence it is that is alleged to be contributory, so as to afford protection to the defenders. It must be the negligence either of the master or of the two so-called pilots who were on board. I agree in thinking that the ship at the time when she ported her helm was in charge of the master. It is true that he had the two men on board, who were acquainted with the river; but it seems to me that he is the person upon whom the negligence ought to be fixed, if it can be fixed at all. Now, was he justified in doing what he did? He himself was a stranger to the river. The harbourmaster was the person whose orders, in my judgment, he was bound to obey. The bye-law is very express; it points out that as soon as a ship arrives at the Moat Brae she is not to proceed if the harbourmaster's orders are that she is not to do so.

Now, was the master guilty of any negligence? or did he act reasonably in

No. 2.

Mar. 31, 1892.
Benney v.
Magistrates
of Kirkcud-
bright.

what he was then doing? Now it is difficult, of course, with a considerable conflict of evidence as to what did take place, to decide upon what is the exact truth; but there is evidence that the harbourmaster said, "Come on." It is also said that he waved his hand, and that the master of the ship was himself ignorant of the state of the water, or of the condition of the river. It seems to me, therefore, that the harbourmaster certainly acted in such a way as that the master and everybody concerned thought that he was inviting the ship to come on, both by his language and by his gesture; and that under these circumstances it is impossible to impute to the master of the ship such negligence as to destroy the pursuer's right to sue.

Then with regard to the two persons who are called pilots, they certainly did know of the danger which the ship was running; but looking to the terms of the bye-law, and also to the power of the harbourmaster and the ordinary course of practice in the river, it seems to me that they might not unreasonably act upon the view that the harbourmaster was going to stop them, and to answer their inquiry, made twice, "Where shall we anchor?" and "Let us know when we are to anchor," in time to prevent any injury. Therefore, I think that they did not act unreasonably in proceeding as far as they did.

INTERLOCUTORS of the 19th December 1890 and 26th February 1891 appealed from reversed: Interlocutor of the Lord Ordinary of the 11th of June 1890 restored: Cause remitted to the Court of Session: The respondents to pay to the appellant the costs of the action in the Court of Session, and the costs incurred by him in respect of the appeal to this House.

PRITCHARD & SONS—MOSS & SHEARPE—STIBBEARD, GIBSON, & WILLS—JOHN BELL, W.S.

No. 3.

THE ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION (Defenders),
Appellants.—*Att.-Gen. Webster—Moulton, Q.C.—J. C. Graham.*

April 5, 1892.
The Anglo-
American
Brush Electric
Light Cor-
poration v.
King, Brown,
& Co.

KING, BROWN, & COMPANY (Pursuers), Respondents.—*Sol.-Gen. Murray—
Alfred Daniell.*

Patent—Prior publication.—The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publication founded upon a description in the specification of an earlier patent.

Held (aff. judgment of the First Division) that the test to be applied to the description so published was not whether it was sufficient to enable a mechanic to make the machine, but whether the invention was disclosed to the public in a manner so clear as to enable educated men conversant with the subject to give instructions for the making of the machines, and that applying that test there had been prior publication.

Ld. Chancellor
(Halsbury).
Lord Watson.
Ld. Herschell
Lord Mac-
naghten.
Lord Field.

(IN the Court of Session, July 16, 1890, 17 R. 1266.)

The defenders appealed.

In the appeal the only questions argued were prior publication and public user.

LORD CHANCELLOR.—This is an appeal against an interlocutor of the First Division of the Court of Session affirming the interlocutor of the Lord Ordinary, setting aside the patent of which the appellants are the assignees, on the ground that the portion of the invention patented (with which, under the circumstances, it is alone material to deal) had been previously published.

The patent so set aside is known as Brush's patent, and bears date the 18th of November 1878, and the question in debate is whether a patent taken out by

Mr Samuel Alfred Varley in 1876 does or does not so anticipate the patent of No. 3. 1878, of which the appellants are the assignees, as to make the latter patent bad.

The patent has relation to the particular form of dynamo-electric machines, all of which have, and were known to have before the date of either patent, this principle in common, that they move magnets past coils of wire or coils past magnets with sufficient velocity to produce the desired result.

April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

It was also familiar knowledge before the date of either patent, that a current of electricity sent round a bar of soft iron would render the bar of iron magnetic.

Undoubtedly the progress of electrical science has given rise to various forms of using that energy in which the two principles to which I have adverted have become important, and the practical application of them by means of different mechanical devices has for some time past exercised the ingenuity of practical electricians.

One appears to have been the idea of making one wire go round the iron bar, to make it and maintain it as a magnet,—making the same wire go to perform whatever work it was intended to perform, and returning to the magnet, and thus the single current doing two things.

The further step was made when what was called the shunt apparatus was invented. The current of electricity was divided into two. One stream, so to speak, was made to go round the iron bar, keeping it magnetic, while the other was led to do the work which it was required to do, and they were rejoined after the work had been accomplished.

Mr Imray explains with great clearness what are the two principles called series and shunt-winding.

On the machine being revolved, he says, a wire wrapped round and round the magnet crosses over to another magnet, proceeds to do whatever work is required of it in what is called the external or working circuit, and goes back again after doing the work.

It is called “series” winding, because the coils of the electro-magnet are in series with the external circuit—that is to say, it is one continuous wire. The current goes straight from start to finish. The whole electricity produced by the machine goes to excite the magnet and to the external wire, and straight from the one to the other.

The weak point of it (said Mr Imray) is this, that as soon as you break the external circuit you cease to have an electric machine, because there is no current. In electrical language, that is spoken of as having the external circuit opened. When the external circuit is broken or opened, the current ceases to flow, and you do not have the advantage of any magnetising action by the current going around the magnets of the machine.

In the same way, the more resistance you put in your external circuit—that is to say, the more work you ask your machine to do—the less current will flow through the external circuit; and the more work you have, the less you will be doing towards the magnetising of your machine. Resistance in wire depends, first, upon the character of the wire, and what metal it consists of; secondly, upon its transverse section; and thirdly, upon its length. The longer the wire, the greater the resistance; the smaller the section, the greater the resistance; and one kind of metal has more resistance than another. Roughly speaking, a short thick wire has much less resistance than a long thin one.

No. 3.
 April 5, 1892.
 The Anglo-American
 Brush Electric
 Light Corporation v.
 King, Brown,
 & Co.

Another form is what is called "shunt" winding, in which the difference is simply in the disposition of the wires. The current coming away is split into two. One portion of it goes to what has been called the external circuit, doing whatever is to be done, and having done that work returns to the machine, but without any actual contact with the magnets of the machine at all. The other portion goes straight to the magnet, is wrapped round it as before, and then returns to the brush, as it is called, without any contact with the external circuit at all.

The strong point (says Mr Imray) of this arrangement is that, whether the external circuit is open or closed, there is always magnetism in the wire capable of producing electricity, because the current is continually running through the shunt to the magnet. A defect in it is that some of the electricity is taken away from the external circuit which otherwise would go through it.

One further explanation of Mr Imray's becomes necessary to follow the question with which your Lordships have to deal, and that has reference to what Mr Imray says is variously known as "electro-motive force," "tension," "pressure," and "potential."

"Potential" seems to be the word generally used, and means the intensity of pressure by which the electricity is caused to pass along a conductor.

The advantage of what is called a compound winding,—which is neither more nor less than a combination of the two previously described, the first being known as "series," the second as "shunt,"—is in producing a constant pressure, or an equal volume, or an even current. It is difficult, except by finding analogies in other subjects of physical research than electricity, to convey the exact idea; but the advantage attained at all events is, that when the work is changed in the outer circuit the amount of current that goes round the magnet is so changed that one compensates, or nearly compensates, for the other.

Now in the patent patented in 1876, Mr Varley says,—“Part of the electricity developed by the machine is diverted” (and the word is significant) “to maintain the magnetism of the soft iron magnets, and the remaining portion is used to produce the electric light. There are several well-known ways of doing this” (this has been the subject of very violent comment); “but the method I prefer is to wrap the soft iron magnets with two insulated wires, one having a larger resistance than the other. The circuit of larger resistance is always closed, and the circuit of less resistance is used for the electric light.

“When the electric light is being produced, the greater portion of electricity passes through the circuit of less resistance, which I term ‘the electric light circuit,’ maintaining the magnetism of the magnets and producing the light. When the electric light circuit is opened from any cause, the electricity developed passes through the circuit of greater resistance only, and maintains the magnetism of the magnets.”

It is impossible to deny that in the present state of electrical knowledge dealing with dynamos, the description given undoubtedly does disclose to anybody familiar with the principle of electro-dynamos and the medium by which the electric current is turned to account, the very thing for which the patent was granted to Mr Brush.

But it is said that, for the purpose of judging of the novelty of the invention of 1876, one must, as nearly as one can, apply one's self to the knowledge exist-

ing at that date, and not apply what we have learned since, so as to interpret the language of the patent of 1876 by the light of later discoveries. No. 3.

I am not quite certain that I understand the application to this case of that principle of interpretation, which, however, I admit to be sound. The “series” was known, the “shunt” was known, and the language seems to me incapable of any other interpretation than that the patentee did mean to combine two previously known systems. If he did, and disclosed the mode of doing it, the novelty of the later patent cannot be supported. April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

I confess that I am unable to entertain a doubt that it was so disclosed. What he intended was, I think, conclusively shewn by the original rough sketch produced. Distinguished electricians cavil at the mode of its disclosure, criticise the language (which is not, perhaps, the most felicitously chosen), and possibly suggest doubts as to what would have been the fate of Mr Varley’s patent if it had been attacked upon the ground of the insufficiency of the specification ; but that is not the question to be determined here.

The question is the disclosure of the invention, which consisted in the combination of two known forms of dynamo-electric machines.

I doubt whether there is much to choose in clearness of exposition between the one patent and the other. I think it is certain that neither the one patentee nor the other had any very definite notion of the importance of the invention until a year or two later.

The invention of the incandescent light brought into prominence the importance of an even, uniform, and continuous flow of the electric energy.

I am therefore of opinion that the interlocutor appealed from ought to be affirmed.

I have confined myself, however, in arriving at this conclusion, to the specifications themselves, aided by scientific witnesses, in interpreting the scientific nomenclature in which the specifications are couched, and the explanations of the witnesses as to the operations produced by the different forms adopted.

I designedly avoid giving any opinion upon the question of the user of Varley’s machine. Many questions, to my mind, arise as to what publication there was from the use of that machine as a machine disclosing the mode by which the electric light was produced. But inasmuch as I have come to the conclusion that I have indicated, it is not necessary further to discuss the extent to which the use of the electric light by means of Varley’s machine for the purpose of illustrating some submarine invention was such an exhibition or publication of it as would make a subsequent patent void.

I therefore move your Lordships, that the interlocutor appealed from be affirmed, and this appeal dismissed, with costs.

LORD WATSON.—The appellants are assignees of Brush’s patent of 1878, for improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes. The patent originally included two different dynamo-electric apparatus, now known respectively as the shunt and the series-shunt ; but in 1882 the appellants, having become aware of the fact that their shunt-winding machine had already been fully described and claimed in Clark’s patent of 1875, amended their specification by disclaiming that part of it which related to shunt-winding, and limiting their claim to the series-shunt.

In this appeal, they complain of a decision of the First Division of the Court

No. 3.

April 5, 1892.
The Anglo-
American
Brush Electric
Light Cor-
poration v.
King, Brown,
& Co.

of Session, affirming an interlocutor of the Lord Ordinary (Trayner), by which he reduced and set aside their letters-patent as amended by disclaimer, on the grounds, *inter alia*, that the series-shunt apparatus therein described had been published in Varley's patent of 1876, and also that there had been prior public user.

Dynamo-electric machines are useful for various kinds of work, but are now chiefly employed for producing light. I shall, in so far as it may be necessary to describe such machines, refer to them as if they were used for the latter purpose.

At the date of Clark's patent, the only known variety of self-exciting dynamos was the series-winding apparatus in which the current of electricity generated in the revolving coils, after it has passed through the commutator, is conducted to and round the magnets, and thence to the lamps, from which it returns to the machine, thus forming a single electric circuit, which performs the double function of magnetising the magnets and doing work. In the shunt apparatus, the volume of electricity, after it has passed the commutator, is divided into two unequal currents by means of a shunt, or bifurcation of the conducting wire, which is in itself a common device. The smaller current is then made to circulate round the magnets, whilst the larger is led to the lamps; and they are again united just before they re-enter the machine. So that these currents form two separate circuits, that of greater resistance maintaining the supply of electric force in the magnets, and that of lesser resistance producing light.

The series-shunt-winding apparatus is, as its name imports, a combination of the two systems already described. Its arrangements are practically the same with those of the shunt-winding machine, subject to this modification, that, after bifurcation, the larger current, instead of being taken direct to the lamps, is, in the first instance, made to encircle the magnets. Accordingly, the smaller current serves for excitation only, as in the shunt system; whereas the larger current serves both for excitation and for work, as in the series-winding system.

Whether the series-shunt system was first disclosed to the public by Varley in 1876, or by Brush in 1878, it seems to be certain that the real merit of the arrangement was neither understood nor appreciated until the subsequent discovery of the incandescent lamp. The efficiency of light produced by the incandescence of filaments of carbon depends upon the maintenance of a uniform and steady flow of electricity in the working circuit, which is now termed a constant potential. In the series, and also in the shunt system, the working current is liable to considerable variation; with this difference, that the same disturbing elements which in the one case cause a decrease, in the other occasion an increase of electro-motive force. The combination of these opposite tendencies brings into play the principle of compensation, and makes it possible, by careful adjustment, to attain a more constant potential with the series-shunt than with either of its component systems.

The terms of Brush's specification indicate that the patentee had not in his view the attainment of that high degree of constancy in the motive force which is desirable for the purpose of incandescent lighting. He points out that other machines were "not well adapted for certain kinds of work, notably that of electroplating," and then proceeds to describe his own in these terms:—"I attain my object by diverting from external work a portion of the current of the machine, and using it either alone or in connection with the rest of the

current for working the field magnets. I prefer the latter plan of the two, No. 3. especially for electroplating machines." In other words, he attains his object by using either the shunt or the series-shunt, but prefers the latter for electroplating. For other purposes than electroplating, he does not suggest that the one system is in any respect greatly preferable to the other. As matter of fact, it appears to be doubtful which of the two is most suitable for plating. Preece, one of the appellants' skilled witnesses, says,—“Pure shunt is preferred in England for electroplating. In America the compound is preferred.”

April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

In Varley's patent in 1876 no claim is made either for shunt or series-winding. The passage which has been held by both Courts below to anticipate the invention claimed by the appellants, is merely descriptive of the machines to which the arrangements claimed by Varley may be usefully applied, and is in these terms. [His Lordship read the portion given above in Lord Halsbury's opinion.*]

In estimating the real significance of Varley's specification, it is necessary to consider what amount of information with respect to dynamo-electric apparatus ought to be attributed to persons who had an opportunity of reading it in the year 1876. The language used by the patentee must be construed with reference to the information then open to the public, and not in the light of subsequent discoveries. To my apprehension, it does not admit of doubt that a reader acquainted only with series-winding might not attach the same meaning to the words used by Varley as would naturally occur to one who was also familiar with the shunt, or with the shunt and series-shunt systems of winding.

Since the hearing of this appeal, I have carefully perused the whole evidence adduced by both parties, in so far as it has any bearing upon the issue of prior publication. Of the respondents' evidence it is sufficient to say that it is in entire accordance with the decision appealed from. The appellants' evidence consists of oral testimony by electricians of great eminence, and is directed mainly, if not wholly, to prove (1) that, on a fair construction of the specification of 1876, the words relied on by the Court of Session do not disclose either shunt or series-shunt winding, and (2) assuming them to do so, that the specification does not contain explanations or directions which would enable a workman of ordinary skill to construct either a shunt or a series-shunt machine. I need hardly say that it is for the Court, and not for the witnesses, to construe the terms of the specification; and that their evidence upon the first of these points is only material in so far as it may supply scientific facts which ought to be taken into account in arriving at the true construction of the instrument.

There is one circumstance which, in my opinion, seriously affects the value of the appellants' evidence upon both points. The testimony of their witnesses was given upon the footing that, in 1876, Clark's invention of the previous year was still unknown, and that those who read Varley's specification could have no knowledge of any system other than series-winding. Upon that assumption, it occurs to me that a reader, whether a man of science or skilled workman, would probably have been at a loss to discover what Varley meant, and might not have arrived at either shunt or series-shunt winding without some exercise of his inventive faculty. I am, however, unable to find any good reason for holding that Clark's shunt machine was unknown in the year 1876.

No. 3.

April 5, 1892.
The Anglo-
American
Brush Electric
Light Cor-
poration v.
King, Brown,
& Co.

It is true that in 1878, Mr Brush had never heard of Clark's invention, and also that shunt-winding was unknown to Sir William Thomson before 1879. But it appears to me, that Clark's taking out a patent for his invention was, both in fact and law, a publication of it. I do not suppose that every electrician, however eminent, is by necessity personally cognizant of every invention patented within the bounds of his science; and the ignorance of two or more of them is unavailing to prove that the knowledge of others was equally defective. I cannot, therefore, avoid the conclusion that in 1876 Clark's shunt-winding machine had been disclosed to the public, and must have been known to some, if not to all electricians; and consequently that the controverted passage in Varley's specification ought to be construed on the footing that shunt-winding was known at its date.

I do not think it necessary to deal with the conflict of testimony as to the sufficiency of Varley's specification for the guidance of a skilled workman. The Lord Ordinary was of opinion that the appellants had failed to prove that part of their case. But I agree with his Lordship, and with the learned Judges of the First Division, in holding that the sufficiency or insufficiency of the specification for that purpose does not afford a crucial test of prior publication. Every patentee, as a condition of his exclusive privilege, is bound to describe his invention in such detail as to enable a workman of ordinary skill to practise it; and the penalty of non-compliance with that condition is forfeiture of his privilege. His patent right may be invalid by reason of non-compliance; but it certainly does not follow that his invention has not been published. His specification may, notwithstanding that defect, be sufficient to convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, and to give a workman the specific directions which he failed to communicate. In that case, I cannot doubt that his invention is published as completely as if his description had been intelligible to a workman of ordinary skill.

Assuming as, in my opinion, I am bound to do, that Clark's invention was known in 1876, I have no hesitation in holding that Varley's specification sufficiently describes both the shunt and the series-shunt machine. The first sentence in the passage already quoted contains an accurate representation of shunt-winding. The electricity developed by the machine is to be "diverted," which is the word used in the appellants' specification to denote bifurcation, into two parts, one for magnetising, and the "remaining portion" for producing light. These expressions plainly refer to a single current of electricity generated by the machine, which is to be split into two currents, one for excitation of the magnets, and one for work—an arrangement which, according to the evidence, embraces all the essential features of a shunt machine. The sentences which follow appear to me to describe the series-shunt with equal accuracy. They commence with the statement that there are several ways of "doing this,"—that is, of obtaining a circuit of excitation and an electric lighting circuit from a single current by dividing it into two portions. The method preferred is to make both circuits pass round the magnets, that of greater resistance being employed for excitation only, whilst that of lesser resistance excites the magnets, and also does the work of lighting. The series-shunt is evidently treated as a mere modification of the shunt system; and I think it might be reasonably regarded in that light by the patentee. The alteration in the mechanical arrangement of the apparatus is in itself trivial; and the possibility of thereby obtain

ing such a constant potential as would, at a future date, suffice for the purpose of incandescent lighting was not present to his mind. There might, as one of the witnesses suggests, still remain room for a patentable improvement upon the series-shunt as described by Varley, consisting in an adjustment which would ensure a high degree of constant potential. No such possibility is indicated either by Varley or in Brush's patent of 1878.

In the argument addressed to your Lordships, counsel for the appellants laid much stress upon these words occurring in Varley's specification. "The insulated wire composing the helices is connected to the insulated wire surrounding the soft iron magnets of the machine, and is usually inserted in the circuit of greater resistance." They maintained that the necessary result of giving effect to that direction would be to deprive the apparatus contemplated by Varley of all the characteristics of series-shunt winding. The point does not appear to have been pressed in the Courts below; at least, it is not noticed by any of the Judges. In the absence of evidence to support the appellants' contention, I have come to the conclusion that the adjustment thus indicated might affect the constancy of the volume of electricity conveyed by the electric light circuit, but that the apparatus would still be a series-shunt-winding machine.

These reasons are sufficient to dispose of this appeal, and I desire to express no opinion upon the matter of prior public user. The argument of the appellants satisfied me that the question was one upon which I should prefer not to form any conclusion without hearing counsel for the respondents. I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL.—This is an appeal against interlocutors pronounced in an action of reduction brought by the respondents for the purpose of obtaining the revocation of certain letters-patent then vested in the appellants. The letters-patent in question bear date the 18th of November 1878, and claim the invention of "improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes." The original specification concluded with sixteen claims, to only two of which I need now refer. The eighth claim is for what is termed in relation to dynamo-electric machinery the "shunt" system; that is to say, a dynamo-electric machine wherein a portion of the current produced is diverted for the purpose of maintaining a permanent magnetic field. The ninth claim is for what is now termed the shunt-series system or compound winding. In January 1882 a disclaimer was filed by which the eighth claim was abandoned, it having been discovered that the shunt system was not new at the date of the letters-patent. The main question, and indeed in my opinion the only question with which your Lordships need concern yourselves, is whether the shunt-series system was a new invention at that date. It is alleged by the respondents that it was not only communicated to the public by the specification of the letters-patent granted to Samuel Alfred Varley in December 1876, but that a machine was under his instructions constructed on that system, and had been in actual use before the date of the patent now vested in the appellants.

Varley's specification claimed a method of obtaining a high degree of "magnetic potential" in the bobbins of an electric machine, and the claim had no reference to the manner in which the electricity generated was to be employed; but there occurs in the course of the specification the following passage:—[His

No. 3.

April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

No. 3. Lordship read the portion of the specification given above in Lord Halsbury's opinion*].

April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

It is scarcely denied that to any electrician possessed of the knowledge of the present day these words would convey the idea of the series-shunt system of winding. But it is said, and with truth, that this is not the test, and that the question is, what idea they would convey to a person reading them prior to the date of the patent which is in contest in the present suit. The learned counsel for the appellants argued strenuously at the bar that in the light of the more limited information then available such a reader would not be led to a knowledge of the device described in Brush's patent. They contended, moreover, that in other parts of Varley's specification statements are to be found which, taken in connection with the passage relied on, would lead the reader away from the conception of this scheme of compound winding. It is necessary, therefore, to inquire what was the state of knowledge prior to 1878. The system of series-winding was well known. By this arrangement the current generated is led round the magnets, and from the magnets is conducted to the lamps, or to serve the other purposes for which it is to be employed, and then back to the machine so as to complete the circuit. This device was subject to the defect that the magnetism of the magnets might be diminished at the very time when it was desirable that the current generated should be maintained. In May 1876 letters-patent were sealed bearing date the 11th of December previous, the specification of which, it is admitted, disclosed the shunt system of winding, by which one part of the current is diverted to maintain the magnetism of the soft iron magnets, whilst the remainder is used to produce the electric light, or serve any other purpose for which the current is required. It was urged on behalf of the appellants that there was no evidence that the invention thus disclosed had become commonly known prior to 1878, or that it had ever been put in operation, and that Varley's specification ought, therefore, not to be construed on the assumption that those who read it would be acquainted with the shunt system of winding. I cannot accede to this view. It appears certain that at the date when he took out his patent Varley was acquainted with the shunt system, and, indeed, with the shunt-series system of winding, for this is conclusively established by the drawing made by him which was put in evidence. Of course, I do not refer to this for the purpose of construing his specification, but only as bearing on the question whether the shunt system was known prior to 1878. The shunt system had been described in Clark's specification of 1875, and it is impossible to say that other electricians may not have been, like Varley, acquainted with it. Under these circumstances, I cannot regard it otherwise than as part of the stock of public knowledge, which must be taken into account when approaching the construction of Varley's specification. Taking, then, the shunt system and the series system of winding as both known, what information ought the specification of Varley to be regarded as conveying? The words with which the important passage in Varley's specification commences appear to me to be apt to describe the shunt system. It is impossible not to be struck with the similarity of the language used to that which is to be found in the part of Brush's specification, which was avowedly describing that system. I am not much struck with the suggestion that the words "the remaining portion is used to produce the electric light" indicate that the use was to be for that

* *Ante*, p. 22.

purpose alone, and that this portion of the current was to play no part in maintaining the magnetism of the magnets, and that the description is therefore inconsistent with the shunt-series system. It seems to me impossible so to understand the language employed when the import of the sentences which immediately follow is considered. Indeed, it is admitted by one of the defendants' witnesses, Professor Sylvanus Thomson, that the criticism resolves itself into this, that he finds in two sentences what he might have expected to find in one. But a passage such as that with which we are dealing, in which each sentence is obviously connected with those which precede and follow, must be construed as a whole, and such a criticism as that which has been applied to it appears to me wholly inadmissible. Then it is said that, although compound winding is described, it would not be understood at that time to refer to compound winding as now understood, but to the winding on the magnets of two wires the current of electricity in each of which was separately excited. But the fact that it is prescribed that one of the two wires is to have a larger resistance than the other, and the statement that when the electric light is being produced "the greater portion of electricity" passes through the circuit of less resistance, appear to me not to suggest the idea of separate excitation, but the contrary; and when the whole passage is read together this impression is strengthened. And it is admitted by the defendants' witnesses that there is at least one passage in the specification inconsistent with the idea that separate excitation was contemplated. The argument that other parts of Varley's specification would lead the reader away from the conception of compound winding was mainly founded upon this passage:—"The insulated wire composing the helices is connected to the insulated wire surrounding the soft iron magnets of the machine, and is usually inserted in the circuit of greater resistance." It was argued that if this were done the circuit of greater resistance would not be always closed. This assertion is controverted. But whether it be correct or no, I do not think the words relied on would lead anyone reading the earlier part of the specification to the conclusion that the circuit of greater resistance was not intended to be always closed in face of the express statement that it was to be so. The other criticisms were, to my mind, of less weight, and I do not think that any part of the specification would divert a reader of the important passage on which the controversy has mainly turned from the idea of shunt-series winding. Sir W. Thomson, one of the defendants' witnesses, admits that it is quite probable that in 1876 a workman might have been led to series-shunt winding by Varley's descriptions. And Professor Sylvanus Thomson says,—
 "If a workman of the present day were to read Varley's patent, I think he would read it as describing a shunt-series machine, because he would read the knowledge of the present day into it, and that would alter the meaning he attached to the language." Now, I admit the difficulty of divesting one's self of existing knowledge, and interpreting any description as it would have been interpreted when the stock of knowledge was more limited. But to anyone acquainted with the shunt and series systems, I think the same idea would be conveyed as is conveyed now. If to a person cognisant of these two systems the conception of their combination into the shunt-series system would have constituted a new departure, the case might have assumed a different complexion; but it is clear that Varley did not regard this combination as a new discovery. And I think it is impossible to read Brush's specification without seeing that when once he had arrived at the shunt system the application of it in conjunc-

No. 3.

April 5, 1892.
 The Anglo-American
 Brush Electric
 Light Corporation v.
 King, Brown,
 & Co.

No. 3.

April 5, 1892.
The Anglo-
American
Brush Electric
Light Cor-
poration v.
King, Brown,
& Co.

tion with the series system appeared to follow as a corollary. His object was to secure a permanent magnetic field. He attained this object by means of the shunt system. His words are,—“I attain my object by diverting from external work a portion of the current of the machine, and using it either alone or in connection with the rest of the current for working the field magnets.” He treats the shunt-series system, in truth, as a mere modification of the shunt system, of which he believed himself to be the inventor, though he has naturally a distinct claim to cover this modification.

The learned counsel for the appellants laid great stress on the fact that since Brush's specification the shunt-series system has come largely into use, and deduced from it the argument that it could not previously have been known. But it must be remembered that the importance of this system has only become very marked since the incandescent lamp has come into use. In connection with this form of electric lighting it is no doubt of the highest importance to secure a constant potential. And this object is best attained by the shunt-series system, the defects of each of these systems when used separately tending to counteract one another when they are used in combination. But there is not a trace in Brush's specification of this idea of a constant potential. What he was concerned to obtain was a permanent magnetic field. He expresses his preference for the combined systems, “especially for electroplating machines.” It is true that a certain number—not, I think, a very large number—of Brush's machines were introduced into this country for electroplating purposes before the days of the incandescent lamp. It is, however, regarded as an open question whether pure shunt is not better for the purpose of electroplating than series-shunt owing to the possibility that the polarity of the magnets may be reversed. It would seem that whilst the latter system is more in vogue in America, the former is given the preference in this country. I am satisfied that neither Varley nor Brush had in his mind the importance of maintaining a constant potential. But for the reasons I have given I think that any electrician reading Varley's specification with a knowledge of the two systems of series and shunt would have found there a description, which he would have had no difficulty in giving practical effect to, of the system of compound winding known as series-shunt.

Having arrived at this conclusion, it is unnecessary to determine the effect of the use of the machine constructed under Varley's instructions, though I think it would be a matter for serious consideration whether after that use the appellants' patent could be supported.

I think the judgment of the Court below was right, and ought to be affirmed.

LORD MACNAGHTEN.—I have had an opportunity of reading in print the opinions which have just been delivered, and I only desire to say that I concur in the judgment which has been proposed, and in the reasons which have been assigned by my noble and learned friends.

LORD FIELD.—I have carefully read and considered the evidence in this case, and the authorities bearing upon the questions involved in it, and I have had the advantage of perusing the opinions expressed by the Lord Chancellor and my noble and learned friends.

I entirely agree with them that the appeal should be dismissed, and for the reasons which they have given, and even if I could succeed in stating those reasons in different—it could not be in better—language.

I entertain, in common with my noble friend Lord Watson, some doubt whether the alleged prior use of the Varley machine was such as to avoid the appellants' patent, and if it had been necessary to decide that point, I should have wished to have heard the argument on behalf of the respondents, but, in the view I take of the case, that becomes unnecessary.

No. 3.

April 5, 1892.
The Anglo-American
Brush Electric
Light Corporation v.
King, Brown,
& Co.

INTERLOCUTORS appealed from affirmed, and appeal dismissed with costs.

RENSHAW—MACKENZIE, INNES, & LOGAN, W.S.—FAITHFUL & OWEN—DAVIDSON & SYME, W.S.

MRS JANE WOOD OR DARLING (Pursuer), Appellant.—*Rhind—Kennedy*.
WILLIAM GRAY & SONS (Defenders), Respondents.—*Sol.-Gen. Murray—C. N. Johnston*.

No. 4.

May 31, 1892.
Darling v.
Gray & Sons.

Reparation—Action by mother for solatium and damages for son's death pending action raised by him for damages for injury.—A workman raised an action against his employers for damages for personal injury alleged to have been caused by the defenders' fault. The pursuer having died, his mother, as his executor, was sisted in his room.

While this action was pending the mother raised a second action in her own right against the same defenders for *solatium* and damages for the death of her son, which she alleged to be due to the same injury.

Held (aff. judgment of the Second Division) that the second action was incompetent.

(In the Court of Session, July 14, 1891, 18 R. 1164.)

The pursuer appealed.

LORD WATSON.—I am of opinion that the unanimous decision of the Second Division of the Court of Session in this case is in strict accordance with the existing law. The reasons assigned for it, which were delivered by Lord Young, are not fully expressed, but it sufficiently appears that the judgment of the Court proceeded upon the ground that the appellant's action was unknown to the law, and was therefore incompetent.

Ld. Chancellor
(Halsbury).
Lord Watson.
Ld. Herschell.
Lord Morris.
Lord Field.

The maxim *actio personalis moritur cum persona* has a very limited application in the law of Scotland, and in evidence of that proposition I need do no more than refer to the elaborate opinions of Lord Neaves and other Judges in *Auld v. Shairp*.¹ It is in my opinion unnecessary for the purposes of this appeal to examine that case or to consider how far a bare claim in respect of personal injuries occasioned by the negligence of another constitutes a debt due to the party injured, which will pass upon his death without having brought an action to his personal representatives. The law has long been settled that when the deceased has instituted an action to enforce his claim his executor can take up and insist in the process to the effect of recovering the pecuniary damages to which the deceased was entitled.

The Court of Session, by a series of decisions which trench somewhat closely upon the province of the Legislature, has, subject to certain limitations, sustained actions at the instance of relatives of the deceased in their own rights, and not in a strictly representative capacity, against the parties whose negligence occasioned his death for the loss which they personally suffered through that event. Your Lordships had recent occasion in *Clarke v. Carfin Coal Com-*

¹ Dec. 16, 1874, 2 R. 191.

No. 4. *pany*¹ to consider the class of persons to whom such a right of action has been given, and it was there held, in accordance with the rule adopted in the Courts below, that it only comprehended those persons between whom and the deceased there existed a reciprocal obligation of support in the event of either of them becoming indigent. The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother, or child to the deceased. In *Eisten v. The North British Railway Company*,² which is the leading authority upon this branch of the law, the Lord President (Inglist) observed,—“As the existence of such claims in our common law is a peculiarity in our system, it is not desirable to extend this class of actions, unless they can be justified on some principle which has been already established.” In that observation, which has been repeatedly made in different terms by other Judges of the Court of Session, I entirely concur. In *Clarke v. Carfin Coal Company* I had occasion to say that the rule which admits the particular action with which we are now dealing “does not rest upon any definite principle capable of extension to other cases which may seem to be analogous, but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other ratio to support it.”

The appellant maintained that whenever an individual is negligently injured there arises to each person standing towards him in the relation which I have explained an independent right of action contingent only upon his death sooner or later, and its being traceable to the injury which he received. For that proposition no authority whatever was produced except the worn-out analogy of actions of assythment. It would be the merest waste of your Lordships' time to go back to our ancient authorities for the purpose of examining the nature of an action of assythment, and shewing that between it and an action by relatives in respect of negligence no analogy exists. In the case of *Eisten v. North British Railway Company*, already cited, the Lord President said,—“This is not an action of assythment, and it does not partake in any degree of the nature of such an action.” Lord Deas,—“To such a case I agree with your Lordships that the law of assythment is not applicable.” Lord Ardmillan and Lord Kinloch expressed their opinions in similar terms.

To my mind the only relevant question in the present case is, has the rule ever been carried so far as to recognise the competency of an action at the instance of relatives, where an action in respect of the same *injuria* has been raised by the deceased during his lifetime, and is still a depending litigation? Unless that question can be answered in the affirmative, the appellant's action is in my opinion incompetent. There is no case to be found in the reported decisions of the Court of Session in which an action was sustained after the deceased's claims had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to and might be insisted in by his executor, and the existence of such a right of action has not been affirmed or even suggested by a single text writer. There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised they must bring one suit, and

¹ July 27, 1891, 18 R. (H. L.) 63.

² July 13, 1870, 8 Macph. 980, Lord President, 984, 42 Scot. Jur. 575.

one only, in which the damages due to them respectively might be assessed. In that state of the law I do not think this House ought to encourage the creation of a new right and corresponding liability which are at present unknown in Scotland. No. 4.
May 31, 1892.
Darling v.
Gray & Sons.

The LORD CHANCELLOR, and LORDS HERSCHELL, MORRIS, and FIELD concurred.

THEIR LORDSHIPS dismissed the appeal.

KEEPING & GLOAG—D. HOWARD SMITH, Solicitor—INGLEDEN, INCE, & COLT—
T. & W. A. M'LALEN, W.S.

FREDERICK ROBERT HUGHES AND ANOTHER (Edwardes' Trustees)

(Defenders), Appellants.—*Rigby, Q.C.—Asher, Q.C.—Peddle.*

HENRY STAPLETON EDWARDES AND ANOTHER (Pursuers), Respondents.

No. 5.

July 25, 1892.

Hughes v.
Edwardes.

Succession—Marriage-contract—Provisions to "children"—Conditio si sine liberis—Trust.—In an antenuptial marriage-contract a wife conveyed a sum of £4000 to trustees for the purposes,—(2) That, in the event of the marriage being dissolved by the predecease of the wife, "leaving a child or children of the marriage," the trustees should pay the annual produce of the fund to her husband "during his life, for his life and alimentary use only," excluding creditors and assignees, and that after his death the capital should be paid over to the child or children of the marriage, to the sons on attaining majority and to the daughters on attaining majority or being married. In the event of the failure of children when the term of payment arrived the fee was to be subject to the disposal of the wife by will, with power to the trustees to convey or pay over the capital "at any time after the death of the predeceasing wife and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will." (3) In the event of the marriage being dissolved by the predecease of the husband, the wife was to enjoy an alimentary liferent of the £4000, and after her death the interest was to be applied for behoof of the children during their minority, and on their majority (or marriage in the case of daughters) the capital was to be paid over to them. It was further declared that if such child or children should all die before their mother, or although they should survive her, "should they all die before attaining majority and without leaving issue of their own bodies," the capital was to be disposed of according to the wife's will, or, in the event of her leaving no will, to be given to her heirs and executors. It was further provided that the provisions to the children should not be payable or become vested interests until after the death of the longest liver of the spouses and until the children attained majority.

The marriage was dissolved by the predecease of the wife, who was survived by one son, and who left a will in which she made over all she possessed to her husband.

In an action against the trustees by the husband and the son (who had no children) for payment upon their joint discharge of the £4000, *held* (rev. judgment of the First Division) that the trustees were bound to retain the capital of the trust (1) for the protection of the alimentary liferent of the husband, and (2) for the eventual interest of the possible issue of the son.

Opinions that the *conditio si sine liberis* is applicable to provisions to children in marriage-contracts.

Testament—Revocation—Conditio si testator sine liberis decesserit.—*Per Lord Watson*,—"According to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case."

(In the Court of Session December 19, 1890, 18 R. 319.)

Hughes and another, Edwardes' marriage-contract trustees, appealed.

No appearance was made for the respondents.

LORD CHANCELLOR.—My Lords, all I desire to say in this case is that I am quite satisfied, after the argument before your Lordships, that there is no authority in the law of Scotland for any such construction as is insisted on.

Ld. Chancellor
(Halsbury).
Lord Watson.
Ld. Herschell.
Lord Mac-
naghten.
Lord Morris.
Lord Hadden.

No. 5.

July 25, 1892.
Hughes v.
Edwardes.

I have had an opportunity of reading the judgment prepared by my noble and learned friend Lord Watson. I entirely concur in that judgment, and I do not think it necessary to state anything further.

LORD WATSON.—The appellants as trustees under an antenuptial contract between Dr and Mrs Edwardes, dated 20th February 1855, hold in trust a sum of £4000 which was settled by the lady's stepfather upon the spouses and their children. The marriage was dissolved by the death of Mrs Edwardes on the 10th June 1862, leaving a son who was her only child. In this action her husband and son are pursuers, and they conclude for a declaration that the appellants are bound to make payment of the sum in question to them upon receiving their joint discharge. The First Division of the Court, reversing the decision of the Lord Ordinary (Kincairney), has given decree to that effect. The pursuers have not appeared as respondents in this appeal, which has been heard *ex parte*. Although your Lordships have not had the advantage of listening to an argument in support of their judgment, the reasoning which prevailed with the three learned Judges who constituted the majority of the First Division is fully disclosed in the opinions which they delivered.

Under the provisions of the marriage-contract the sole duty of the trustees, during the lifetime of both spouses, was to pay the income of the fund to Mrs Edwardes for her personal and alimentary use, exclusive of the *jus mariti* and right of administration of her husband. Separate directions are given with respect to the disposal of the income and *corpus* of the fund applicable to the alternative events of the wife or husband predeceasing. In the event of the wife's predecease leaving a child or children, the trustees are directed to pay the income to the husband during his life for his alimentary use, his right to assign, and the diligence of his creditors, being excluded. On his death the capital is made payable to "the said child or children," after their attaining majority in the case of sons, and in the case of daughters, after their attaining majority or being married. Should there be no child or children alive at the wife's decease, or should they die before the terms at which their provisions become payable, the trustees are directed to make over the capital at her husband's death to any person whom she may appoint by will or other writing, whom failing to her nearest heirs and executors.

Mrs Edwardes on the 17th April 1860 made a will in favour of her husband the terms of which are sufficient to carry the capital of the trust-fund to him upon the occurrence of the events in which the testatrix had power to dispose of it. Although these events have not occurred, the pursuers maintained, in both Courts below, that they were entitled to present payment upon their joint demand, because the fund, which has not yet vested in either of them, must inevitably belong to one or other of them—to the son in the event of his surviving his father, and to the father in the event of his son's predecease. If that were an accurate statement of the beneficial interests in the fee of the trust fund which can emerge in any possible event, and there were no obstacle interposed by the terms of the trust, I should be prepared to hold, as I indicated in *Muirhead v. Muirhead and Orellin*,¹ that they were entitled to immediate payment of the fund. But, in my opinion, their right to immediate payment cannot be affirmed if, notwithstanding their ultimate interest, the terms of the trust require

¹ May 12, 1890, 15 App. Cas. 300, 17 R. (H. L.) 48.

that it shall be kept up, or if their right is liable to defeasance by the possible existence of other beneficiaries. No. 5.

The appellants argued that there are three reasons, each of them in itself sufficient to justify their refusal to pay over the capital of the trust fund to the pursuers. First, that in present circumstances they are bound to retain it for the protection and continuance of the husband's alimentary liferent; secondly, that in the possible event of the son's death leaving issue before his interest becomes vested, such issue will be entitled to take if they survive their grandfather; and thirdly, that the will of Mrs Edwardes in her husband's favour was revoked by the subsequent birth of her son. July 25, 1892.
Hughes v.
Edwardes.

Only the first and second of these reasons were pleaded by the appellants in the Court of Session. The Lord Ordinary and Lord Adam, who held that the appellants were under no obligation to denude, rested their judgment upon an affirmance of the second, and expressed no opinion upon the first. The late Lord President (Ingليس), who with Lords M'Laren and Kinnear constituted the majority of the First Division, necessarily dealt with and rejected both these reasons in arriving at the judgment appealed from. The third reason was not submitted by the appellants either to the Lord Ordinary or to the Inner-House, and, in my opinion, it ought not to be considered by your Lordships. According to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case. In this case not only was the point not raised in either Court below, but the record contains no averment to the effect that the younger of the pursuers was born after the date of his mother's will. The allegation of the date of his birth, upon which the plea is founded, was made for the first time in the appellants' case, to which there is no answer; and even there it is stated incidentally, and is not put forward as a reason for denying effect to the will of Mrs Edwardes.

The learned Judges of the Inner-House, who decided in favour of the pursuers, do not suggest that a trust duly constituted for payment of an alimentary annuity can be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *White's Trustees v. Whyte*,¹ and *Duthie's Trustees v. Kinloch*.² In both instances the parties entitled to the fee had a vested interest, which is not the case here; and in *Duthie's Trustees v. Kinloch*, the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settlor's intention to make the annuitants' right alimentary, a result which could not be attained except by continuing the trust. None of their Lordships disputed the existence or force of the rule, but they were of opinion that its application was in this case excluded by the terms of a clause in the marriage settlement which provides that the trustees shall have power to pay over the capital of the fund "at any time after the death of the predeceasing wife, and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will or settlement." The view which they took was thus explained by the Lord President,³—"The only obstacle to the application of this clause is the existence

¹ June 1, 1877, 4 R. 786.² June 5, 1878, 5 R. 858.³ 18 R. 327.

No. 5.

July 25, 1892.
Hughes v.
Edwardes.

of the other pursuer, Henry Frederick (that is, of the son). But the clause just quoted shews that there was no intention to maintain the trust in all events merely for security of the alimentary liferent, and if all parties interested, the surviving husband and the only child, are desirous to put an end to the trust and obtain a conveyance of the fee, it appears to me that the principle, if not the letter, of the clause is clearly applicable." I find it is impossible to concur in that interpretation, which, in my opinion, is as much at variance with the spirit as with the letter of the clause. The clause contains an exception which appears to me to accentuate the expression of the settlor's intention that the trust shall continue for the purpose of making the husband's liferent alimentary, in every event save the one specified, namely, the failure of issue of the marriage, and the consequent devolution of the fee to the wife's heirs, legal or testamentary. It was the obvious purpose of the settlor to provide that the surviving husband should remain in the enjoyment of a strictly alimentary allowance so long as there existed children or issue of the marriage whom he was under an obligation to support, and that the trust was not to be terminated until the fee devolved upon persons to whom he owed no such obligation.

The Lord Ordinary held that by virtue of the implied condition *si sine liberis decesserit*, issue of children are conditionally instituted, and that a child of the younger pursuer would take the fee in the event of his father predeceasing the liferenter. When the case went to the First Division, the majority were of opinion that the deed contained expressions sufficient to oust the condition, if otherwise applicable; whilst Lord Adam thought that, irrespective of the condition, its terms were sufficient to give to issue of children, on the failure of their parent before the term of payment, the share of fee which he would have taken on survivance. But all the learned Judges of the Division, Lord Adam included, treated it as an open and doubtful question whether the *conditio si sine liberis decesserit* applies to a provision in a marriage-contract. No reason was assigned by any of their Lordships for the doubt which they thus cast upon a principle which I have been accustomed to regard as settled, and I have not been able to discover any foundation for it.

In *Wood v. Aitchison*,¹ John Aitchison became bound, in the marriage articles of his son Thomas, to invest £400 in land, or on security, and to take the right in favour of the spouses and the longest liver of them in liferent, "and to the child or children to be procreated betwixt them, whom failing, to the said John Aitchison, his heirs and assignees whatsoever, in fee." The wife predeceased her husband, at whose death there were alive one son of the marriage, and the daughter of a predeceasing child. The surviving son claimed the whole provision, but the Court held that the daughter, by virtue of the implied condition, was entitled to take her parent's share. Their Lordships were unanimously of opinion, "that in all provisions of this sort the issue of children predeceasing the term of payment were entitled to that share which their parent could have claimed." It would be no light matter to disturb a decision of the Court of Session upon such a point in the year 1789—a decision which must not only have been relied upon in practice, but so far as I am aware, during the century which has elapsed, the authority of which has never been questioned. It was followed in *Robertson v. Houston*,² and so late as the year 1870 the First Divi-

¹ Mor. Dict. June 26, 1789, 13,043.

² May 28, 1858, 20 D, 989.

sion, in *Arthur and Seymour v. Lamb*,¹ upon a case remitted for their opinion, advised the Court of Chancery that a provision by a father in a Scotch contract of marriage, "in favour of himself in liferent and to the children of the said intended marriage in fee," did not lapse by the only child of the marriage predeceasing the liferenter, but subsisted in favour of the issue left by that child. No. 5.
July 25, 1892.
Hughes v. Edwardes.

I cannot therefore doubt that according to the law of Scotland the condition must be read into the provision with which we are dealing, unless its application is expressly or impliedly excluded by the context. The expressions upon which the majority relied as ousting the condition occur in the directions for the disposal of the fee in the event of the husband's predecease. In that case the wife took an alimentary liferent, the fee being payable on her decease to the "child or children" of the marriage. Then follow declarations to the effect that "if such child or children should all die before their mother, or although they should survive her, should they all die without leaving issue of their bodies," their mother's alimentary annuity was to continue, but that in the event of "failure of issue" she was to have the power of disposing of the capital by will or other writing, to take effect at her decease. Upon these conditions the Lord President observed,—“The contrast between this and the clause applicable to the predecease of a wife is very remarkable. In the latter the only parties entitled to the fee as institutes are ‘children.’ In the former the grandchildren are conditionally instituted to their parents, and the widow's right to test is made dependent not on the failure of children but on the failure of the issue of the marriage, a term of more elastic signification than ‘children.’ and including descendants of any generation if the natural meaning is not controlled by the context.” His Lordship accordingly came to the conclusion that the settlor having used different words of gift in the two events contemplated, and having expressly instituted issue of children in the one case and omitted them in the other, must be held to have done so intentionally. The same reasoning was adopted by Lords M'Laren and Kinnear.

I do not think that there exists any such contrast between the two clauses as their Lordships have suggested. In both clauses the words of gift are precisely the same, being to "the child or children of the marriage." The expressions "should they all die before attaining majority, and without leaving issue of their own bodies," are only introduced for the purpose of limiting the wife's power of disposal by will in the event of her surviving her husband. In the event of her predeceasing him, her powers appear to me to be subject to the same limitation, because in that event it is provided that the trustees may pay to the liferenter, and to her heirs-at-law or by will, "at any time after the death of the predeceasing wife and the failure of issue," or, in other words, after the failure of children and their descendants. What might have been the effect of an express gift to children in the one event, and to children and their issue in the other, it is unnecessary for the purposes of this case to determine. In my opinion these incidental expressions occurring in each clause point in the same direction. They equally indicate the understanding of the settlor that his gift to "a child or children" would bear the meaning which the law ascribes to the words in the marriage-contract provision, and would therefore include the issue of such child or children. I am confirmed in that impression by the fact that the two clauses already referred to are followed by provisions applicable to both,

¹ June 30, 1870, 8 Macph. 928, 42 Scot. Jur. 542.

No. 5.
July 25, 1892.
Hughes v.
Edwardes.

in which the beneficiaries are described as "children of the marriage." I can hardly conceive that the settlor meant these words to signify "children" only in the one clause, and "children whom failing their issue" in the other.

For these reasons I have come to the conclusion that the interlocutor of the Inner-House, in so far as appealed from, must be reversed, and the interlocutor of the Lord Ordinary restored. Your Lordships are not required to deal with the question of expenses in the Courts below, seeing that there is no appeal from that part of the interlocutor of the First Division which disposes of them. I think the appellants ought to have their costs of this appeal as between agent and client out of the trust fund in question.

LORD HERSCHELL.—I have had an opportunity of reading the opinion which has just been delivered by my noble and learned friend. I entirely concur with it, and I have nothing to add.

LORD MACNAGHTEN.—It seems to me that the trustees have done no more than their duty in refusing to hand over the trust funds to Dr Edwardes and his son. In my opinion they have made good both the grounds on which their refusal was based.

The authorities cited by the learned counsel for the appellants have satisfied me that the trustees were bound to uphold the trust for the purpose of protecting the surviving husband's alimentary liferent. If I understand aright the opinion of the late Lord President, he would have come to the same conclusion but for a special clause in the settlement which gives the trustees power to pay over the capital of the trust-estate after the wife's death in the event of failure of issue of the marriage. Whether, even in that case, the trustees would have been bound to denude against their own judgment is perhaps doubtful. I can understand that the lady's stepfather or his advisers may have thought that if it should happen that there was no issue of the marriage to be cared for, there would be less reason for securing an alimentary provision for the husband, and that the matter might well be left to the discretion of the trustees. But however that may be, I am unable to assent to the view that because the trustees are authorised or even required to part with the trust funds in one particular case which has not happened, it follows that in another and a different case the Court is at liberty to set aside restrictions which the law allows and the settlement has in terms imposed.

On the second point also I venture to differ from the opinion of the majority of the First Division of the Court of Session. The settlement is not well drawn, but if it is read fairly, it is I think impossible not to see that it was the intention of the parties to make provision for the issue of children dying in the lifetime of their parents. I doubt whether the word "children" in this settlement of itself and by its own force comprehends "grandchildren." I rather think that the word "children" is used in its proper sense, and so I think is the word "issue." But it seems to me that the settlement is framed upon the view that in calling children the settlors were at the same time calling the issue of children. The settlement itself speaks of its provisions as being provisions "for the issue of the marriage." Each purpose of the trust that deals with the interest of children contains somewhere a reference to issue, and the reference I think is not the less significant because it is brought in (so to speak) rather casually. In fact the condition *si sine liberis* seems to run through the whole settlement, and to have been in the contemplation of the parties throughout.

In the result I think that the interest of possible grandchildren cannot be disregarded. No. 5.

On both grounds therefore I am of opinion that the appeal must be allowed. July 25, 1892.
Hughes v.
Edwardes.

LORD MORRIS.—My Lords, I concur.

LORD HANNEN.—My Lords, I also concur.

INTERLOCUTOR appealed from reversed, with costs.

ANDREW BEVERIDGE—MACANDREW, WRIGHT, & MURRAY, W.S.

SIR FREDERICK JOHN WILLIAM JOHNSTONE (Second Party), Appellant.— No. 6.

Johnston—Craigie—Le Breton.

THE DUKE OF BUCCLEUCH (First Party), Respondent.—*Sol.-Gen. Murray—* July 25, 1892.
Johnstone v
Duke of
Buccleuch.
P. J. Blair.

Superior and Vassal—Entry—Composition or Relief-duty—Confirmation.—

A proprietor having a personal title to the lands of W.—inherited from an ancestor who was a singular successor of the last entered vassal, and who held an infeftment unconfirmed,—in 1810 disposed the lands to trustees for payment of debts and of annuities to himself and his wife, for implementing the provisions of any settlement to be left by him, and finally for reconveyance to himself or to his heirs of the lands not sold. Power was given to the trustees to sell with the grantor's written consent. In 1815 the trustees, having obtained decree of adjudication in implement against the truster's heir, and having been infeft thereon, were entered with the superior as trustees, for the purposes of the trust-deed, by a charter of sale, adjudication, and confirmation, which, *inter alia*, expressly confirmed the infeftment of the truster's ancestor. The trustees paid composition to the superior. In 1860 they granted a disposition to the truster's heir-at-law of the lands not sold, who was infeft thereon, and subsequently by the Conveyancing Act, 1874, obtained an entry with the superior. The last surviving trustee having died in 1863, the superior claimed composition. The vassal tendered relief-duty.

Held (aff. judgment of the Second Division) that the vassal was bound to pay composition, in respect (1) that if the charter of confirmation obtained by the trustees created a new investiture, it did not operate as an enfranchisement of the truster's heirs, and that the heir to whom the trustees conveyed was a singular successor to them; (2) that if the trust title did not create a new investiture, but was a mere burden upon the truster's right, the vassal was not the heir of any investiture recognised by the superior, since his ancestor's infeftment had not been confirmed prior to the charter of confirmation obtained by the trustees, and since the confirmation of it contained in that charter was to be regarded as confirming it only to the limited effect of validating the trustees' title.

(In the Court of Session, Feb. 28, 1891, 18 R. 587.)

Sir Frederick John William Johnstone, second party, appealed.

At delivering judgment,—

I d. Chancellor
(Halsbury).
Lord Watson.
Lord Mac-
naghten.
Lord Hannen.

LORD WATSON.—My Lords, the appellant is proprietor of three parcels of land, known respectively as Dornock, Woolcoats, and Torbeckhill, situated in the county of Dumfries, and within the dukedom of Queensberry, which is now vested in the respondent. These lands were conveyed to the appellant by Masterton Ure as trustee under a disposition executed by Sir John Lowther Johnstone of Westerhall, the appellant's grandfather. In September 1860 the appellant recorded his conveyance in the General Register of Sasines, and immediately on the passing of the Conveyancing and Land Transfer (Scotland) Act, 1874, he, by virtue of its provisions, became the entered vassal of the respondent, and (Mr Ure having died in the interval) also liable in payment of a feudal casualty in respect of his entry. The parties have differed as to the

No. 6.

July 25, 1892.
Johnstone v.
Duke of
Buccleuch.

casualty payable, and they have adjusted a special case in order to obtain a decision upon the question whether the appellant's liability is that of an heir or of a singular successor. The Second Division of the Court, by a majority of three Judges against one, have held that he is a singular successor, and must, therefore, pay composition, being a year's rent of the lands.

The true relation of the appellant to his superior, whether that of an heir of the standing investiture, or that of a stranger to it, can only be ascertained by reference to the titles under which these parcels of land were acquired and held by the predecessors in title whom the appellant represents until they became vested in his person. I shall therefore endeavour to describe, as briefly as may be consistent with accuracy, the state of possession and title since their acquisition during the last century by the appellant's ancestor, Sir John Pulteney, afterwards Earl of Bath.

In the year 1768, Dornock, which then belonged to James Douglas, and Woolcoats, which belonged to him in liferent and to his son Archibald in fee, both father and son being duly entered with the superior, were exposed for judicial sale, and were purchased by one William Alexander, who obtained a decree of sale in virtue of which he was base infest in Woolcoats. On the 7th April 1775 he conveyed both parcels, and assigned the decree of sale to Sir William Pulteney, who also took base infestment in Woolcoats. Upon his death the lands were possessed by his nephew, Sir John Lowther Johnstone without expeding a feudal title.

The third parcel—the lands of Torbeckhill—were in June 1765 disposed by Margaret Graham, who was fully entered with the superior, to David Armstrong of Kirtleton, whose personal right was brought to judicial sale by his creditors, and was purchased by Sir William Pulteney. He obtained a decree of sale on 27th January 1790, under which he possessed without taking infestment, and on his decease the lands passed into the possession of his daughter and heir of line, Henrietta Laura Pulteney, Countess of Bath, upon whose death they passed to her cousin-german Sir John Lowther Johnstone. Neither the Countess nor her successor made up a title or was infest.

On the 10th December 1810 Sir John Lowther Johnstone, being then in possession of all three parcels under his personal title, conveyed them, along with the rest of his Westerhall estates, to David Cathcart and Masterton Ure, but that in trust only for payment of his debts, and of annuities to himself and his wife, and the fulfilment of any provisions contained in deeds of settlement executed or to be executed by him. The power of the trust disponees to deal with the fee of the trust-estates was limited to selling such portions thereof as might be deemed necessary, with the consent of the truster expressed in writing. They were bound to reconvey—the debts being paid off—on or before the 11th November 1814, and after that date whenever required to do so, whether his debts were paid or not. In the event of the truster's death before reconveyance, and of his heir being then in minority, it was declared that the trust should subsist until his whole debts were paid off, the heir in the meantime receiving an allowance.

Sir John Lowther Johnstone, the truster, died in 1811, leaving a deed of settlement by which he conveyed his estates, including Dornock, Woolcoats, and Torbeckhill, to himself in liferent, and to the heirs-male of his body and certain heirs-substitute *seriatim* in fee, subject to family provisions which were implemented by his trustees.

The trustees appointed by the deed of 1810 appear to have entered at once upon the administration of the trust-estates, which they carried on jointly until the death of Mr Cathcart in 1829. After the death of the truster they proceeded to complete a title by adjudication to Dornock and Woolcoats, in which they were duly infeft, and on payment of a composition they obtained from the respondent's predecessor a charter of sale, adjudication, and confirmation dated 27th March 1815, which expressly confirms the base infeftments taken in Woolcoats by William Alexander and his disponee Sir William Pulteney. They next adjudged and were infeft in the lands of Torbeckhill, and then entered as singular successors with the late Duke of Buccleuch and Queensberry, obtaining from his Grace a charter of adjudication in implement dated 15th February 1828.

No. 6.

July 25, 1892.
Johnstone v.
Duke of
Buccleuch.

It is proper to notice here that the special case contains express averments to the effect that Sir John Lowther Johnstone was duly infeft in Dornock and Woolcoats and also in Torbeckhill. These statements appeared to your Lordships to conflict with the tenor of documents of title which are incorporated with and form part of the case, and your Lordships therefore required the parties either to explain the discrepancy or to inform the House of the true state of the facts. The result was that the parties by their counsel concurred in stating to your Lordships that the statements in the case were inaccurate, and that with the single exception of Sir William Pulteney's infeftment in Woolcoats no sasine was taken in any of the three parcels either by Sir William Pulteney or by any ancestor and predecessor of the appellant.

At the death of the truster, Sir John Lowther Johnstone, in 1811 the heir entitled to succeed was his eldest son Sir Frederick George Johnstone, the appellant's father, who died in 1841 without having made up any title to the lands. Some years after his decease the appellant raised an action in the Court of Session for the purpose of compelling the surviving trustee of his grandfather to denude in his favour, and the conveyance upon which the appellant has been infeft and obtained a statutory entry with his superior was executed in obedience to a decree of the Court.

It thus appears that the appellant does not represent any predecessor in these three parcels of land who was during his lifetime an entered vassal. He is not the heir of the trustee from whom he derives his feudal title, and he is not the heir either of the Douglasses of Dornock or of Margaret Graham, who were or had been the last entered vassals at the dates when the trustees of Sir John Lowther Johnstone completed their titles to Dornock, Woolcoats, and Torbeckhill by obtaining charters of confirmation from the superior following upon decrees of adjudication in their favour. He is, however, the representative and heir of Sir William Pulteney and his daughter, as well as of his own father and grandfather. But not one of his predecessors was entered with the superior or was even infeft base in Dornock or Torbeckhill. The state of their title to Woolcoats differs in this respect only, that Sir William Pulteney took base infeftment in that parcel, a circumstance which gave rise to an argument for the appellant which I shall notice in due course.

The appellant's counsel strongly relied upon the recent case of *Stuart v. Jackson*, 15th November 1889, 17 R. 85, which was decided by the whole Court, and was followed by the Judges of the Second Division (Lord Rutherford Clark dissenting) in *Duke of Athole v. Stewart*, 20th March 1890, 17 R. 724, and *Duke of Athole v. Menzies*, 20th March 1890, 17 R. 733. In *Stuart v.*

No. 6.

July 25, 1892.
Johnstone v.
Duke of
Buccleuch.

Jackson there was much and serious diversity of judicial opinion, but the majority of their Lordships held that the terms of a trust-disposition executed by an entered vassal were such that although the trustees took infeftment and were entered with the superior by force of the Statute of 1874, their right constituted a mere encumbrance upon the standing investiture, and consequently that the heir of the truster who expedited a title by taking a conveyance from the trustees was entitled to enter upon payment of relief-duty. I do not think it is necessary for your Lordships in disposing of this appeal to consider the merits of these decisions or the conflicting opinions expressed by the learned Judges who took part in them. Had Sir John Lowther Johnstone or his predecessors been duly infeft and entered, the case would have been different. But these decisions, assuming them to be sound, only go this length, that the heir of an entered vassal is not divested of that character by the fact that the ancestor whose heir he is has created a trust which does not extinguish but is a mere burden upon the investiture. Even if the trust created by Sir John Lowther Johnstone were held to be simply an encumbrance, the appellant's position would be no better now than if the trust had never been in existence, and in that case he would not have been in a position to enter as an heir. It cannot be said in this case, as was held in these decisions, that the appellant takes from an entered predecessor either *non obstante* the trust or through the medium of the trust.

Then it was argued that the superior's confirmation by the charter of March 1815 of Sir William Pulteney's infeftment in the lands of Woolcoats had the effect of making him an entered vassal, and of enfranchising his heirs in these lands. No authority was cited to us which bears out that proposition, which appears to me to be founded upon a misconception of the object of confirmation, which is to fortify and complete the investiture of the person obtaining the charter. Beyond what is necessary for that purpose confirmation of prior writs by the superior has, in my opinion, no operation whatever. My views upon this point are so fully and satisfactorily expressed in the judgment of Lord Trayner that I shall not discuss it further.

It was also urged on behalf of the appellant that his entry was enfranchised by the previous entry of his grandfather's trustees upon payment of a composition, and in support of that argument he mainly relied upon *Advocate-General v. Campbell Swinton*, 30th January 1854, 17 D. 21. That case was a very special one, and does not appear to me to have any material bearing upon the facts before us. The person from whom a composition was claimed was at the time the entered vassal of the Crown, and had already paid a composition, and the opportunity afforded to the superior of claiming a second composition was entirely due to the form of conveyancing which the parties had adopted with the object of subjecting him to entail fetters. The judgments of four out of the five learned Judges who constituted the Court of Exchequer proceeded on these specialities. That of Lord Deas went further, and contains many *dicta* which, so far as I know, are without authority, and with which I am not prepared to agree.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed, and the appeal dismissed with costs, and I so move your Lordships.

LORD CHANCELLOR.—I concur in the judgment which has been moved.

LORD MACNAGHTEN.—I have had an opportunity of reading the judgment of my noble and learned friend Lord Watson, and I entirely concur in it.

LORD HANNEN.—I also concur in the judgment which has been moved.

THEIR LORDSHIPS dismissed the appeal with costs.

HENRY S. SHERRY—WELSH & FORBES, S.S.C.—GRAHAMES, CURREY, & SPENS—
STRATHERN & BLAIR, W.S.

No. 6.

July 25, 1892.
Johnstone v.
Duke of
Buccleuch.

THE HERITABLE REVERSIONARY COMPANY, LIMITED, First Parties,
Appellants.—*Johnston—Goudy.*

ROBERT COCKBURN MILLAR (M'Kay's Trustee), Respondent.—*Lorimer*
—*Hunter.*

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

Bankruptcy—Vesting of heritable property in trustee—Latent trust—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 102.—The Bankruptcy Act, 1856, sec. 102, enacts that the Act and warrant of confirmation in favour of the trustee in a sequestration shall vest in him "the whole property of the debtor."

Held (rev. judgment of First Division) that heritable property to which a bankrupt has an unqualified feudal title, but which does not belong to him, is not his property in the sense of the Act, and does not vest in his trustee.

Opinion (per Lord Watson) that a creditor adjudging heritage held by his debtor subject to a latent trust can be in no better position in a question with the *cestui que* trust than if he had obtained a conveyance without value from his debtor.

(In the Court of Session, July 14, 1891, 18 R. 1166.)

The Heritable Reversionary Company, Limited, appealed.

At delivering judgment,—

Ld. Herschell.
Lord Watson.
Lord Mac-
naghten.
Lord Field

LORD HERSCHELL.—The question which arises in this case is whether heritable property vested in a bankrupt, which is subject to a latent trust, passes to the trustee in his sequestration free of that latent trust, and is held for distribution amongst the bankrupt's creditors.

The facts may be shortly stated. Daniel Smith M'Kay, the bankrupt, was the manager of the appellant company. On the 17th of May 1882 he purchased certain tenements of houses in Edinburgh, which were exposed for sale by public roup, at the upset price. The subjects were conveyed to him by a disposition dated the 16th and 17th July 1882, and he was duly infeft by recording the disposition in the appropriate Register of Sasines on the 14th September 1882. The purchase was made by M'Kay for behoof of the appellants, and on the instruction of their directors, and the purchase-money, save in so far as it was raised by a bond and disposition in security over the subjects, was provided by the appellants. They were not, however, *ex facie* of the deeds, parties to the purchase, and although in May 1886 M'Kay executed a declaration of trust, it was not recorded in the Register of Sasines. On the 2d of December 1890 the estates of M'Kay were sequestrated in the Sheriff Court of Glasgow. In these circumstances, the question has arisen whether the property which became vested in M'Kay, as above stated, formed part of the sequestrated estate, and passed to the respondent as trustee for the bankrupt's creditors.

It seems beyond dispute that as between M'Kay and the appellants he was a bare trustee, and they were the true and beneficial owners of the property. I do not understand it to be questioned that the law of Scotland recognises such a relationship, or that, if it appeared *ex facie* of the dispositions, the beneficiary would be regarded as the true owner as against all persons and for all purposes. Although as regards third persons the case may be very different when the trust is latent, I do not see how this can affect the relation of the trustee and beneficiary *inter se*. If M'Kay had disposed of the property and

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

converted the proceeds to his own use, he would, I apprehend, have been guilty of a breach of trust, and rendered himself amenable to the criminal law. It is true that an onerous purchaser from him would have obtained an unimpeachable title, but this would not be because the property was his, but because the ~~true owners had permitted him to appear on the Register of Sasines as the owner,~~ and thus entitled anyone dealing with him for value to regard him as such. A register, whether of heritable or any other subjects, would obviously fail of its purpose unless this were the law. A person entrusted with the custody of a negotiable instrument, who has no property in it, may equally give a perfect title to an onerous purchaser.

I have thought it well to dwell on these considerations, because it appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare trustee, and that of heritable property as to which the owner has come under some contractual obligation. The latter was the case in *Wyllie v. Duncan*.¹ Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to re-dispose to Wyllie, from whom he took the subjects. But this was a mere personal contract. If he had sold the property and disposed of the proceeds he might have rendered himself liable to legal proceedings on the ground that he had put it out of his power to fulfil his obligation, but he would not have been guilty of a breach of trust, or brought himself within the reach of the criminal law.

The section of the Bankruptcy (Scotland) Act which relates to the vesting of the bankrupt's estate in his trustee is the 102d. The first part of that section enacts what is to vest in the trustee; the following subsections have in view the making that vesting effectual, and accordingly prescribe what is to be the nature and effect of the vesting. The section commences in these terms:—"The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following."

For some reason, which is not apparent, this part of the section was not alluded to in the Court below, the only words discussed being those which have reference to the effect of the vesting of the heritable estate. But unless any subject be within the words with which the section commences, the remaining provisions of the section become irrelevant. Wherever, therefore, it has to be determined whether heritable or any other estate vested in the trustee, the first question which arises is, was it the "property of the debtor"? The expression is not a technical one, but is obviously intended to comprehend all that would ordinarily be understood as covered by it. It cannot be doubted that it includes all beneficial interests possessed by the bankrupt, even though the property be vested in other persons as trustees for him. On the other hand, I cannot think, unless compelled by authority to take that view, that it includes, or was ever intended to include, estates of which the bankrupt was a bare trustee, and in which he had no beneficial interest.

The 2d subsection which was so much discussed in the Court below, and which only applies, as I have pointed out, to that which comes within the description "property of the debtor," itself commences with these words:—

¹ 1803, M. 10,269.

"The whole heritable estate belonging to the bankrupt in Scotland to the same effect," &c. The words "belonging to" are not technical, and I do not think that a heritable estate of which the bankrupt is a bare trustee, and in which he has no beneficial interest, can with any propriety be said to "belong" to him. No. 7.
Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

It was indeed suggested, and the view found some favour in the Court below, that the trustee in the sequestration was to be regarded as an onerous and *bona fide* alienee from the bankrupt. I am unable to accede to this view. I do not think that he is an onerous alienee within the principle which renders the title of such a person valid even though it be obtained from a bare trustee in fraud of the beneficial owner. That he is not such an alienee appears to me to be well established in the law of Scotland as regards property other than heritable, and I fail to see any ground for a distinction in this respect between heritable and other descriptions of property.

It is to be observed that the Bankruptcy Act of 1783 required the bankrupt, under the penalty of imprisonment, to make over to the trustee "his whole real and personal estate wherever situated." There were corresponding provisions in the Acts of 1793 and 1814. I cannot think that it was the intention of the Legislature to compel a bankrupt to convey to his trustee for the benefit of his creditors property which he could not dispose of to any creditor at the time of sequestration without being guilty of a criminal breach of trust. The Act of 1839, which preceded the one now in force, vested in the trustee the heritable estates "belonging to the bankrupt in Scotland." I have already commented on these words in connection with their use in the present Act.

The only case which to my mind can even plausibly be said to be inconsistent with the view I take of the statutes is the case of *Jeffrey v. Paul*¹ in this House. Lord Brougham in pronouncing his decision assigned no reasons for the conclusion at which he arrived. It can therefore only be said to be an authority for the proposition contended for by the respondent if no other ground for the judgment is reasonably conceivable. The circumstances of that case were peculiar. It was a contest between two trustees and the representative of a third who had become bankrupt. All the trustees had made advances to the trust-estate, and one contention put forward on behalf of the trustee in the sequestration was, that the bond which was then in question had, by reason of the advances they had made, been held by the three trustees in equal shares in their own right, and not on behalf of their trust. Whether this was the ground of Lord Brougham's judgment it is impossible to say, but I think it much more likely that it was, than that he should have determined, without statement made or reason given, the important principle contended for, affecting as it does so seriously rights of property, and being applicable to every sequestration which should thereafter occur in Scotland.

For these reasons I am of opinion that the interlocutor appealed from should be reversed; that it should be declared that the subjects in question did not pass to the respondent; that the appellants as beneficial owners are entitled to the sum consigned in bank; and that the respondents do pay the costs of this appeal.

LORD WATSON.—The facts giving rise to the question of law involved in this appeal are fully set forth in a special case submitted by the parties for the

¹ May 15, 1835, 1 S. and M'L. 767.

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

opinion of the First Division of the Court of Session, and so far as material may be shortly stated.

The appellants in May 1882 purchased through Daniel Smith M'Kay, who was at that time their manager, certain heritable subjects in Edinburgh at the price of £2150. The disposition, which is absolute and unqualified in its terms, was taken to M'Kay as an individual, and was recorded by him in the appropriate Register of Sasines on the 14th September 1882. Part of the price was obtained by his granting a bond and disposition in security over the subjects for a loan of £1450, which was recorded in the Register of Sasines of the same date with the disposition, and the balance was provided by the appellants. M'Kay ceased to be their manager in February 1886, and on 17th May 1886 he executed in their favour a formal back-bond or declaration of trust by which he acknowledged that he was vested with the subjects in trust only for behoof of the appellants, and undertook that, whenever required to do so, he would subscribe and deliver a formal and valid conveyance in favour of any person or persons whom they might name.

The appellants neither recorded their back-bond nor required M'Kay to denude, and the feudal title to the subjects continued to stand in his name as absolute proprietor until the 2d December 1890, when his estates were sequestrated in terms of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79). The respondent was duly appointed trustee in the sequestration, and in that capacity he asserts his right to hold and realise the subjects as part of the bankrupt's heritable estate for behoof of his creditors, leaving the appellants to rank for a dividend as personal creditors in respect of their beneficial interest. The appellants, on the other hand, maintain that the subjects did not form part of the bankrupt's estate within the meaning of the Act, and did not pass to the respondent as trustee in the sequestration.

The subjects were sold in March 1891 with the consent of both parties, and under reservation of their respective claims. After paying the heritable bond with interest, and the expenses of sale, there remained a balance of £365 which was consigned in bank to abide the issue of this litigation.

By the interlocutor appealed from the majority of the First Division, consisting of the late Lord President (Inglis), with Lords Adam and Kinnear, declared that the respondent, as trustee on M'Kay's sequestrated estate, took the subjects in question, which were vested absolutely in the bankrupt, free of the latent trust in favour of the appellants, and that the appellants are only entitled to rank on the sequestrated estate for the value of the subjects, and are not entitled to recover the same from the respondent as their own property. In pursuance of that declaration their Lordships found that the consigned money belongs to the respondent. From that judgment Lord M'Laren, the only other member of the Court, strongly dissented.

It is sufficiently obvious that the controversy between these parties must depend upon the terms in which the right of the trustee in a sequestration is defined by the Act of 1856. Before adverting to the language of the statute I think it may be useful to consider the nature of the relations existing between a solvent trustee who is feudally vested in the heritable estate of the trust by a title *ex facie* absolute, and his *cestui que* trust, whose right rests upon a latent back-bond. As between them there can, in my opinion, be no doubt that according to the law of Scotland the one, though possessed of the legal title, and being the apparent owner, is in reality a bare trustee; and that the other,

to whom the whole beneficial interest belongs, is the true owner. Upon that point the opinions expressed by noble and learned Lords in *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cases, 53,¹ and by those learned Judges of the Court of Session with whom their Lordships in that case agreed, appear to me to be conclusive. But in that state of the title the trustee, though his action may be in breach of duty, or even grossly fraudulent, can communicate a valid right to a purchaser or a lender on the security of the trust-estate, who transacts with him for value and without notice of the interest of the beneficiary. That rule, which alike applies to moveable and heritable estate, was finally settled in the law of Scotland by the judgment of this House in *Redfearn v. Somervail*, 1 Dow's App. 53, an authority which seems to have been regarded by the Lord President as practically decisive of the present case. It must, however, be kept in view that the validity of a right acquired in such circumstances by a *bona fide* disponee for value does not rest upon the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.

No. 7.
Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

It is also necessary to keep in view that the rule of personal bar which thus protects transactions with the trustee from challenge by the *cestui que* trust only applies to transactions which affect and create an interest in the trust-estate. Personal creditors of the trustee who neither stipulate for nor obtain any conveyance to that estate do not, in the sense of law, transact on the faith of its being the property of the trustee. As Lord M'Laren observed in this case (18 R. 1175),—"Creditors in general do not give credit to a bankrupt in reliance upon any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security they know nothing of his title-deeds and trust only to his personal credit." Accordingly, the contraction of debts by the trustee whilst the trust is latent creates no *nexus* over the trust-estate in favour of personal creditors. If they proceeded to attach the trust-estate on the footing of its belonging to their debtor, the beneficiary could defeat their diligence by appearing to vindicate his right. An adjudging creditor gives no new consideration for the interest in the estate which he secures by the process of adjudication, and, in my opinion, he can be in no better position in a question with the *cestui que* trust than if he had obtained a conveyance without value from the trustee. That appears to me to have been the ratio of the decision in *Thomson v. Douglas, Heron & Company*, which is reported in Morison's Dictionary (15th November 1784, Mor. Dict. 10,229), and also by Lord Hailes (Hailes' Decns. 1002). In that case Thomson disposed his lands to his agent Armstrong, "in order that he might sell the same and apply the proceeds for behoof of Thomson." In making up a title by charter of resignation Armstrong omitted these words from the procuratory, so that the qualification of his right did not appear on the record. He then, instead of selling, borrowed money for his own purposes from Douglas, Heron, & Company, and conveyed the lands to them in security of the debt, and subsequently some of his general creditors obtained decrees of

¹ Dec. 10, 1886, 14 R. (H. L.) 1.

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

adjudication, upon which they were not infest. Thomson brought a reduction of Armstrong's title, and of these rights flowing from him, upon the allegation of Armstrong's fraud, and the Court found "that the allegation of fraud was not relevant against the heritable securities and infestments, but that it was relevant as to the creditors adjudgers." The report in Morison, which is taken from the Faculty Collection, contains certain observations which are said to have been made by the bench, but Lord Hailes, who was himself a party to the decision, has noted the opinions delivered by the Lord Justice-Clark (Braxfield), and by Lord Monboddo, as containing what he at the time understood to be the grounds upon which it proceeded. Lord Braxfield, than whom there is no higher authority in this department of the law, said—"I think that Mr Armstrong might have sold for a price, and the purchaser would have been secured by his *bona fide*. The same is the case as to heritable creditors. The case is different as to adjudgers. They are not on the same footing with Mr Armstrong selling for a price." The same distinction, based upon the obvious fact that the heritable creditor does, and the adjudging creditor does not, give value for the interest which he takes in the land, is thus tersely stated by Lord Monboddo—"An heritable bond is good because it is the price of the estate; the adjudger seeks to mend his former security."

It was argued for the respondent, on the strength of some *dicta* by institutional writers, that *Thomson v. Douglas, Heron, & Company* was overruled in the subsequent case of *Russell v. Ross' Creditors*, January 31, 1791, Mor. Dict. 10,300, but the argument when examined is really destitute of foundation. Among the observations attributed to the bench in Morison's report of the earlier case is one to the effect that the adjudging creditors "must take the right of their debtor *tantum et tale* as it was in his person." A second and brief report of the same case in Morison (Dict. 10,299) bears that "the Court did not mean to lay down the rule in general that adjudgers must take *tantum et tale*," and the same remark was made by the Court in *Russell v. Ross' Creditors*. What appears to me to have been decided in *Thomson v. Douglas, Heron, & Company* was, that creditors who have given no value for the right cannot carry off from the true owner property standing in name of their debtor in which he has no beneficial interest—a decision perfectly sound in principle. In *Russell v. Ross' Creditors* there was no question of trust, and it was sought, unsuccessfully, to apply the doctrine of *tantum et tale* to creditors who had completed a feudal title by adjudication to lands of which their debtor was the beneficial owner, in competition with others who had prior but merely personal rights to demand a conveyance from him. I do not doubt that in such circumstances the doctrine of *tantum et tale* has no application. It was rejected by the Court of Session in *Mitchells v. Ferguson*, February 13, 1781, Mor. Dict. 10,296; *Wylie v. Duncan*, December 8, 1803, Mor. Dict. 10,269; and in *Mansfield v. Walker's Trustees*, 28th June 1833, 11 S. 813, which was appealed to this House, and there affirmed—1 W. and S. App. Cas. 203—upon the special ground that the bond of corroboration upon which the appellant relied was granted by the bankrupt after he had been divested of his estates through the operation of the Act 54 Geo. III. chap. 137. These authorities were brought fully under your Lordships' notice by counsel; but, in my opinion, they have little, if any, bearing upon the point which your Lordships have to decide, because in all of them the competition related, not to estate held by the bankrupt under a bare trust, but to estate of which he was the beneficial proprietor.

I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleeming v. Howden*, July 16, 1868, 6 Macph. (H. L.) 121, with reference to the nature of the interest which a trustee in sequestration takes in the heritable estate of the bankrupt, require considerable modification. They were strictly *obiter*, because in that case the clause of devolution upon which the successful claim of the heir-substitute depended, whether it be regarded as constituting a trust in the bankrupt or a qualification of his right, was apparent upon the face of his recorded title.

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

But these considerations as to preferences between the trustee and a creditor, and as to the doctrine of *tantum et tale*, when the subject of competition is the undoubted property of the bankrupt, are, in my opinion, of very secondary importance in this case. It does not admit of dispute that all property, whether heritable or moveable, in which the bankrupt has a beneficial interest, whether the title be in him or in a trustee for him, to the extent of that interest, passes to and vests in the trustee in his sequestration, under the Act of 1856, which also makes provision for the extent and effect to which it shall vest in the trustee, as in a question with creditors having claims upon it. What shall vest, and what shall be the effect of vesting, are two different things, and they are separately dealt with in the statute. In my opinion two questions arise in this case upon the Act of 1856,—First, do the subjects in question fall within the statutory definition of property which passes to the trustee for behoof of the bankrupt's creditors? Secondly, if they do, what is the right of the appellants as against the respondent? It is manifestly idle to consider what may be the effect of these subjects vesting in the respondent until it has been shewn that they did vest in him. Yet the learned Judges of the First Division seem to have confined their attention to the second of these questions. They all refer to and discuss the enactments relating to the effect of vesting, and they take no notice of the statutory definition of the property which is to vest.

Section 102 of the Bankruptcy (Scotland) Act contains the whole of its provisions which deal expressly with the vesting of the bankrupt's estates in his trustee, and its effect. The structure of the clause is worthy of observation. It first of all prescribes what property is to vest in the trustee, and then goes on to define, in three subsections, to what effect (1) moveable estate and effects wherever situated, (2) heritable estate in Scotland, and (3) heritable estate in England, Ireland, or any of Her Majesty's dominions, are to become vested in him. Omitting the subsections, clause 102 is in these terms,—“The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following.”

Were the subjects in dispute the property of M'Kay, within the meaning of that enactment, at the date of his sequestration? Upon the language of the statute, that appears to me to be a very simple question, admitting only of a negative answer. An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title. That which, in legal as well as in conventional language, is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

committing a fraud. It is true that the law will sustain a right created by his fraudulent alienation in the person of a *bona fide* alienee for value, but not, as has been already pointed out, upon the ground that the thing alienated was the property of his author. The respondent, as representing creditors who had no dealings with the bankrupt in relation to the estate of which the appellants had the beneficial fee, and who have given no value for the interest which he claims on their behalf, does not stand in the position of an onerous and *bona fide* alienee, and cannot take benefit from the principle which validates the right of the latter.

I am confirmed in these views by a reference to previous statutes regulating the process of sequestration in Scotland, of which there were no less than five prior to the consolidating Act of 1856. The first of them (12 Geo. III. chap. 72), passed in 1772, only applied to the personal estate of the debtor; but the next and all subsequent Acts embrace his heritable as well as his personal estate, making them a common fund for distribution among his creditors, according to their respective rights and preferences. The object of the progressive legislation, which has culminated in the Act of 1856, has not been to alter or extend the definition of the bankrupt's property available for distribution, but to simplify procedure, and to put an end to the possibility of individual creditors obtaining preferable securities over the estate, after sequestration, by giving the trustee when appointed a complete and absolute title as at its date.

The Act 23 Geo. III. chap. 18, the first which brought real estate within the scope of the sequestration, by section 19, made it incumbent on the bankrupt, when ordered by the Court, to execute a disposition or dispositions making over to the trustee and his successors in that office, "his whole real and personal estate, wherever situated." In the event of his refusal to convey, the Court was authorised to punish the bankrupt by imprisonment: and, if necessary, to issue a decree finding "the property of the whole sequestrated estate and effects, real and personal," to be in the trustee, and adjudging to him the whole lands and heritable estate within its jurisdiction. These provisions were in substance re-enacted by the 23d section of 33 Geo. III. chap. 74, in which the property which the bankrupt was bound to convey, under pain of imprisonment, is described as "his whole estate and effects, heritable and moveable, real and personal, wherever situated." Similar provisions were made for vesting the sequestrated estate in the trustee by section 29 of the Act 54 Geo. III. chap. 137, which describes the property to be conveyed to him by the bankrupt in the same terms with the preceding statute of 1793. In 1839 the Act 2 and 3 Vict. cap. 41, the immediate predecessor of the Act of 1856, by section 79 vested directly in the trustee, by force of statute, and without the intervention either of the bankrupt himself or of the Court, the whole heritable estates "belonging to the bankrupt in Scotland."

I venture to think that the property described in these four Acts as falling within the sequestration includes no heritable or other estate of which the bankrupt was not the true owner. That construction gives effect to the literal meaning of their language; and it is to my mind hardly conceivable that the Legislature should have intended to confiscate the property of persons other than the bankrupt for the behoof of his creditors, by requiring him to execute a disposition in favour of their trustee, which but for the statute he could not have granted without being guilty of the crime of breach of trust and embezzle-

ment. I can find nothing in these statutes which lends countenance to the suggestion that the Legislature meant to compel any such fraudulent proceeding. No. 7.

The principle which ought to govern the decision of this case was, in my opinion, rightly understood and applied by the Court of Session in *Gordon v. Cheyne*, Feb. 5, 1824, 1 S. (N. E.) 566, and a case of earlier date—*Dingwall v. Maccombie*. There is not a report of the opinions, if any, delivered in *Gordon v. Cheyne*, but *Maccombie's* case is reported in a footnote (1 S. (N. E.) 567, *et seq.*), together with the opinions of the Judges by whom it was decided. The same point was raised in each of these cases. In *Dingwall v. Maccombie*, the debtor was *ex facie* absolute proprietor of two shares of the Aberdeen Shipping Company, which he held in trust for Dingwall; and the trust being still latent, he being at the time insolvent, conveyed these shares to Maccombie for behoof of his creditors. In *Gordon v. Cheyne* the bankrupt, at the date of his sequestration, held one share in the same company as absolute proprietor under a latent trust for Gordon, the true owner. Accordingly, the competition, in both cases, lay between the true owner and a trustee for creditors, the only difference being that in the one the trustee had a legal, and in the other a voluntary disposition of the whole property belonging to the insolvent. The Court in both decided in favour of the *cestui que* trust; and their decisions have since been accepted as conclusively settling that incorporeal personal rights, affected by a latent trust, though vested in the bankrupt by a title *ex facie* absolute, do not pass to the trustee in his sequestration. Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

The decision of this House in *Redfearn v. Somervail*, 1813, 1 Dow. App. Cas. 60, which appeared to one learned Judge to be conclusive against the appellant, related to an incorporeal moveable right, being a share in a private trading society. If that decision were adverse to the appellant's claim, it would *a fortiori* be fatal to the authority of *Dingwall v. Maccombie* and *Gordon v. Cheyne*. The rule followed by the House in *Redfearn v. Somervail* does not conflict with these cases, which decide, in my opinion rightly, that a trustee for general creditors, whether by voluntary conveyance from the bankrupt or taking right under the Sequestration Acts, cannot plead the equities competent to a person who has acquired an interest in the trust property from the bankrupt *in bona fide*, and for onerous cause. And so far as concerns the right of the trustee in sequestration, I am unable to discover any ground, either in common sense or in legal principle, for making a distinction between heritable and moveable rights vested in the bankrupt subject to a latent trust, and for holding that the heritable right is, and that the moveable right is not, carried by the sequestration.

Lord Adam and also Lord Kinnear appear to have held that the present question was concluded by the decision of the Court of Session in *Wylie v. Duncan*, 1803, Mor. Dict. 10,269, and of this House in *Jeffrey v. Paul*, May 15, 1835, 1 S. and M'L. App. Cas. 767, but I venture to think that their opinion is based upon a misapprehension of what was really decided in these cases.

I have already stated what I believe to have been the import of the judgment in *Wylie v. Duncan* and similar cases, and I have only to remark further, that a personal obligation to convey heritable estate, undertaken by one who is the beneficial as well as the feudal owner, does not, according to the law of Scotland, denude him of his beneficial interest, or confer upon the person to whom it was contracted either the character or the rights of a trust beneficiary.

The case of *Jeffrey v. Paul* was very special in its circumstances. Harley, an

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

insolvent, compounded with his creditors, and in order to secure the cautioners for his composition, conveyed certain heritable subjects belonging to him, to himself and them in trust, with power to sell or burden, for repayment of any advances made by them on his behalf, and for payment of any balance remaining to himself, his heirs, or disponees. The trustees sold part of the subjects, and took from the purchaser a heritable bond and disposition in security for £400, payable to three of their number, Cook, Cuthill, and Paul, as individuals. Cuthill became bankrupt, at the time when the sums advanced and liabilities incurred by the cautioners exceeded the value of the trust-estate. Jeffrey, as trustee in Cuthill's sequestration, claimed one-third of the sum contained in the bond as belonging to the bankrupt, and was opposed by the solvent cautioners, who maintained that the bond was trust property. The Court of Session rejected Jeffrey's claim, but on appeal to this House it was sustained. The report in the Court of Session, June 11, 1834 (12 S. 718), assigns no reasons for the judgment; and in this House, Lord Brougham, sitting alone, moved its reversal without explanation or comment. In these circumstances, I find it impossible to regard the judgment of that noble and learned lord as a decision upon the point raised in this appeal. The pleadings of the appellant in this House disclose that he claimed a third share of the bond on the footing that the bond by its terms was equivalent to a payment in cash by the trust to Cook, Paul, and the bankrupt, and in my opinion it is exceedingly probable that the case was decided in his favour upon that view. At all events, the decision cannot be regarded as establishing the rule that a trustee in sequestration takes, by force of statute, property vested in the bankrupt subject to a latent trust.

For these reasons I concur in the judgment which has been moved by the noble and learned Lord on the woolsack.

LORD MACNAGHTEN.—My Lords, if this House were compelled to uphold the decision under appeal, I rather think I should be inclined to doubt whether the law of bankruptcy in Scotland was in a condition altogether satisfactory.

One M'Kay, a bankrupt, at the time of his bankruptcy stood infeft in certain heritable estates consisting of houses in Edinburgh, on a title upon the face of it absolute and unqualified. M'Kay had been the manager of the appellant company. The houses in question had been bought by him for and on behalf of his employers; the purchase-money, so far as any money passed, was paid by them. But for the sake of convenience the company took the conveyance in the name of their manager. Some years afterwards M'Kay left the company's employment, and then he executed a declaration in writing in which he confessed and declared that he held the premises "in trust only for behoof of the company," and undertook on request to transfer the trust property according to their directions. No transfer however was executed, nor was the declaration of trust registered. So there was nothing in the public records at the time of the bankruptcy to shew that the bankrupt was not the real and true owner. In this state of things the First Division of the Court of Session (Lord M'Laren dissenting) has held that these houses form part of the bankrupt's sequestrated estate applicable to the payment of his debts, and that the company for whom he declared himself trustee can only claim in the bankruptcy for the value of the property.

Is that decision right? It was argued that the question depends upon the feudal law of Scotland and upon certain provisions of the Bankruptcy Act of

1856. I venture to think that it turns wholly upon the language of the Act, and that a decision in favour of the company would not in the slightest degree trench upon the principles of the feudal law. No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

Under the Act of 1856, proceedings in bankruptcy are commenced by a petition for sequestration. If the case is within the Act, the Lord Ordinary or the Sheriff is directed to issue a deliverance awarding "sequestration of the estates which then belong or shall thereafter belong" to the bankrupt before the date of his discharge, and declaring the estates "to belong to the creditors" for the purposes of the Act. A trustee is to be elected by the creditors. On the election being confirmed, the Sheriff-clerk is directed to issue "an act and warrant" in a prescribed form, and it is provided that such act and warrant shall be evidence of the trustee's right and title to the sequestrated estate for the purposes of the Act. The bankrupt is required to make up and deliver a state of his affairs specifying his whole property, and also "a rental of his heritable property." It is provided by section 102 that "the act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following." Then follow three subsections. The last deals with the bankrupt's real estate out of Scotland, but within Her Majesty's dominions. The first is concerned with the effect of the vesting as regards the moveable estate and effects of the bankrupt wherever situated. It is admitted that with regard to moveable estate the only property which passes to the trustee is property of which the bankrupt was the true owner. The doctrine of reputed ownership, at least as regards moveable property, has no place in the bankruptcy law of Scotland. The second subsection on which the opinions of the First Division are founded deals with the effect of the vesting as regards "the whole heritable estate belonging to the bankrupt in Scotland." It declares that the vesting is to be "to the same effect as if a decree of adjudication in implement of sale, as well as a decree for adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration."

Such being the main provisions of the Act of 1856, I cannot help thinking that the learned Judges who formed the majority of the First Division have dwelt too much upon the effect of the vesting, and that they have paid too little attention to the thing which is vested. The vesting is absolute. It strips the bankrupt of every shred of interest. But what is the thing which is vested? It is "~~the property~~" of the bankrupt. As regards his real estate in Scotland it is "the heritable estate belonging to him." The words "property" and "belonging to" are not technical words in the law of Scotland. They are to be understood, I think, in their ordinary signification. They are, in fact, convertible terms—you can hardly explain the one except by using the other. A man's property is that which is his own—that which belongs to him. What belongs to him is his property. No one in ordinary parlance would speak of land or funds held only in trust for another as the property of the trustee. Land or funds so held are not the trustee's property in any real sense any more than a bankrupt's sequestrated estate is the property of the trustee in bankruptcy. It is true that in the present case the complete feudal title was in the bankrupt. It is true that in a strict legal view the right of the beneficiaries was only a personal claim against their trustee. But for all that the bankrupt could not

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

have applied the property to his own purposes, or used it for his own benefit, without committing a fraud for which he might have been made criminally responsible. The beneficiaries were the true owners all along. The bankrupt, though he had the feudal title, though he might have given a perfectly good title to a person dealing with him on the faith of the register without notice of the trust, was in reality only nominal owner without any property or proprietary right. It seems to me that in bankruptcy, by the very terms of the Bankruptcy Act, the Court is bound to look not to the form of the feudal title, but to that which Lord Justice-Clerk Hope, in contrast to the feudal or "nominal" title, as he terms it, described in one case as "the substance and reality of the right of property"—*Giles v. Lindsay*, 1 Ross' L. C., 491.

My Lords, I think it would be idle for me to refer to the authorities which have been so fully explained by my noble and learned friend Lord Watson. I am satisfied that there is nothing in any one of the cases which conflicts with the view which has been presented to your Lordships. And I entirely concur in the motion that the interlocutor under appeal should be reversed with costs.

LORD FIELD.—My Lords, the only question in this appeal is, whether the nett proceeds of the heritable estate in question belong to the appellants or to the respondent, and the answer to the question depends upon the construction which your Lordships ought to place upon the 102d section of the Bankruptcy (Scotland) Act of 1856.

By that section there is undoubtedly transferred to and vested in the respondent for and on behalf of the creditors of the bankrupt, amongst other subjects, his whole property, with all rights, title, and interest in his whole heritable estate in Scotland.

Now, the subjects in question are heritable estates in Scotland, and in one and a somewhat limited sense might be understood, as it was contended for the respondent they ought to be, as the property of the bankrupt. He was *ex facie* the donee of them—he was the only recorded owner of them known to the public, and he was so recorded as the absolute owner, and without mention of any trust or limitation—and they were feudally vested in him. His disposition of them, although fraudulent and dishonest on his part, would have passed the property to an onerous donee without notice.

In a larger and broader sense, however, they were not his. The consideration for the disposition to him was provided by the appellants, and the bankrupt only took and was recorded as owner for their convenience, for whom he has always held them as a trustee.

But it is clear from the authorities referred to by my noble and learned friends that the law of Scotland recognises as property the beneficial interest in the subject, so that if the two interests, the legal on the one hand, and the whole beneficial interest on the other, are vested in different persons, the apparent owner who has only the legal title is, as between him and the beneficial owner, the bare trustee, and the *cestui que* trust is the true and real owner.

In this state of the law, therefore, the language of the section is capable of two possible constructions, and it is a sound rule of construction of a statute that if there are two constructions, one of which will do great and unnecessary injustice, and the other will avoid that injustice and keep exactly within the

purpose and objects for which the statute was passed, it is the bounden duty of a Court to adopt the second and not the first of those constructions—per Lord Chancellor Cairns in construing the analogous English Bankruptcy Act in the case of the *East and West India Dock Company v. Hill*, 1884 (9 App. Cas. 453), and adopted by the Judicial Committee in the case of an Insolvent Act of the Victoria Legislature in *Railton v. Wood*, 1890 (15 App. Cas. 363). This rule does not depend upon any principle or authority peculiar to the English law, but may safely be applied to the construction of an analogous statute forming part of the law of Scotland.

No. 7.
Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

Now, in which of these two senses is the language of the Act now in question to be understood? It is like all bankruptcy or insolvent statutes a “special law having for its object the distribution of the debtor’s estate equitably amongst his creditors”—per Lord Justice James in *Ex parte Walton*, 1881, 17 Chan. Div. 756. It is the debtor’s estate, and not the estate of any third person. The purpose and object of the statute is to distribute amongst the creditors of the bankrupt in satisfaction of his debts his estate and property, and not that of anybody else who is not within the purview of the statute.

The effect of the construction contended for by the respondent, and adopted by the majority of the Court below, would be the distribution, not of the bankrupt’s estate, which his creditors might have rendered liable to the payment of their debts, or which he might honestly and without fraud have parted with to them in satisfaction, but of the property of the *cestui que* trust to which the trustee could only have created a title in a third person by fraud, and which his personal creditors could not have in any way attached or rendered liable to the payment of their debts.

This construction would involve the great injustice of applying one man’s property in satisfaction of another man’s debt. Whereas the other construction is free from any such injustice and is quite consistent with the fair object of the Act, which is to free the bankrupt upon taking from him and giving to his creditors everything which might have been rendered available for the payment of their debts.

The only possible injustice which such a construction might give rise to would be in the case of any creditor who had given credit to the bankrupt upon the faith of the apparent title vested *ex facie* in the bankrupt; but as my noble and learned friends Lord Watson and Lord M’Laren in the Court of Session have both dealt with that point, I will only add that in other Bankruptcy Statutes reputed ownership clauses have been expressly included in the scheme of distribution in order to deal with that possible evil in the case of moveables, but have not, that I am aware of, extended the provision to heritable estate. It seems to me, therefore, that heritable subjects of which the bankrupt is a bare trustee do not pass by the warrant of confirmation.

I have thus far dealt with the case solely upon general principles of construction, and have not adverted to the numerous authorities cited at the bar and commented upon by the Lords of Session in their various judgments. It has been my duty to examine them, but my noble and learned friends have so fully placed them before your Lordships and commented upon them so exhaustively, that it is quite unnecessary for me to say more than that I concur in the view taken of them by them, and by Lord M’Laren, who dissented from the interlocutor appealed from.

I concur in the motion proposed by your Lordship.

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

THEIR LORDSHIPS decided that the interlocutor appealed from be reversed, and that it be declared that the subjects in question did not pass to the respondent, and that the appellants, as beneficial owners, are entitled to the sum consigned in bank; and that the respondent do pay the costs of this appeal.

A. BEVERIDGE—WATT & ANDERSON, S.S.C.—KEEPING & GLOAG—MORTON, SMART, & MACDONALD, W.S.

No. 8.

Mar. 11, 1892.
Pickard &
Curry v. Prescott.

PICKARD & CURRY (Complainers), Appellants.—*Moulton, Q.C.—John Boyd—A. Statham.*

GEORGE PRESCOTT (Respondent), Respondent.—*Sol.-Gen. Murray—W. C. Smith.*

Patent—Proof of prior publication.—In an action for interdict against the infringement of a patent, dated 24th July 1885, the respondent pleaded that the patent was invalid by reason of prior publication of the invention. It was proved that in a foreign review, dated 30th June 1885, there was a description of an article admittedly indistinguishable from the subject of the patent. Evidence which held sufficient to instruct that the review had been published in this country prior to the date of the patent.

Ld. Chancellor
(Halsbury).
Lord Watson.
Lord Morris.
Lord Field.

(IN the Court of Session, July 9, 1890, 17 R. 1102.)

The complainers appealed.

The question raised in this case was whether the appellants' patent, "for improvements in the bridges of pince-nez or double eye-glasses," dated 24th July 1885, was invalid in respect that the invention had been previously published in this country in the *Revue Générale d'Ophthalmologie* of 30th June 1885. It was not disputed that the invention disclosed in the review was the same as that set forth in the patent, and the question raised upon the proof was whether there had been publication in this country before the date of the patent.

The substance of the proof (led in November 1889) upon this point was as follows:—

Otto Schulze, manager in Edinburgh for Messrs Williams & Norgate, foreign booksellers, deponed,—“We have a house in London as well as in Edinburgh. We are agents in Great Britain for the sale of the *Revue Générale d'Ophthalmologie*, which is published monthly in Paris. We are mentioned as agents for it in the catalogues published to the trade. We supply it to various individuals, and also to institutions. We supply it to the Ophthalmic Hospital, London, and to the Medico-Chirurgical Society, London. These copies are supplied from the London house. In Edinburgh, we supply it to Dr George Berry. I exhibit our Periodical Book,* from which it would appear that Dr Berry was supplied with the sixth month's issue of 1885 on 10th July of the same year. That would be the number of 30th June. . . . Cross.—Besides Dr Berry and the institutions I have mentioned, we supplied copies of the *Revue Générale d'Ophthalmologie*, in 1885, to Dr Nettleship, and to Bell & Taylor, or Mr Bell Taylor. To the best of my belief these were the only copies that were coming into this country at that time. The interval between the

* The following is a copy of the entry in the periodical book of Williams & Norgate relating to Dr Berry.

Revue D'Ophthalmologie.

G. Berry, 1885.

28/2	22/3	16/4	20/5	20/6	10/7	27/6	2/10	30/10	3/12	3/12	22/2
1	2	3	4	5	6	7	8	9	10	11	12

date of publication and the time when such foreign publications come into the hands of booksellers or agents here for distribution is very uncertain. I cannot say whether we had copies of the *Revue Générale d'Ophthalmologie* for sale in our shops in 1885; we may or we may not. The copies I have mentioned were all supplied to order. In supplying them, we acted as agents. Our periodical book shews the date of delivery of the various papers. The numbers running from one to twelve are the months of the year. The number above the figure six I take to be ten, not twenty. . . . The figures shewing the July delivery of the June periodical are not very clear. I cannot explain how it came that the June delivery was on the 20th, and the July delivery on 10th. The irregularity of the Paris house sending out the numbers would quite account for a difference of ten days in the delivery. The figures record the delivery made in the month under which they occur. The record of the seventh month, July, is 27/6. (Q.) Does not that record that the delivery in fact made in July of the number of the seventh month was on 27th June? (A.) Yes. . . . Re-examined.—It is our practice to send the *Revue* out on the day we received it if possible. By the Court.—(Q.) Is the result of your reading of the book that this June number of the *Revue Générale* was delivered to Dr Berry on 10th July? (A.) Yes. Re-examined.—It is the custom of our London house to send out the *Revue* as soon as it is received. We never get it before the date that is upon it; that is not a continental system at all.”

No. 8.

Mar. 11, 1892.
Pickard &
Curry v. Prescott.

Dr George Berry deponed,—“I am a doctor of medicine in Edinburgh, and a specialist in ophthalmology. I know the *Revue Générale d'Ophthalmologie*. I have taken it in since it began in 1882. . . . I have no particular recollection of getting the part of 30th June 1885. . . . The pencil writing upon my copy of 30th June 1885 is in my handwriting. The writing is, ‘If you think well of this, please make me one to shew patients.’ I must have written that at the time. I remember of writing something and sending it to Pickard & Curry. To the best of my recollection I sent them the June number of the *Revue* with the note I have just read upon it. . . . Cross.—I have no copy of any letter sending the paper to complainers. It came back with a letter. I have not got the letter that came back with it. . . . I am not prepared to say anything about the date of the letter. The *Revue* may have lain in my possession some time unopened. (Shewn copy letter by complainers to witness, dated 4th September 1885)—That is the letter I received from complainers in reply to my communication. It must have been shortly before that that I sent the *Revue* to them. I would receive the reply probably in the course of a week, I should think. (Q.) Are you satisfied now that you had not read the *Revue* or seen this drawing until the latter part of August? (A.) No, I cannot be sure. I may have been away on a holiday at the time.” In his subsequent examination on the merits, Dr Berry deponed that he sent the June number to Pickard & Curry in the first few days of September or the last few days of August 1885.

The complainer Curry deponed,—“My late partner, Joseph Fidoe Pickard, and I were the sole inventors of the pince-nez described in our provisional specification of 24th July 1885. We made the drawings about the middle of March, and sent them to a house in London to be forwarded to Paris for execution, because we were afraid, if we carried them out in our own shop, the design would be divulged and copied before it was protected. . . . (Shewn copy letter by complainers to Dr Berry, Edinburgh, dated 4th September 1885)—That letter was written in reply to one by Dr Berry to us asking if we had seen the article in the *Revue*.

No. 8.

Mar. 11, 1892.
Pickard &
Curry v. Pres-
cott.

. . . I wrote in reply to Dr Berry the same day as we received his communication ; I always write in course of post, or I make an apology for not doing it. I am satisfied that it was in the month of September that I received the communication from him."

George Prescott, the respondent, deponed,—“I first saw that issue of the *Revue* and the illustration on page 11 at the time of publication immediately after 30th June 1885. It was brought to me at my own house (in Dublin) by a Dublin oculist, Dr Storey. I afterwards saw another copy in the possession of Dr Fitzgerald, surgeon-oculist to the Queen in Ireland. This was a day or two after Dr Storey had brought me the copy. (Q.) Was it before the end of July 1885? Certainly. These were the only copies I saw at that time, but since then I have seen another in the possession of Dr Berry, Edinburgh. Cross.—I fix the date when I saw the copy of the *Revue* to which I have spoken by the date of that particular number, 30th June. That is the date when the *Revue* was printed in Paris. When Dr Storey brought the copy to me, he said,—‘Here is something new,’ or ‘I have just got this,’ or words to that effect. I have no distinct recollection of the date when he brought it. I have no note or record to enable me to fix the date. It was not in June 1885. (Q.) May it have been in August? (A.) The matter was not impressed on my mind at the time, but I don’t think so. (Q.) But as to any date in July or any other month you are not prepared to speak? (A.) No, I can only say I saw it when it was published in Ireland. (Q.) When did it first occur to your mind or to anybody else’s mind who communicated it to you, that you could set up this as having been published in this country before 24th July 1885? (A.) A few days ago, when Dr Berry suggested it.”

After hearing counsel for the appellants,—

LORD CHANCELLOR.—In the opinion to which I am about to give utterance in this case, I desire not to be understood as attempting to lay down any general principles of law. I cannot help thinking that occasional observations made by a learned Judge upon the subject of the facts in a particular case have been from time to time misunderstood as conveying some opinion upon the subject of the general law, and have given rise to confusion. Now, I protest against being supposed in this case to do more than apply my observations to the particular case with which your Lordships have to deal. I do not think that the question of publication in this country of the invention which is the subject-matter of the claim is anything but a question of fact ; and inasmuch as it is a question of fact to be determined in the particular case upon the facts, it is very idle to lay down any general canon of what will be the result of this or of that particular case. Each case must depend upon its own circumstances ; and the effect, extent, and operation of the document by which the invention is supposed to be communicated to the public in this country, so as to anticipate the invention of the person who first took out letters-patent for the invention, vary infinitely as the facts must vary. For example, there are a great variety of instances in which it might very well be that the mere fact of an invention being completely disclosed on a written paper, and that written paper brought into this country would, notwithstanding those circumstances, not in the smallest degree amount to publication, and would not interfere with a patent afterwards taken out. On the other hand, such a case as is now before your Lordships raises to my mind, and simply as a question of fact, the irresistible inference that this invention was communicated in the strictest sense to the public, in

such a way as to prevent the operation of the letters-patent taken out after the date of that publication. No. 8.

Now, my Lords, the first point which I have to consider is, what is the thing itself? I think that Lord Lee has very justly observed (though there is a misprint in his judgment) "This is not the case of depositing a private document" (as it ought to be printed) "as distinguished from a published journal in a public library," and I think it is most important in this case to bear that in mind. What is the thing about which we are disputing? It is a magazine published monthly, and addressed to persons interested in ophthalmic surgery, presumably persons who would give their attention to such a subject, and desire to be informed upon that subject as soon as the new discoveries or accounts of scientific meetings, or what not, could be communicated to them. Therefore, starting with the nature of the thing in one's mind, it is to me almost impossible to resist the conclusion that assuming that this thing which was published in Paris was circulated in the United Kingdom (I will not for the moment assume at what date it was published, but whenever it was published, and whenever it was distributed to the subscribers, or the persons who took an interest in those subjects), I say that I should think it would be the most natural inference in the world to hold that it was within a reasonable time at all events after its publication in Paris brought to the notice of those persons who took an interest in such subjects, if the magazine circulated in England or in the United Kingdom at all. Starting with that proposition, what is the evidence? I am bound to say that I am wholly unable to follow the commentary of the Lord Ordinary upon the evidence of the respondent himself. The respondent says,—“I first saw that issue of the *Revue* and the illustration at the time of publication, immediately after 30th June 1885. It was brought to me at my own house by a Dublin oculist, Dr Storey. I afterwards saw another copy in the possession of Dr Fitzgerald, surgeon-oculist to the Queen in Ireland. This was a day or two after Dr Storey had brought me the copy.” Now, there, is positive proof of publication very shortly after, he says, the 30th of June. If that was the only evidence as to the date, and if he was not corroborated,—not by the two medical gentlemen who, the Lord Ordinary seems to think, ought to have been called to corroborate him,—but if there had been independent proof that, although this publication was dated the 30th of June, it was not in circulation in this country until the month of July or some later date, it might be said that his recollection and the words which he uses, “at the time of publication, immediately after the 30th June 1885,” ought not to be sufficiently relied upon to justify the Courts in acting upon them. And I am not prepared to say that had there been only the evidence of a witness speaking vaguely and with unrefreshed memory, some three or four years afterwards, I should have been entirely satisfied with evidence of that character.

But the evidence does not stop there. Leaving out again the date for the moment (for reasons which I have already indicated), I find that the complainers themselves have given evidence that on the 25th of August (I note first the date) there was a copy in the hands of a gentleman who was connected with the Middlesex Hospital. And then I find that Mr Makins proves that he saw three copies of that issue of the *Revue*, besides the particular one which he held in his hand, one at the Royal Ophthalmic Hospital, London, one at the Ophthalmological Society, and one in the possession of Dr Nettleship, Wimpole Street, Cavendish Square, London. I say nothing about the Medico-Chirur-

Mar. 11, 1892.
Pickard &
Curry v. Prescott.

No. 8.
 Mar. 11, 1892.
 Pickard &
 Curry v. Prescott.

gical Society, because he was only informed that there was one there, and I think that would not be evidence upon which one could rely. But there we have evidence that in Dublin, and in London, those institutions which were likely to take an interest in such questions as these had copies of this particular document.

Then it is said, and truly said, but this was within a week of the time at which the witness was being examined, and that of course that is no proof that on the 30th, or shortly after the 30th of June 1885, the copies were in the possession of those three institutions. In the sense of its being direct proof, I agree that it is not; but I should certainly infer (and regard it as a reasonable inference) that they had them within a reasonable time. What is a reasonable time depends of course upon the particular subject-matter with which one is dealing, but I should certainly infer that within a reasonable time after the publication of these documents they would have been received by the persons for whom they were designed, and who took an interest in such questions.

Now, then, my Lords, we come to the question, what was the date of publication? I observe that the respondent broadly alleges that the publication of the number was on the 30th of June. Possibly he did not know that. But he ought to have been cross-examined to shew whether he did or did not know it; and there is certainly legal evidence, because there it is; he says that it was on the 30th of June, and he is not cross-examined upon it. There again, however, I think it is very likely that it was allowed to pass, and that what was really referred to was the date on the document itself, and, therefore, I do not rely upon this statement.

But, then there comes the evidence of the publication having reached the hands of the agent of Messrs Williams & Norgate in Edinburgh. That depends to some extent of course upon the accuracy of the entry in the book. Well, I think that if one assumes it to be accurate, it proves two things, not only the publication to Dr Berry, with which I will deal in a moment, but also that this publication was being distributed to subscribers to it, and persons interested in it, on the 10th of July. And why am I to assume that the respondent is not accurate when he says that he saw it shortly after its publication in Dublin? And why am I to assume that these different institutions interested in ophthalmic surgery did not receive their copies in London? And why am I to assume that the medical gentlemen in Dublin did not receive their copies in Dublin as soon as that copy which was intended for distribution in Edinburgh was received there, that is, on the 10th of July?

My Lords, I am hardly able to compass the argument which suggests that I ought not to draw the inference that this thing, which was intended for publication, and was undoubtedly in circulation in this country at some time or another, and was sent at some time or another to these different institutions, was sent as soon as it might reasonably be expected to be sent. A reasonable time was certainly, I should have thought, within less than ten or twelve days of the date of publication, considering the distance and the mode of communication between Edinburgh and Paris. But, at all events, I am not left to that speculation of what is reasonable, because, as I say, apart altogether from what Dr Berry says, there is the fact that it is traced to the publishing house of Williams & Norgate in Edinburgh on the 10th of July. Therefore, my Lords, dealing with it as a question of fact, I assume that that was about the period of publication to the other persons interested in having this publication; and

therefore, apart altogether from a single word uttered by Dr Berry, and if the proof had simply stopped at the fact that there it was at Messrs Williams & Norgate's, and if Dr Berry had not seen it at all, I should have drawn the same inference that there was sufficient evidence to establish the period of its distribution; and if it was distributed to others at that time, then the consequence is too obvious to require statement.

No. 8.

Mar. 11, 1892.
Pickard &
Curry v. Prescott.

Then, my Lords, with reference to Dr Berry, I do not know in what way I am to assume that Dr Berry did not pursue what would be the ordinary course of any person interested in such subjects. I do not at all deny that what Mr Moulton and his learned junior have very forcibly argued is true, that sometimes people allow their books to remain on their tables and do not open them, and do not even cut them. That is very true. But the question is, what am I to assume and what am I to infer to be proved upon the evidence as it stands in the absence of evidence on the other side? A person presumably wants to read and desires to read that which he pays for; and having become a subscriber for this thing, I suppose a gentleman who required ophthalmic studies to be added to his stores of knowledge would be likely to read that which would and did assist him in those studies. But then it is said that Dr Berry cannot tell us that he did read it. Of course he cannot; and as Mr Moulton's junior very candidly said in his short but very able and terse argument, "I would not believe him if he did." No, of course not. Nobody, unless it is a very exceptional man, can bring his memory back after the lapse of years sufficiently to be able to say,—“At that particular time I read such and such a thing.” The ordinary common sense of mankind naturally leads one to the conclusion, I should say, that taking the fact that this is a monthly publication intended to give information on the subject in which its subscribers and readers are interested at the time when it is published, and taking the fact that it is published, not merely once every year, but once every month, because it is intended to give people the current information upon the subject, Dr Berry probably did read it within a reasonably short time after he received it, and if so, it seems to me that having received it on the 10th or 11th of July (giving an extra day for it to reach him) he probably read it about that time, and if so, the same result would follow as I have before indicated.

Then it is said that Dr Berry cannot say whether he was in Edinburgh or not. That he cannot say that positively is true, but I should have thought that dealing with an Edinburgh man who was receiving books in Edinburgh and reading them there, the reasonable inference would be that he was at home unless the contrary appeared. At least I should be sorry to suppose that it was not a reasonable inference that a man was at home unless he remembered that he was away.

That, my Lords, seems to me to dispose of this case. Hitherto I have, of course, assumed the accuracy of the particular date in the book. Now, upon that I am not at this moment quite certain that I quite followed Mr Moulton's argument. He says that an entry does not prove its own accuracy. I will deal with it now as if it was offered in this country and not subject to the laws of evidence in Scotland. I think in strictness if it had been offered in this country the learned counsel against whose interest it was offered would have been entitled to interpose and say,—“Did you write it yourself?” If the witness had declared that he did not write it, then for that purpose he would have been compelled to retire and give place to somebody else who would have

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

insolvent, compounded with his creditors, and in order to secure the cautioners for his composition, conveyed certain heritable subjects belonging to him, to himself and them in trust, with power to sell or burden, for repayment of any advances made by them on his behalf, and for payment of any balance remaining to himself, his heirs, or disponees. The trustees sold part of the subjects, and took from the purchaser a heritable bond and disposition in security for £400, payable to three of their number, Cook, Cuthill, and Paul, as individuals. Cuthill became bankrupt, at the time when the sums advanced and liabilities incurred by the cautioners exceeded the value of the trust-estate. Jeffrey, as trustee in Cuthill's sequestration, claimed one-third of the sum contained in the bond as belonging to the bankrupt, and was opposed by the solvent cautioners, who maintained that the bond was trust property. The Court of Session rejected Jeffrey's claim, but on appeal to this House it was sustained. The report in the Court of Session, June 11, 1834 (12 S. 718), assigns no reasons for the judgment; and in this House, Lord Brougham, sitting alone, moved its reversal without explanation or comment. In these circumstances, I find it impossible to regard the judgment of that noble and learned lord as a decision upon the point raised in this appeal. The pleadings of the appellant in this House disclose that he claimed a third share of the bond on the footing that the bond by its terms was equivalent to a payment in cash by the trust to Cook, Paul, and the bankrupt, and in my opinion it is exceedingly probable that the case was decided in his favour upon that view. At all events, the decision cannot be regarded as establishing the rule that a trustee in sequestration takes, by force of statute, property vested in the bankrupt subject to a latent trust.

For these reasons I concur in the judgment which has been moved by the noble and learned Lord on the woolsack.

LORD MACNAGHTEN.—My Lords, if this House were compelled to uphold the decision under appeal, I rather think I should be inclined to doubt whether the law of bankruptcy in Scotland was in a condition altogether satisfactory.

One M'Kay, a bankrupt, at the time of his bankruptcy stood infeft in certain heritable estates consisting of houses in Edinburgh, on a title upon the face of it absolute and unqualified. M'Kay had been the manager of the appellant company. The houses in question had been bought by him for and on behalf of his employers; the purchase-money, so far as any money passed, was paid by them. But for the sake of convenience the company took the conveyance in the name of their manager. Some years afterwards M'Kay left the company's employment, and then he executed a declaration in writing in which he confessed and declared that he held the premises "in trust only for behoof of the company," and undertook on request to transfer the trust property according to their directions. No transfer however was executed, nor was the declaration of trust registered. So there was nothing in the public records at the time of the bankruptcy to shew that the bankrupt was not the real and true owner. In this state of things the First Division of the Court of Session (Lord M'Laren dissenting) has held that these houses form part of the bankrupt's sequestered estate applicable to the payment of his debts, and that the company for whom he declared himself trustee can only claim in the bankruptcy for the value of the property.

Is that decision right? It was argued that the question depends upon the feudal law of Scotland and upon certain provisions of the Bankruptcy Act of

1856. I venture to think that it turns wholly upon the language of the Act, and that a decision in favour of the company would not in the slightest degree trench upon the principles of the feudal law. No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

Under the Act of 1856, proceedings in bankruptcy are commenced by a petition for sequestration. If the case is within the Act, the Lord Ordinary or the Sheriff is directed to issue a deliverance awarding "sequestration of the estates which then belong or shall thereafter belong" to the bankrupt before the date of his discharge, and declaring the estates "to belong to the creditors" for the purposes of the Act. A trustee is to be elected by the creditors. On the election being confirmed, the Sheriff-clerk is directed to issue "an act and warrant" in a prescribed form, and it is provided that such act and warrant shall be evidence of the trustee's right and title to the sequestered estate for the purposes of the Act. The bankrupt is required to make up and deliver a state of his affairs specifying his whole property, and also "a rental of his heritable property." It is provided by section 102 that "the act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following." Then follow three subsections. The last deals with the bankrupt's real estate out of Scotland, but within Her Majesty's dominions. The first is concerned with the effect of the vesting as regards the moveable estate and effects of the bankrupt wherever situated. It is admitted that with regard to moveable estate the only property which passes to the trustee is property of which the bankrupt was the true owner. The doctrine of reputed ownership, at least as regards moveable property, has no place in the bankruptcy law of Scotland. The second subsection on which the opinions of the First Division are founded deals with the effect of the vesting as regards "the whole heritable estate belonging to the bankrupt in Scotland." It declares that the vesting is to be "to the same effect as if a decree of adjudication in implement of sale, as well as a decree for adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration."

Such being the main provisions of the Act of 1856, I cannot help thinking that the learned Judges who formed the majority of the First Division have dwelt too much upon the effect of the vesting, and that they have paid too little attention to the thing which is vested. The vesting is absolute. It strips the bankrupt of every shred of interest. But what is the thing which is vested? It is "~~the property~~" of the bankrupt. As regards his real estate in Scotland it is "the heritable estate belonging to him." The words "property" and "belonging to" are not technical words in the law of Scotland. They are to be understood, I think, in their ordinary signification. They are, in fact, convertible terms—you can hardly explain the one except by using the other. A man's property is that which is his own—that which belongs to him. What belongs to him is his property. No one in ordinary parlance would speak of land or funds held only in trust for another as the property of the trustee. Land or funds so held are not the trustee's property in any real sense any more than a bankrupt's sequestered estate is the property of the trustee in bankruptcy. It is true that in the present case the complete feudal title was in the bankrupt. It is true that in a strict legal view the right of the beneficiaries was only a personal claim against their trustee. But for all that the bankrupt could not

No. 7.

Aug. 9, 1892.
Heritable
Reversionary
Co., Limited,
v. Millar.

have applied the property to his own purposes, or used it for his own benefit, without committing a fraud for which he might have been made criminally responsible. The beneficiaries were the true owners all along. The bankrupt, though he had the feudal title, though he might have given a perfectly good title to a person dealing with him on the faith of the register without notice of the trust, was in reality only nominal owner without any property or proprietary right. It seems to me that in bankruptcy, by the very terms of the Bankruptcy Act, the Court is bound to look not to the form of the feudal title, but to that which Lord Justice-Clerk Hope, in contrast to the feudal or "nominal" title, as he terms it, described in one case as "the substance and reality of the right of property"—*Giles v. Lindsay*, 1 Ross' L. C., 491.

My Lords, I think it would be idle for me to refer to the authorities which have been so fully explained by my noble and learned friend Lord Watson. I am satisfied that there is nothing in any one of the cases which conflicts with the view which has been presented to your Lordships. And I entirely concur in the motion that the interlocutor under appeal should be reversed with costs.

LORD FIELD.—My Lords, the only question in this appeal is, whether the nett proceeds of the heritable estate in question belong to the appellants or to the respondent, and the answer to the question depends upon the construction which your Lordships ought to place upon the 102d section of the Bankruptcy (Scotland) Act of 1856.

By that section there is undoubtedly transferred to and vested in the respondent for and on behalf of the creditors of the bankrupt, amongst other subjects, his whole property, with all rights, title, and interest in his whole heritable estate in Scotland.

Now, the subjects in question are heritable estates in Scotland, and in one and a somewhat limited sense might be understood, as it was contended for the respondent they ought to be, as the property of the bankrupt. He was *ex facie* the disponee of them—he was the only recorded owner of them known to the public, and he was so recorded as the absolute owner, and without mention of any trust or limitation—and they were feudally vested in him. His disposition of them, although fraudulent and dishonest on his part, would have passed the property to an onerous disponee without notice.

In a larger and broader sense, however, they were not his. The consideration for the disposition to him was provided by the appellants, and the bankrupt only took and was recorded as owner for their convenience, for whom he has always held them as a trustee.

But it is clear from the authorities referred to by my noble and learned friends that the law of Scotland recognises as property the beneficial interest in the subject, so that if the two interests, the legal on the one hand, and the whole beneficial interest on the other, are vested in different persons, the apparent owner who has only the legal title is, as between him and the beneficial owner, the bare trustee, and the *cestui que* trust is the true and real owner.

In this state of the law, therefore, the language of the section is capable of two possible constructions, and it is a sound rule of construction of a statute that if there are two constructions, one of which will do great and unnecessary injustice, and the other will avoid that injustice and keep exactly within the

CASES

DECIDED IN

THE COURT OF JUSTICIARY

1891-92.

JOHN M'DONALD, Appellant.—*Strachan*.
GEORGE DUFF, Respondent.—*Craigie—Anderson*.

No. 1.

Nov. 2, 1891.
M'Donald v.
Duff.

Sentence—Education (Scotland) Act, 1872 (35 and 36 Vict. c. 62), sec. 70
—*Education (Scotland) Act, 1883 (46 and 47 Vict. c. 56), sec. 9.*—A parent was charged under a complaint with having contravened the Education (Scotland) Acts, 1872 to 1883, in so far as he had, "without reasonable excuse, failed to discharge the duty of providing, as required by said Acts, efficient elementary education . . . for his child," aged thirteen years, and penalties were prayed for under the 70th section of the Education (Scotland) Act, 1872.* The Sheriff-substitute found that the accused had "failed to secure the regular attendance" of the child "at some public or inspected school after due warning," and pronounced an attendance order under the Act of 1883.†

The Court held that under a complaint alleging a contravention under sec. 70 of the Education Act, 1872, it was incompetent for the Sheriff-substitute to find that the accused had failed to secure the regular attendance of his child at some public or inspected school after due warning, in terms of sec. 9 of the Education Act, 1883.

* The Education (Scotland) Act, 1872 (35 and 36 Vict. c. 62), sec. 70, enacted that on a report by their officer that a parent has failed to provide elementary education for his or her children the school board may summon the defaulting parent, and if not satisfied with the explanations or undertaking given, "it shall be lawful to and shall be the duty of the school board to certify in writing that he has been and is grossly, and without reasonable excuse, failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county or district of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the Sheriff of the county for such failure of duty as is in the certificate specified, and on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days. . . ."

† The Education (Scotland) Act, 1883 (46 and 47 Vict. c. 56), sec. 9, enacted,—"If the parent of any child, without reasonable excuse, neglects to provide efficient elementary education as aforesaid for his child, or fails to secure the regular attendance of his child at some public or inspected school, it shall be lawful for the school board, after due warning to the parent of such child, to complain to a Court of summary jurisdiction, and such Court may, if satisfied of the truth of such complaint, order that the child do attend some public or inspected school willing to receive him and named in the order, being either such as the parent may select, or if he do not select any, then such as the Court may think expedient, and the child shall attend the school every time the school is open. . . ."

No. 1.

Nov. 2, 1891.
M'Donald v.
Duff.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Lord Kin-
cairney.
Justiciary
Clerk.

JOHN M'DONALD, appointed by the School Board of the parish of Tain to prosecute in terms of the Education (Scotland) Acts, 1872 to 1883, prosecuted George Duff, farm-servant, Tain, before the Sheriff of Ross and Cromarty and Sutherland on a complaint which charged Duff with having "contravened the Education (Scotland) Acts, 1872 to 1883, . . . in so far as the said George Duff has for a period of at least one month immediately preceding the date hereof, without reasonable excuse, failed to discharge the duty of providing, as required by said Acts, efficient elementary education in reading, writing, and arithmetic for Margaret Duff, aged thirteen years, his child, and residing with him, whereby the said George Duff is liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days, in terms of the 70th section of the Education (Scotland) Act, 1872."

The accused pleaded guilty, and the Sheriff-substitute (Crawfurd Hill) refused to fine or to imprison him in terms of the 70th section of the Education (Scotland) Act, 1872, but pronounced an "attendance order" in terms of the 9th section of the Education (Scotland) Act, 1883, finding that the accused "has failed to secure the regular attendance of . . . his child, at some public or inspected school after due warning, and therefore ordains the said child to attend the Tain Public School every time the said school is open, and during the whole time the same is open for the instruction of children of similar age . . ."

M'Donald appealed to the High Court upon a case stated by the Sheriff-substitute, from which the above narrative is taken.

The questions of law for the opinion of the Court were,—“(1) Is it competent for a School Board, in a complaint under the Education (Scotland) Acts, 1872 to 1883, to conclude only for the penalties under the Education (Scotland) Act, 1872? (2) If it is, is it in the power of the Sheriff under such a complaint to pronounce an attendance order in terms of the Education (Scotland) Act, 1883?”

Argued for the appellant;—Under the 15th section of the Education Act of 1883 the School Board had power to proceed under one or other of the Acts, but not under both. The complaint here contained a charge under section 70 of the Act of 1872, and concluded for penalties under that section. The attendance order under the 1883 Act was thus incompetently pronounced.¹

Argued for the respondent;—The complaint was brought under the Education Acts, 1872 to 1883, and the Sheriff-substitute was quite entitled to consider whether he would impose a penalty under the one Act or the other.

LORD JUSTICE-CLERK.—The fatal objection to what has been done in this case is, that while the complaint charges the accused with having, "without reasonable excuse, failed to discharge the duty of providing, as required by said Acts, efficient elementary education" for his child, the Sheriff-substitute has given no finding on the matter. He has found that the accused "failed to secure the regular attendance" of his child "at some public or inspected school after due warning"; but, then, that is not what the accused was charged with. If he had been so charged, for aught we know to the contrary, he might have had a perfectly good defence to the effect that he never had been duly warned to do that which he was charged with neglecting. A judgment which only finds that the accused has failed to secure attendance at school after due warning is a

¹ Macaulay v. Macdonald, June 3, 1887, 1 White, 376, 14 R. (Just. Cases) 43.

finding upon a matter of which there was no notice in the complaint. The complainer pleaded guilty not to having failed to send his child to school after due warning, but it is this of which the Sheriff-substitute convicts him. I think, then, that the Sheriff-substitute's decision was bad and must be set aside.

No. 1.

Nov. 2, 1891.
M'Donald v.
Duff.

As regards the first question, I entertain no doubt that the School Board, in a complaint under the Education (Scotland) Acts, 1872 to 1883, was quite entitled to conclude for the penalties only under the Act of 1872.

The other question I should answer by saying that it is not in the power of the Sheriff, under a complaint which only charges failure to provide efficient elementary education, to convict the person so charged of having failed to secure regular attendance at an inspected school after due warning.

LORD ADAM.—I do not understand the counsel for the respondent to maintain that the School Board were not entitled to proceed under the 70th section of the Act of 1872 alone, or the 9th section of the Act of 1883 alone.

The only objection to the conclusion in the complaint for penalties under the Act of 1872 only is, that the complaint charges contravention of the Education (Scotland) Acts, 1872 to 1883.

I do not think that affects the matter, and that being so, there is really no dispute that the first question must be answered in the affirmative.

I confess I also think that, assuming such a complaint to be competent, it is not in the power of the Sheriff under such a complaint to pronounce an attendance order under the Act of 1883.

Where a complaint is laid under a special Act and under a special clause, to say that a Sheriff can award another penalty for a different ground of complaint would be against all practice and principle. I therefore think that the second question must be answered in the negative.

LORD KINCAIRNEY.—I concur with your Lordships upon the first question, and have nothing to add. Nor have I any difficulty as to the answer to the second question, but as the person charged, instead of objecting to the order, appears in support of it, I have difficulty in setting it aside.

THE COURT pronounced this interlocutor:—"Answer the first question in the case in the affirmative: With reference to the second question, find that it was not competent for the Sheriff, under a complaint alleging a contravention under section 70 of the Education Act of 1872, to find that the party complained against had failed to secure the regular attendance of his child at some public or inspected school after due warning, in terms of section 9 of the Education Act, 1883: Remit to the Sheriff, and decern."

MORTON, SMART, & MACDONALD, W.S.—DAVID A. ROSS, S.S.C.—Agents.

JOHN HALLIDAY, Complainer.—*Lorimer.*

No. 2.

ROBERT WILSON (Procurator-Fiscal for Lanarkshire, at Hamilton),
Respondent.—*Maconochie.*

Nov. 3, 1891.
Halliday v.
Wilson.

Instance—Change of Lord Advocate—Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 3.—Sec. 3 of the Criminal Procedure Act, 1887, enacts that "the Lord Advocate and his Deputies shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments, and the Lord Advocate shall enter on the duties of his office immediately on receiving his appointment."

An indictment was served on 3d October in name of Lord Advocate Robert-

No. 2.

Nov. 3, 1891.
Halliday v.
Wilson.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

son. It was objected that a new Lord Advocate had been appointed by 2d October, on which day notice of his appointment appeared in the *Gazette*. His commission was not issued till 13th October.

Objection *repelled*.

ON 3d October 1891 John Halliday, police-constable, Hallside Village, Cambuslang, was served with an indictment on a charge of theft. The indictment bore to be "at the instance of the Right Honourable James Patrick Bannerman Robertson, Her Majesty's Advocate," and Halliday was indicted before the Sheriff of Lanarkshire, with a jury. At the diet for trial, which took place at Hamilton, on 28th October, Halliday objected to the instance in the indictment, in respect that, on 1st October, two days before the indictment was served upon him, Sir Charles Pearson had been appointed Lord Advocate, and therefore he maintained that the indictment was inept. This objection was repelled by the Sheriff-substitute (Davidson). After evidence had been led, the jury returned a verdict of guilty, and Halliday was sentenced to three months' imprisonment.

Halliday then brought a suspension of the conviction and sentence, pleading,—“The said indictment is inept, in regard that it proceeds in the name and at the instance of the said Right Honourable James Patrick Bannerman Robertson, as Her Majesty's Advocate, while at the time the said indictment was raised and served the said Sir Charles John Pearson was Her Majesty's Advocate, and the said conviction and sentence, and all following on said indictment, ought to be suspended and quashed, and the complainer liberated.”

The facts as to the appointment of the Lord Advocate were ascertained to be as follows:—In the *Edinburgh Gazette* of 2d October 1891 the following notice appeared:—“Office of the Secretary for Scotland, Whitehall, S.W., October 1, 1891.—The Queen has been pleased to appoint Sir Charles John Pearson, Knight, Q.C., Solicitor-General for Scotland, to be Her Majesty's Advocate for Scotland, in the room of the Right Honourable James Patrick Bannerman Robertson, Q.C., appointed Lord Justice-General and President of the Court of Session in Scotland.” On 6th October a warrant under the royal sign manual was received at the Crown Office for issuing Sir Charles Pearson's commission, and on 13th October a commission in favour of Sir Charles Pearson was issued under the Great Seal.*

Argued for the suspender;—The date of the service must be taken as the date of the indictment. It was not served till 3d October, while Sir Charles Pearson's appointment was made on the 1st and gazetted on the 2d October. The warrant which arrived on 6th October was merely evidence of the appointment.

Argued for the respondent;—On a sound construction of the statute, the date of the appointment of the Lord Advocate was the date on which he received his commission, or at all events of the royal warrant on which the commission follows. Till then his predecessor was to be regarded as Lord Advocate, and indictments were properly framed at his instance.

LORD JUSTICE-CLERK.—The facts here are beyond all doubt. The warrant for issuing the present Lord Advocate's commission under the Great Seal is dated the 1st October, and parties are agreed that it did not reach the Crown Office till the 5th or 6th October.

* The Criminal Procedure Act, 1887 (50 and 51 Vict. c. 35), enacts, by sec. 3,—“The Lord Advocate and his Deputies shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments, and the Lord Advocate shall enter on the duties of his office immediately on receiving his appointment.”

The 3d section of the Criminal Procedure (Scotland) Act, 1887, is,—“The Lord Advocate and his Deputes shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments, and the Lord Advocate shall enter upon the duties of his office immediately on receiving his appointment.” Taking then this latter clause first, I have no doubt that, till the warrant reached the Crown Office, the present Lord Advocate, Sir Charles Pearson, could not “enter upon the duties of his office,” because he had not received his appointment. And not having received his appointment, his predecessor continued in office. Therefore the indictment which was served on the 3d October is perfectly good, for it was served in name of the Lord Advocate who by statute remains in office till his successor has received his appointment.

No. 2.

Nov. 3, 1891.
Halliday v.
Wilson.

LORD RUTHERFURD CLARK.—I agree. The only question is, what do the words “receive appointment” mean? They occur twice. “The Lord Advocate and his Deputes shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments”; and again, “the Lord Advocate shall enter upon the duties of his office immediately on receiving his appointment.” The expression “receiving appointment” must therefore mean that something has occurred which enables the new Lord Advocate to act. And it is quite out of the question that that something could be the mere appearance of a notice in the *Gazette*.

LORD TRAYNER.—I concur.

THE COURT refused the bill of suspension.

JOHN LATTI, S.S.C.—CROWN AGENT—Agents.

JOSEPH YOUNG HUTTON AND ANOTHER, Appellants.—*Salvesen*.
ALEXANDER MAIN (Procurator-Fiscal of Leith Police Court),
Respondent.—*Dickson*.

No. 3.

Nov. 5, 1891.
Hutton v.
Main.

Breach of the peace—Relevancy—Complaint—Specification—Street preaching—Annoyance or disturbance of residents.—A police complaint charged that on a particular evening and on a street in Leith the accused persons “did loudly read, sing, pray, and preach, and did continue to do so for half-an-hour, by which a large crowd was collected, and the residents and others in the neighbourhood were annoyed and disturbed.”

Held that this did not constitute a relevant charge of any offence at common law, and conviction following thereon *set aside*.

JOSEPH YOUNG HUTTON and Malcolm M'Donald were on 16th September 1891 charged at the instance of Alexander Main, Procurator-fiscal before the Leith Police Court, the charge being, that “on the evening of 7th September 1891, on the public street in the Kirkgate or Duke Street, near the foot of Leith Walk, all in Leith, they did loudly read, sing, pray, and preach, and did continue to do so for half-an-hour, by which a large crowd was collected, and the residents and others in the neighbourhood were annoyed and disturbed.”

The accused objected to the relevancy of the complaint. The objections were repelled.

The accused pleaded not guilty, and evidence was led. The magistrate convicted the accused and dismissed them with an admonition. The accused obtained a case for the High Court, putting, *inter alia*, this question, viz., Is the complaint relevant?

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

No. 3.

Nov. 5, 1891.
Hutton v.
Main.

Argued for the appellants ;—The complaint was irrelevant, because it set forth no statutory offence and no common law offence. For two persons loudly to read or sing or pray on the street was not, at least was not necessarily, any offence, and no facts sufficient to shew that in the special case it amounted to a breach of the peace were libelled.¹ The case was distinguishable from *Deakin v. Milne*,² where an order by the magistrates was founded on in the complaint.

Argued for the respondent ;—There was a relevant charge of breach of the peace. To use these words was unnecessary, for statement of a *nomen juris* was unnecessary.* A person might by loud shouting and bawling, to the annoyance of residents in a district, commit a breach of the peace.³

LORD JUSTICE-CLERK.—There is no doubt that people who have the best intentions, and whose sole desire is to do good, may commit a breach of the peace by forming a procession, or even, it may be, by standing upon the street doing nothing further than these appellants are said to have done. And plainly in the *Arbroath* case² to which we were referred there was a relevant charge. The members of the Salvation Army, in defiance of a proclamation by the magistrates, who in their discretion considered that a continuance of the conduct in which the members of the army engaged was likely to cause a breach of the peace and ought to be stopped, persisted in that conduct and continued their processions. A conviction obtained against certain of them was most properly upheld.

On the other hand, it is equally plain that a prosecutor who libels a breach of the peace is not ordinarily bound to use the words "breach of the peace," if he states facts which amount to that crime.

Now, street-preaching is a familiar thing. Respectable persons gather, sing in order to attract the attention of those near, and thereafter preach to them. It is matter of common knowledge that such things are done without anyone having an idea of these persons committing a breach of the peace. Accordingly it is a delicate matter to charge persons who have so acted as to gather people together to hear the Gospel preached on the street, and such cases require careful libelling. It is just one of the cases in which a mere bald statement that the accused did sing, preach, and pray, whereby a crowd was collected and persons were disturbed is insufficient, indeed utterly inadequate to suggest a breach of the peace. There must be more specification, and it is easy to give more if the acts done were truly in breach of the peace. In this particular case I am not surprised that the prosecutor did not add to what he has said, that a breach of the peace was committed. I am satisfied that if he had done so it would not have made the complaint relevant. The expression "breach of the peace" would not have been more than a summing up of the acts

¹ *Marr v. M'Arthur*, May 28, 1878, 5 R. (Just. Cases) 38, 4 C. 53; *Ritchie v. M'Phee*, Oct. 25, 1882, 10 R. (Just. Cases) 9, 5 C. 147.

² *Deakin v. Milne*, Oct. 27, 1882, 10 R. (Just. Cases) 22, 5 C. 174; *Beatty v. Gillbanks*, 1882, L. R., 9 Q. B. D. 308.

* The Criminal Procedure Act, 1887 (50 and 51 Vict. c. 35), enacts (sec. 5) that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime."

³ *Deakin v. Milne*, *supra*; *Hendry v. Ferguson*, June 13, 1883, 10 R. (Just. Cases) 63, 5 C. 278; *Bewglass v. Blair*, Feb. 10, 1888, 15 R. (Just. Cases) 45, 1 White, 574.

charged. It is necessary in such a case to set forth the acts said to be done, **No. 3.**
 and these acts must amount to an offence. Now, the words here, "did loudly
 read, sing, pray, and preach," do not seem to import more than that these things **Nov. 5, 1891.**
 were done aloud. Then we come to the words, "did continue to do so for half- **Hutton v. Main.**
 an-hour, whereby a large crowd was collected," and persons were disturbed.
 These do not at all suggest the gathering of a riotous and disorderly crowd, such
 that it would have been the duty of the police to disperse it.

As has been remarked in previous cases, such matters require to be dealt with
 in a reasonable way. What on one day may be quite legitimate may at another
 time, and under other circumstances, be illegitimate even at the same place.
 As I read the complaint, it does not import that the assembly of the crowd was
 to the annoyance and disturbance of the lieges.

I think, on these grounds, that this complaint should not have been sent to
 trial, but ought to have been dismissed as irrelevant.

I am therefore for setting aside the conviction.

LORD RUTHERFURD CLARK.—I think the only question to be determined is
 whether this was a relevant complaint at common law. I am of opinion that it
 was not.

LORD TRAYNER concurred.

THE COURT set aside the conviction.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—**J. CAMPBELL IRONS, S.S.C.**—Agents.

MRS MARY GRAHAM OR IRVING AND OTHERS, Appellants.—*D.-F. Balfour* **No. 4.**
—Macfarlane.

CHARLES STEUART PHYN (Procurator-Fiscal of Sheriff Court of Dumfries **Dec. 14, 1891.**
and Galloway), Respondent.—*Asher—Dundas.* **Irving v. Phyn.**

Fishing—Salmon-fishing—Weekly close time, calculation of—Salmon Fisheries Act, 1862 (25 and 26 Vict. c. 97), sec. 7—Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. c. 123), sec. 24, and Schedule D, bye-law secs. 1 and 2.—The Salmon Fisheries Act, 1862, sec. 7, makes provision for a weekly close time for salmon-fishing, other than by rod and line, "from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning," but gives power to the Salmon-Fishery Commissioners to vary the commencement of the period in any salmon-fishery district or part of a district, in so far as they may think reasonable or expedient, provided that such weekly close time shall in no case be less than thirty-six hours. The Salmon Fisheries Act, 1868, sec. 24, enacts that the proprietor or occupier of every fishery at which, *inter alia*, stake-nets or fly-nets are used shall, in regard to such nets, do all such acts required by any bye-law in force within the district in which such fishery is situated for the due observance of the weekly close time.

Schedule D, bye-law secs. 1 and 2, annexed to the last-mentioned Act (being one of the regulations with respect to the due observance of the weekly close time in, *inter alia*, the Annan district), provides that fly-nets and stake-nets shall be thrown out of fishing order in a certain way specified so as effectually to prevent the capture or obstruction of salmon.

The occupiers of a fishery in the Solway were charged with a contravention of the 24th section of the Act of 1868 and the above bye-laws, in so far as, during the weekly close time on a particular Saturday, they had failed to have two stake-nets and seven fly-nets thrown out of fishing order in terms of the bye-law. It was proved that at 5.30 on the evening in question the tide was at high water; that at 6 P.M. it was impossible to throw the nets out of fishing order so as to comply with the bye-law; that the earliest hour thereafter at which this could be done was about 8 P.M.; that the nets were then thrown out

No. 4. of fishing order; that this state of the tide occurred once every fourteen days; that when it occurred on a Saturday it would be necessary to throw the nets out of order about 8 A.M. of that day after fishing the previous tide, so that they might be out of fishing order at 6 P.M.; that being thrown out of fishing order at 8 P.M. the nets could at soonest have been and were put in fishing order again at the same state of the tide, *i.e.*, about 11 A.M. on Monday following, and thus were out of fishing order for upwards of thirty-six hours.

Dec. 14, 1891.
Irving v.
Phyn.

Held that the Act of 1862 was unambiguous and imperative, and that therefore the accused must be held to have contravened it.

Observations upon Osborne v. Anderson, Nov. 4, 1887, 15 R. (Just. Cases) 12, 1 White, 497.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Ld. M'Laren.
Lord Trayner.
Ld. Wellwood.
Ld. Stormonth
Darling.
Lord Low.
Justiciary
Clerk.

MRS MARY GRAHAM OR IRVING, William Graham Irving, and John Irving, residing in Gretna Parish, Dumfriesshire, tenants of the Loch Salmon-Fishings in the Solway Firth, were charged before the Sheriff-substitute (Campion) at Dumfries, at the instance of the Procurator-fiscal of Court, upon a complaint which charged them "with having on the evening of Saturday, 13th June 1891, and within or during the weekly close time for the district of the River Annan, first, omitted to have a clear opening of at least four feet in width from top to bottom made and kept free from obstruction in the pouches, traps, or chambers of two stake-nets placed in the Solway Firth, at a part thereof in the parish of Dornock, Dumfriesshire, opposite the farm of Wyllies, in the parish and shire last mentioned, and within the said district of the River Annan; and, second, omitted or failed to have raised and tied to the upper ropes, or lowered and tied to the lower ropes, the pouches, traps, or chambers of seven fly-nets placed in the Solway Firth aforesaid, three of them at that part thereof in the said parish of Dornock opposite the said farm of Wyllies, and the remaining four of said nets at that part of the said firth in the parish of Gretna and said shire opposite the farm of Baurch in the said parish of Gretna, and all within the said district of the River Annan, so as effectually to prevent the capture or obstruction of salmon by said nets," contrary to the Salmon Fisheries (Scotland) Act, 1868, sec. 24, and secs. 1 and 2 of the bye-law, Schedule D, annexed to that Act.*

* The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. c. 123), sec. 24, enacted,—“The proprietor or, when let, the occupier of every fishery at which stake, weir, or stake-nets, fly-nets, or bag-nets are used, shall, in regard to such nets, do all acts required by any bye-law in force within the district in which such fishery is situated for the due observance of the weekly close time.” Then followed a provision as to penalties.

Sections 1 and 2 of the bye-law, Schedule D (being “regulations with respect to the due observance of the weekly close time” in, *inter alia*, the Annan district), were as follows:—“(1) That in each and every stake, weir, or stake-net a clear opening of at least four feet in width from top to bottom shall be made and kept free from obstruction in each and every pouch, trap, or chamber of the same. (2) That the pouches, traps, or chambers of each and every fly-net shall be either raised and tied up to the upper ropes of same, or lowered and tied to the lower ropes, so as effectually to prevent the capture or obstruction of salmon.”

The Salmon Fisheries Act, 1862 (25 and 26 Vict. c. 97), sec. 7, enacted,—“The annual close time for every district shall continue for 168 days; and the weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning; but the Commissioners shall have power, on the application of the district board, or of any two proprietors of fisheries in any district, to vary the period at which the weekly close time shall commence in any district, or any part thereof, in so far as they may think reasonable or expedient, provided that such weekly close time shall in no case be less than thirty-six hours.”

After evidence led, the Sheriff-substitute convicted the accused of the contravention charged in the complaint, and they craved a case, in which the Sheriff-substitute set forth as follows:—"The facts proved in evidence (which were not denied) were, that on the date libelled the tide was at high water about 5.30 P.M.; that this state of the tide occurs about the hour mentioned on a Saturday in each fortnight; that at 6 P.M. on said day the appellants could not fish and open the nets, so as to comply with the provisions of the bye-law to said Act; that the soonest time at which they could fish and put the nets out of fishing order was about eight o'clock of said night, at which time the said nets were opened, as provided by said bye-law; that the earliest time at which they could have been and were put into fishing order on the following Monday morning was about 11 A.M.; that the space of time during which the nets were thus out of fishing order was upwards of thirty-six hours; that in order to have ensured the nets in question not being in fishing order after 6 P.M., when such a state of the tide occurs on a Saturday, they should have been put out of fishing order about 8 A.M. of that day, after fishing the previous tide."

No. 4.

Dec. 14, 1891.
Irving v.
Phyn.

The question of law for the opinion of the High Court was,—“Whether, on the evidence adduced, the appellants were rightly convicted of the contravention charged; or whether, under the circumstances proved, the appellants sufficiently complied with the requirements of the statute in regard to the observance of the weekly close time, and so could not be legally convicted of said contravention?”

The case was heard in October, and continued to be reheard before a full bench.

Argued for the appellants;—The Sheriff-substitute had disregarded the case of *Osborne v. Anderson*,¹ which was on all-fours with the present case. But assuming that that case was ill decided, (1) looking to the strict letter of the complaint, there was no contravention of sec. 7 of the Act of 1862, but only of sec. 24 of the Act of 1868 and the relative bye-law, and in neither of them was any mention made of a time within which the operation enjoined was to be performed. The prosecution was not one for neglect to perform an operation in connection with the weekly close time, but for violating the close time itself. It was an implied condition that the operations should be performed at such a time as should not interfere with the weekly close time, but there was nothing to shew that they must be performed by 6 P.M., if in point of fact no practical injury resulted, *i.e.*, no fish were caught (as was the case), by prolonging the operation to a later period. But (2) the construction placed upon the Act by the Sheriff-substitute was not reasonable. The laws of nature operated once a fortnight to make it impossible to put the nets out of fishing order during the particular thirty-six hours specified in the statute. It was not reasonable to suppose that when this state of tide occurred, the Legislature meant that the fishermen should keep their nets out of order for fifty-one hours. The state of the tide, which made it impossible for them to comply with the statute, was *vis major*. The fairest way of construing the statute was to hold that there was sufficient compliance with its terms if an uninterrupted passage was left for the fish once a-week for thirty-six hours.

Argued for the respondent;—The provisions of section 7 of the Act of 1862 were unambiguous and imperative. If the Legislature had intended that there should be a different close time in districts where the tide varied, it would have said so. This was no case of *vis major*,² or of an occurrence

¹ *Osborne v. Anderson*, Nov. 4, 1887, 15 R. (Just. Cases) 12.

² *Cooper v. Tough*, April 22, 1874, 2 Couper, 547; *Parr v. Mitchell*, Feb. 24, 1890, 2 White, 434.

No. 4.

Dec. 14, 1891.
Irving v.
Phyn.

which could not be foreseen or provided for. The appellants were aware of the state of the tide on the occasion libelled, and deliberately risked being detected in evading the statute. The case of *Osborne* was badly decided. The judgment was pronounced in face of a strong dissent by Lord Rutherford Clark, and in any case it could not be authoritative in the present case, for it was decided on the ground (1) that there had been a long period of local practice, which the respondents in that case had been following, and (2) that the Court were unwilling in the circumstances to disturb a verdict of acquittal.

At advising,—

LORD ADAM.—This is an appeal against a judgment pronounced by the Sheriff-substitute of Dumfries and Galloway, by which he convicted the appellant of a contravention of the Salmon Fisheries Act, 1868, section 24, and 1 and 2 of the bye-laws annexed to it in Schedule D.

The clause of the Act of Parliament is very clear. It provides that “the proprietor, or, when let, the occupier, of every fishery at which stake, weir, or stake-nets, fly-nets, or bag-nets are used shall, in regard to such nets, do all acts required by any bye-law in force within the district,” and “for the due observance of the weekly close time”; and the bye-laws provide (1) “that in each and every stake, weir, or stake-net a clear opening of at least four feet in width from top to bottom shall be made and kept free from obstruction in each and every pouch, trap, or chamber of the same. (2) That the pouches, traps, or chambers of each and every fly-net shall be either raised and tied up to the upper ropes of same, or lowered and tied to the lower ropes, so as effectually to prevent the capture or obstruction of salmon.”

The weekly close time is provided for by section 7 of the Salmon Fisheries Act, 1862. It provides that the weekly close time shall, except for rod and line, continue from the hour of six o'clock on Saturday night to the hour of six o'clock on Monday morning. Now, the charge against the appellants is that they had contravened these statutes by failing to put their nets out of fishing order at six o'clock on Saturday night in observance of the weekly close time, and that is the offence of which they have been found guilty.

Now, the facts proved as stated in the case are that the nets were put out of fishing order at eight o'clock on Saturday night and not at six o'clock, and that they were not again put into fishing order until eleven o'clock on Monday forenoon. That being so, I think there has been a clear contravention of the statute. The answer that is made by the appellants to this charge is that the state of the tide was such that it was impossible to put the nets out of fishing order at six o'clock, that the soonest time they could put them out of fishing order was about eight o'clock, and that to have them out of fishing order at six o'clock they must have been put out of fishing order about eight in the morning, and so the fishermen would lose a tide. They further say that the fact that they were put into fishing order about eleven on Monday morning shews that the space of time they were out of fishing order was upwards of thirty-six hours.

It is contended that that is an unreasonable construction to put on the statute to insist that the nets should be out of fishing order at the fixed hour of six in the evening, entailing great loss upon the fishermen, and that all that is required is that there should be a weekly close time of thirty-six hours, beginning as near as possible to six o'clock on Saturday evening. The question is whether that is a good answer to the very clear and unambiguous words of the statute. I do not think that the construction of the statutes is doubtful.

The Act of 1862 provides for an annual and weekly close time. The annual close time is to extend to 168 days—no beginning is named, and no end. The weekly close time is much more precise. The Act says it shall continue from six o'clock on Saturday night to six o'clock on Monday morning. I think these words are too clear for construction. How they could be read as meaning any other hour I cannot understand. To come to any other conclusion than that it shall continue from that time is to read into the section words that are not there, such as, "or as near thereto as the tide will permit." It may well be, and I have no doubt it must be, the fact that it often happens that to have the nets out of fishing order at six o'clock on Saturday night they require to be put out of fishing order a tide beforehand. This is not a case of *vis major*, such as a sudden storm, or a case which could not have been foreseen and provided for, but one of which the occurrence was certain and might easily have been provided for. We must assume that the Legislature had this in view, and notwithstanding decided that they would make no alteration in the close time.

No. 4.

Dec. 14, 1891.

Irving v.
Phyn.

The appellants have founded here very strongly on the case of *Osborne v. Anderson*. But the facts in that case were very special, and holding as I do that the words of the statute are too clear for construction, I think that this appeal should be dismissed.

LORD M'LAREN.—This case illustrates one of the advantages of the elastic constitution of the Court of Justiciary, which enables us, in cases where there is an apparent conflict of opinion on the construction of a statute, to have the subject reconsidered by a larger number of Judges. I am not satisfied that in previous cases there was a real difference of opinion on the construction of the Salmon Fishing Acts, because the case of *Osborne v. Anderson* was an appeal against a sentence of absolvitor, and the Court were there considering whether they would interfere with the sentence of the Sheriff-substitute, who held that the respondent had not intentionally infringed the Act of Parliament. In deciding this question the Judges constituting the majority of the Court were, I think, chiefly influenced by the consideration that the question of the proper commencement of the weekly close time was a question calling for the intervention of the Commissioners, and the Sheriff-substitute having held that there was no intention to evade the Act, that the Court ought not to interfere with his judgment of acquittal.

I need hardly say that there is always a strong leaning against interfering with a judgment of acquittal. But the question is now raised as a pure question of construction, and it is argued that in place of the positive words contained in this section enacting a close time, which is to begin at six o'clock, we are to substitute a time of closing depending on the state of the tide. Now, it is perfectly obvious that the possibility of establishing a tidal close time was a consideration which could not have escaped the attention of those who were responsible for the preparation of the Act, and that if the Legislature had intended anything of the kind it would have been so enacted.

The establishment of a tidal close time would not have been an easy matter, because separate tables would have been required for the different rivers and districts, extending over the full period of ordinary variation of the tides, which is about eighteen years. Unless such tables were provided, every fisherman would choose his own time for putting his nets out of fishing order, with the result that there would not have been the period of free run for the fish which

No. 4.
Dec. 14, 1891.
Irving v.
Phyn.

was intended, and that it would have been very difficult to obtain a conviction. Therefore, I do not doubt that what the Legislature intended was to establish a definite number of hours when the nets were to be open and out of fishing order. It follows that in certain states of the tides four tides will be lost to the fishermen instead of three, but this cannot be helped. It is the necessary result of the condition of net-fishing, and of the provisions of the statute.

LORD TRAYNER.—The conviction in this case is of a contravention of the Salmon Fisheries (Scotland) Act, 1868, section 24, and sections 1 and 2 of bye-law Schedule D annexed to the Act, the charge against the appellants being, to put it shortly, that they had failed to observe the weekly close time. Now, the weekly close time is fixed by the Salmon Fisheries Act, 1862, in these terms—“The weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning”—and it would not have occurred to me that the Legislature when fixing a close-time could have fixed it in language more absolute or unambiguous than the language of that section. It is said, however, that that language is open to construction, and that in effect it meant, or may mean, not six o'clock on Saturday night to six o'clock on Monday morning, but any thirty-six hours convenient to the tides between Saturday afternoon and Monday forenoon. I cannot put that construction upon the section; the words mean precisely what they say. They do not say that the close time is to extend for thirty-six hours, but for certain specific hours, and if these hours are not observed, then a breach of the statute is committed. The words are precise and unambiguous, and I must hold that the Legislature in using them knew and had in view that in certain districts the tides would vary, but nevertheless provided that the weekly close time was to be everywhere the same. I am the more persuaded that this view is sound by the fact that there is a provision in the statute enabling a person who thinks he is injured by the existing close time to go to the District Commissioners and have the hours changed. As long, however, as it stands, the words of the section are clear and must be obeyed. With regard to the case of *Osborne v. Anderson*, I am not sure that the Judges who decided that case were of opinion that the section of the Act of 1862 was open to construction, as now contended for by the appellants. I think the Judges there were moved by the special circumstances (1) that there had been a long period of local practice which the respondents in that case had been following, and (2) that they were dealing with a verdict of acquittal, which they thought in the circumstances they were not called upon to disturb. But if that case is to be held as settling (and we were told by the appellants that it had been so regarded) that the section of the Act of 1862 is open to the construction and bears the meaning now contended for by the appellants, I cannot agree with it. I concur in the opinion of Lord Rutherford Clark in that case.

LORD WELLWOOD, LORD STORMONTH DARLING, and LORD LOW concurred.

LORD JUSTICE-CLERK.—As your Lordships are agreed upon your judgment, I have no vote, but I may be allowed to express my view, which is in accordance with the opinions expressed by your Lordships. It seems to me that the clause of the statute means that all fishing within the hours of the weekly close time shall be illegal. No words could be more distinct and

definite than those used in the statute. Any construction of the Act which would permit a fisherman to stop his fishing when he thought it a suitable time to put his nets out of fishing order would lead to confusion, and to there practically being no close time at all, or at least a much shorter close time than the thirty-six hours required by the Act. For a close time means a free passage throughout for the fish. But if the thirty-six hours are to be such hours as the fishermen may hold to be the most suitable, then one fisherman may put his nets out of fishing order before six on Saturday, and make that an excuse for commencing fishing before six on Monday morning. Another may count his close time from a later hour than six P.M. on Saturday. Thus there would be no fixed range of thirty-six hours of slap, and the intention of the statute would be defeated. I think the Act is quite clearly expressed, and is so unambiguous in its terms that it is not open to construction, and it is, I think, plain that any construction which would sanction nets being in fishing order at any time between the hours prescribed in the statute would in a greater or less degree defeat its plain purpose, which is that the water shall be absolutely free to the fish for thirty-six continuous hours.

No. 4.

Dec. 14, 1891.
Irving v.
Phyn.

THE COURT pronounced this interlocutor:—"The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered the case and heard counsel for the parties, find that the appellants were rightly convicted of the contravention charged: Dismiss the appeal: Find no expenses due, and decern."

JOHN CLERK BRODIE & SONS, W.S.—STRATHERN & BLAIR, W.S.—Agents.

WILLIAM BOYCE, Appellant.—*Aitken—Wilton.*

No. 5.

WILLIAM SHAW (Procurator-Fiscal of Glasgow Police Court), Respondent.
—*Lees—A. S. D. Thomson.*

Dec. 15, 1891.
Boyce v.
Shaw.

Oppression—Severity of sentence—Right of accused to adjournment of trial—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 11—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 132 and 135, art. 5.—In an appeal the following statements were made by the appellant: The appellant, a lad of nineteen, was apprehended in the streets of Glasgow shortly after midnight and taken to prison. Next morning he was brought before the magistrate, and asked to plead to a charge of riotous and disorderly behaviour under sec. 135 of the Glasgow Police Act, 1866, under which section (art. 5) the penalty for conviction of the offence was ten pounds, or alternatively without payment, imprisonment for sixty days. He pleaded not guilty, and, after evidence led, he was convicted, and sentenced by the magistrate to fourteen days' imprisonment. This was his first offence. He appealed under sec. 132 of the Glasgow Police Act, on the grounds (1) that the sentence was oppressively severe, and (2) that the magistrate had failed, in terms of section 11 of the Summary Procedure Act, 1864,* to inform him of his right to an adjournment for the purpose of preparing for his defence.

Held (1) that the sentence was in the discretion of the magistrate, and could not be reviewed by the High Court on a mere statement that it was severe; (2)

* The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 11,—“Any respondent brought before the Court by a warrant of apprehension under the authority of this Act shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period of not less than forty-eight hours; and such requisitions shall be complied with, if made before the examination of any witness on the merits shall have commenced. . . .”

No. 5.

Dec. 15, 1891.
 Boyce v.
 Shaw.

that there was nothing in the case to suggest to the magistrate that it was necessary as a matter of justice to inform the appellant of his right to an adjournment, and that the conviction could not be set aside on the ground that he had not done so.

Observed that while there was no legal obligation on a magistrate to inform an accused of his right to an adjournment for forty-eight hours, there might be circumstances in particular cases which might render it proper that he should do so, and that his not having done so might be a material circumstance in considering whether a conviction should be set aside.

Per Lord Justice-Clerk,—"In the case of a first offence, it would be very advisable" to inform the accused of his right to an adjournment.

HIGH COURT.
 Lord Justice-
 Clerk.
 Lord Adam.
 Lord Kin-
 cairney.
 Justiciary
 Clerk.

THIS was an appeal by William Boyce, machineman, Glasgow, under the Glasgow Police Act, 1866, sec. 132, to the Circuit Court of Justiciary, at Glasgow, and certified by Lord Adam to the High Court.

The appeal was against a conviction and sentence of fourteen days' imprisonment pronounced by the Stipendiary Police Magistrate (Gem-mell), upon a complaint at the instance of William Shaw, Procurator-fiscal of Court, charging the appellant and William Semple with having, "contrary to the Glasgow Police Act, 1866, sec. 135 (art. 5), thereof, on 10th June 1891, in Wilson Street, Glasgow, been riotous and disorderly in their behaviour by quarrelling and fighting with each other, whereby the lieges were annoyed and disturbed."

The penalty craved was a fine not exceeding £10 each, and, alternatively without payment, imprisonment for a period not exceeding sixty days each, in terms of article 5 of section 135 of the Act of 1866.

The following statements were made by the appellant :—The appellant (who had never been charged with an offence before) was returning home from a neighbour's house, with a man called Semple, shortly after midnight on 9th June, when they were both arrested by two police-officers and lodged in the police-cells. About eleven o'clock on the morning of the 10th they were brought before the magistrate, the charge was read over to them, and they were asked to plead in the usual way. They pleaded not guilty, and, after evidence led, the magistrate convicted them, and pronounced the sentence upon them above set forth, without opportunity afforded to them of being dealt with under the Probation of First Offenders Act, 1887, in the event of the charge being proved against them. The complainer was not prior to the trial informed that he was entitled to have the hearing adjourned for forty-eight hours, of which it was the duty of the magistrate to inform him, and in order that he might prepare for his defence. The sentence was in itself grossly severe. The police-officers were actuated by malice against him.

The reasons for the appeal were, *inter alia*;—"Third, The magistrate failed in his duty to inform the complainer of his right to an adjournment. Fourth, In any case, the sentence of fourteen days' imprisonment, without the option of a fine, was oppressive, and contrary to natural justice for a first offence of the trivial nature alleged; and the complainer was, in any event, also entitled to be dealt with under the provisions of the Probation of First Offenders Act, 1887, for which his relations or law-agent could have instructed circumstances had he had the opportunity of consulting them."

Argued for the appellant;—Under the 11th section of the Summary Procedure Act, 1864 (quoted p. 13, note), there was an obligation upon the magistrate to inform an accused person of his right to obtain an adjournment in order that he might prepare for his trial.¹ The magistrate's neg-

¹ *H.M. Advocate v. Goodall*, May 3, 1888, 2 White, p. 1, 15 R. (Just. Cases) 82; *Pyper v. Walker*, July 10, 1885, 5 Couper, 631, 12 R. (Just. Cases) 47;

lect to perform this very reasonable duty invalidated the proceedings. It was said that, as this complaint was not brought under the Act of 1864, its provisions could not be pleaded. But whether a complaint was brought under that Act, or as here under a local Act, the same procedure applied.¹ No. 5.
Dec. 15, 1891.
Boyce v. Shaw.

(2) The sentence was in the circumstances oppressively severe.²

Argued for the respondent;—The Summary Procedure Act, 1864, did not apply to this case. The case was brought under the Glasgow Police Act, 1866. But assuming that the former Act applied, and that its provisions could be pleaded, the 11th section merely provided that the accused should be entitled to “require” an adjournment. There was thus no obligation whatever laid upon the magistrate by the section to inform the prisoner that he was entitled to this privilege. At most it could only be said that the magistrate had abstained from doing something which he was not required by the statute to do. The case of *Pyper*³ was distinguishable from the present case. There there was a serious charge of theft, and the Court held that the accused ought to have had notice of it. Lastly, the punishment inflicted was a matter for the discretion of the magistrate, and could not be considered by the High Court.

LORD JUSTICE-CLERK.—The complainer who raises this appeal is a lad nineteen years of age, and he appeals against the conviction on the ground that he was oppressively treated, as the appeal states, “in being apprehended, charged, and sentenced for the trifling offence alleged, all within a few hours of one and the same day, and that without having the opportunity of advising with his relations and a law-agent, or citing witnesses, and otherwise preparing for his defence.”

Now, the offence is no doubt not of a very serious nature, but it is an offence for which a sentence of imprisonment without the option of a fine, and a sentence in certain cases very much in excess of what was awarded here, may be passed.

It certainly, however, does at first sight strike one as a somewhat strong and severe sentence in the case of a person who has not been in the hands of the police before; but I feel bound to say that the question whether a sentence of fourteen days’ imprisonment is a suitable and proper sentence to be pronounced in a certain case is a matter which is in the discretion of the magistrate, and I do not think that it is for the Appeal Court to judge at all in such a matter, and to decide that such a sentence was oppressive merely because of the character of the offence as stated in the complaint. The Appeal Court does not sit for the review of the severity of sentences. It can only consider whether it was a competent one for the magistrate to pronounce. If a magistrate were to take it into his head always to pronounce the highest sentence within his power in all cases, that would not be a ground for our interference, but it would be a public question suitable to be dealt with by the Crown through the Minister having the duty of advising the Sovereign in matters relating to the royal prerogative. I, however, desire to express no opinion definitely on the matter. I

Gardner v. Jones, March 4, 1890, 2 White, 474, 17 R. (Just. Cases) 44; Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 11.

¹ Wilson v. Sherry, June 29, 1887, 14 R. (Just. Cases) 46, 1 White, 410; Gray v. Dewar, July 18, 1889, 2 White, 290; M’Kenzies v. M’Phee, Jan. 28, 1889, 2 White, 188, 16 R. (Just. Cases), 53.

² Stevenson v. Lang, Sept. 7, 1878, 4 Couper, 76.

³ Pyper v. Walker, 5 Couper, 631, 12 R. (Just. Cases) 47.

No. 5.

Dec. 15, 1891.
Boyce v.
Shaw.

only say that, in an isolated case where a magistrate has pronounced what is called a severe sentence, it is not for the Appeal Court to interfere with that sentence on the ground of its severity.

It was said that the trial took place without opportunity afforded to the accused of citing witnesses, but I am afraid that that is just the course of proceeding in every summary case where there is no adjournment asked for.

Every prisoner apprehended by the police over night is brought up for trial next day before the Police Court, unless there is a rule in that Court to adjourn every case if no plea of guilty is tendered, or unless by statute there must be an adjournment.

The appellant here was tried at once without an opportunity being afforded him of communicating with his friends or citing witnesses.

I therefore think the real and crucial question comes to be whether or not the conviction is to be set aside on the ground that the magistrate failed in his duty to inform the appellant of his right to an adjournment.

I am dealing with the case of a person able to take care of himself—a young man of nineteen.

There is no doubt that a person accused is entitled to ask for and obtain an adjournment. Is it the duty of the magistrate in every case to inform a person accused that this is so? I have looked into the matter with great care, and after considering the decisions which have been pronounced in previous cases, I am not prepared to say that in the case of an adult there is any duty upon the magistrate to inform him of his right to an adjournment, although I cannot help saying in passing that in the case of a first offence it would, I think, be very advisable to do so.

Here, however, the only question we have to consider is whether it is a ground for setting aside the conviction that the magistrate did not inform the accused that if he chose he could have an adjournment of forty-eight hours. I have come to be of opinion that that question must be answered in the negative. I therefore move your Lordships to dismiss this appeal.

LORD ADAM.—This case came before me at Glasgow Circuit. I thought then that the appeal was not well founded, but at the request of the appellant, and because I considered it a case of importance, I certified it to the High Court.

The appellant was convicted under the Glasgow Police Act, 1866, particularly section 135, which provides for punishment of persons who had been "riotous and disorderly in their behaviour by quarrelling and fighting with each other whereby the lieges were annoyed and disturbed." He was sentenced to fourteen days' imprisonment without the option of a fine. There is no question here of the competency of the magistrate to inflict the punishment. This appeal is brought under the 132d section of that Act, upon the ground, and, as was admitted, the only competent ground, of legal oppression, and the question we have to consider is, whether the circumstances shew there was oppression.

Now, the facts to be gathered from the complaint seem to be these,—This appellant and another lad were apprehended in the streets of Glasgow after midnight. They were lodged in the police cells for the night, and the next day about eleven o'clock they were brought before the magistrate. The complaint was read over to them, and they were asked to plead in the usual way. They pleaded not guilty, evidence was led, the magistrate convicted them, and sentenced them to fourteen days' imprisonment. Now, so far as I can see, every-

thing was done in the regular manner, but it is said there was oppression because they were not informed that they could have demanded an adjournment for forty-eight hours.

No. 5.

Dec. 15, 1891.
Boyce v.
Shaw.

A question was raised whether the 11th section of the Summary Procedure Act, 1864, applies to such a case as the complainers'. It is not material to decide that question, because even if it does, that Act imposes no duty upon the magistrate to inform any prisoner of his right to have an adjournment.

The Act imposes no duty upon the magistrate, but it puts it in the power of the prisoner to require the magistrate to adjourn, and it is his duty to do so if required, but the duty is upon the accused, not upon the magistrate. If there is no legal obligation upon the magistrate to inform the prisoner of his power to ask for an adjournment, the fact that he did not do so cannot be held a reason for setting a conviction aside.

Although, however, there may be no legal obligation on the magistrate to inform the accused of his rights, it may be right and proper in the circumstances of a particular case that he should do so. The character and gravity of the offence, the age of the accused, the nature of the defence, and other circumstances, are what a magistrate might very well consider in exercising his discretion in the matter, and his not having done so may be a very material circumstance in considering whether a conviction should be set aside or not. But I agree with your Lordship in the chair that there is nothing in this case to suggest to the magistrate that as a matter of justice it was necessary to inform the accused of their right to an adjournment. The offence charged was trivial, and the accused was of an age at which he was quite capable of looking after himself.

The only other question raised by this complaint is on account of certain averments that the witnesses upon whose evidence the appellant was convicted were actuated by malice towards him and his companion. If that statement had been made to the magistrate at the trial I have no doubt it would have had weight with him in the question of adjournment, but it is not even said that such a statement was made to the magistrate at the time. I think it is altogether impossible to set aside a conviction obtained after a regularly conducted trial because the accused now come forward and say that if the magistrate had adjourned for forty-eight hours they could have shewn that the witnesses were actuated by malice.

LORD KINCAIRNEY.—I concur. I do not think that the 11th section of the Summary Prosecutions Appeals Act imposes on the magistrate any absolute obligation to inform an accused person that he has a right to ask for an adjournment, and therefore I cannot say that the magistrate has in this case violated any statutory duty. I do not, however, say that cases may not arise in which a conviction would be set aside because the magistrate had not given an adjournment or has not informed the accused of his right. In this case where it is said that the accused had never been tried at a Police Court before, I certainly think that it would have been better if his right to demand an adjournment had been explained to him.

THE COURT dismissed the appeal.

SCOTT & LOGAN, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 6.

Dec. 15, 1891.
Robertson v.
Malcolm.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

JOHN ROBERTSON, Applicant.—*Lees—Hunter.*

JOHN MALCOLM (Procurator-Fiscal of Burgh Court of Dumfries),
Respondent.—*A. J. Young.*

Appeal—Conditions of—Payment of fees—38 and 39 Vict. c. 62 (Summary Prosecutions Appeals Act, 1875), sec. 3 (1) (2).—The 3d section of the Summary Prosecutions Appeals Act, 1875, provides, (1) "The appellant shall not be entitled to have a case stated and delivered to him unless within . . . three days he shall . . . (2) pay the Clerk of Court his fees for preparing the case."

Held that the condition was absolute, and that the Court had no power to dispense with implement of it.¹

ALEXANDER WYLIE, S.S.C.—WHIGHAM & COWAN, S.S.C.—Agents.

No. 7.

Dec. 15, 1891.
Ross v.
M'Leod.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

ROBERT ROSS, Applicant.—*Glegg.*

NEIL M'LEOD, Respondent.—*Maclaren.*

ALEXANDER FRASER (Sheriff-substitute of Inverness), Respondent.—
Maclaren.

Procedure—Statement of case—"Frivolous"—38 and 39 Vict. c. 62 (Summary Prosecutions Appeals Act, 1875), sec. 4.—The Court will be slow to interfere with the discretion of the inferior Judge who refuses to state a case on the ground that the application to him to do so is frivolous,* if it appears that the facts of the case raise no question of law.

NEIL MACLEOD was charged at the instance of Robert Ross, a private prosecutor, before the Sheriff-substitute (Fraser) at Portree, with an offence under the "Act for the more effectual preservation of the game in that part of Great Britain called Scotland" (13 Geo. III. c. 54), in respect he had in his possession on a day libelled certain game, he not being a person qualified to kill game or to have game in his possession, and being without leave or orders from any person so qualified to have it in his possession.

The Sheriff-substitute, on 10th November 1891, after evidence led, found the charge not proven. Ross' agent required the Sheriff-substitute to state a case. He refused, because he thought the application was "frivolous," and stated in his certificate of refusal,—"No objection to the relevancy or to the competency or admissibility of evidence was stated or taken at the trial. No documentary evidence was produced or tendered, and no question of law arose."

Ross thereupon presented a note under the 5th section of the statute asking for an order on the "inferior Judge and the said Neil Macleod to shew cause why a case should not be stated in terms of" the statute. In the note it was stated that "at the trial . . . it was proved that" Macleod, "on the day libelled, pointed out to Donald Macdonald, a clerk in the office of the" railway company, on whose premises the game was, "a box . . . which he said was his, and which he directed the clerk to send off by steamer; that later on the same day he returned to the railway office and asked the officials there to hide the said box. The said box, on being opened, was found to contain a number of grouse and partridges. The Sheriff-substitute found that the box not having been

¹ *Authorities cited by applicant.*—Thom v. Caledonian Railway Co., Nov. 12, 1886, 14 R. (Just. Cases) 5, 1 White, 248, and M'Gregor v. Rose, Nov. 3, 1887, 15 R. (Just. Cases) 10, 1 White, 477.

* 38 and 39 Vict. c. 62, sec. 4,—“It shall be lawful for an inferior Judge to refuse any application made to him under this Act to state and sign a case, should he consider such application to be frivolous.”

proved to have been actually in the hands and physical possession of the accused, the charge was not proven." No. 7.

At the hearing on this note the applicant argued;—The statement in the note must in the meantime be taken *pro veritate*, and it indicated plainly a question of law, viz., must possession under the statute be actual, or might it be constructive? Such a question had been treated as a question of law.¹ Dec. 15, 1891.
Ross v.
Macleod.

Argued for the respondents;—If the Sheriff-substitute could not state a point of law the application to him was frivolous. Now, his judgment simply found the charge not proven. He now desired to state that this question of constructive possession had never entered into his mind. He found it not proven that there was any connection between Macleod and the box.

LORD TRAYNER—Under the statute the inferior Judge has a discretion whether he shall state or refuse to state a case, and that is a discretion with which this Court should not be forward to interfere. At the same time I should be jealous of the exercise of that discretion in any case where a question of law might arise out of the facts. But the Sheriff-substitute states through his counsel that on the facts which were proved here no question of law arose or could arise.

That being so, I am of opinion that we should not interfere.

The **LORD JUSTICE-CLERK** and **LORD RUTHERFURD CLARK** concurred.

THE COURT refused the application.

A. B. C. WOOD, W.S.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

MARTIN LANGSTON HOWMAN (Procurator-Fiscal for Orkney), Appellant.— No. 8

Lord-Adv. Pearson—Wallace, A.-D.

ALEXANDER ROSS, Respondent.—*Watt.*

Dec. 15, 1891.
Howman v.
Ross.

Procedure—Alibi—Notice of—Summary procedure.—A person tried before a Court of summary jurisdiction is not required to give notice of a defence of *alibi*.

ALEXANDER ROSS, master of the steam trawler "North Coast," was tried summarily before Sheriff-substitute Armour at Kirkwall for a contravention of the Herring Fishery Act, 1889, and the amending Act of 1890, by trawling within three miles of low water-mark at a certain place. After the case for the prosecution was closed, in which the witnesses deponed to the offence having taken place at the place libelled, about 5 P.M. on the day libelled, the panel proceeded to call witnesses. On the first of these being sworn the panel intimated that he intended to prove that the "North Coast" left the place libelled at 6 A.M. on the day libelled, and had not since returned to it. HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

The procurator-fiscal objected to this evidence being allowed, in respect it was a defence of *alibi*, of which no notice had been given.

The panel answered that it was not such a defence of *alibi* as in any case to require notice or to admit of it, and that, even if it was, notice was not required in a summary proceeding.

The Sheriff-substitute repelled the objection, and admitted the evidence. He afterwards found the charge not proven.

A case was stated at the request of the procurator-fiscal, submitting to

¹ Wood v. Collins, June 2, 1890, 17 R. (Just. Cases) 55, 2 White, 497; Mackenzie v. Lockhart, Oct. 27, 1890, 18 R. (Just. Cases) 1, 2 White, 534; Young v. Jamieson, Jan. 26, 1891, 18 R. (Just. Cases) 20, 2 White, 581.

No. 8. the Court for opinion these questions, viz. :—“(1) Does written notice, or any notice, of an *alibi* require to be given to a prosecutor prosecuting under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887? (2) In the circumstances stated, was the evidence for the respondent competently admitted without written notice of the defence he was to state having been lodged with the procurator-fiscal?”

Dec. 15, 1891.
Howman v.
Ronn.

The appellant argued ;—(1) There was, it was admitted, no practice requiring notice, and, again, it was true that the statute did not require notice, and that in the Justiciary Court it was required by statute,¹ and in Sheriff and Burgh Courts by Act of Adjournal.² But the same considerations as applied in the former classes of cases³ applied in summary cases, and this High Court had power to regulate procedure in all inferior judicatories. The summary nature of the proceedings made it impossible, it was true, to give long notice, but the panel should give notice at least before the prosecutor's case was closed. (2) The defence here was in truth an *alibi*, and whenever such a defence was set up as a substantive defence notice of it must be given. [LORD JUSTICE-CLERK.—Take the case of a man charged with robbing another of his watch in a room in a public-house. The Crown does not examine the keeper of the house, but the panel calls him, and he depones that the panel passed out just before the person robbed came in. Must notice be given of that?] Not if the witness was on the Crown list; for there the Lord Advocate could not say that he was taken by surprise. If he was not on the list, notice was necessary, and the prisoner's protection was the well-known fairness of the Crown in such matters.

Argued for the respondent ;—(1) The appellant by his admissions had made his appeal hopeless. He admitted that there was no practice, no statute, and no Act of Adjournal to require notice; how could he, then, maintain that it was required by law? Besides, it was impossible to give notice, for the proceedings might take place within forty-eight hours of the offence. Besides, of what use would notice be to the prosecutor? It was not proposed to order the panel to give in a list of witnesses. Why then ask him to give notice,—the object of the notice being to give the prosecutor time to test the witnesses who were to be adduced?⁴ It was noticeable that the Act of 1887⁵ in its 71st section, declaring what should be the conditions of summary procedure, did not mention this as one of them. (2) But this was not such an *alibi* as to require notice. No one was required to give notice of an *alibi* unless it was of such a character as made it impossible that he could commit the offence.⁶ Now, the panel was at the place libelled on the day libelled, and, till he knew what hour of the day was to be named as the hour of his crime, he had not a defence of *alibi* to offer.

LORD JUSTICE-CLERK.—There is a general latitude allowed to the prosecutor in charges of crime, so that he shall not be too closely tied up as regards time in proving his charge, on the general assumption that it is not of any great consequence on what exact day of the week or hour of the day the act charged was done. Exactitude of time is not generally necessary, unless a special defence applicable to time is raised. For example, in a case of theft the prosecutor may

¹ 20 Geo. II. c. 43 (Heritable Jurisdictions Abolition Act), sec. 41.

² 17th March 1827.

⁴ Alison, ii., p. 48.

³ See Hume, ii., p. 399.

⁵ 50 and 51 Vict. c. 35.

⁶ Alison, ii., p. 625.

take a latitude of three months, and nothing requires to be stated or established in evidence about the minute or even the hour of the theft to justify conviction, unless the accused makes such allegations as necessarily give importance to the question of exact time.

No. 8.

Dec. 15, 1891.

Howman v. Ross.

The prosecutor in a case which is to be tried by a jury is entitled to have notice of a defence of *alibi*, viz., a defence to this effect,—“At the time you allege I was in such and such a place, I was not there, but at some other place.” In such a case the prosecutor is thus put upon his inquiry as to the exact time when the act charged was committed, and he is not entitled to skip about from one time to another. Take the case, *e.g.*, of the theft of a watch, it is not necessary to prove at what hour of the day this was done, but if the panel says that he was not at the place of the theft at the particular time when it took place, the prosecutor must be exact.

But that is the law on cases tried on indictment, and was applicable to the High Court alone; and when it was necessary to extend that to the Sheriff or Burgh Courts this was done by Act of Adjournal.

Here we are dealing with summary procedure. In the case of trial on indictment the panel is entitled to have notice of witnesses and documents, by having lists of both furnished to him. If upon that notice he finds that he can prove that he was not at the place at the time to which the witnesses or other evidence point as the time of the offence, he then must give notice of his intention to prove that he was not there but at another place.

It is suggested now, that in a case where there is no such privilege, where no such notice is given, where there are no *induciae* for inquiry by the prosecutor and accused, and where the panel is not entitled to know what evidence is to be led, still, if the panel is going to prove an *alibi*, he must give notice of his intention.

It is not said that there is any practice to this effect; there is certainly no statute requiring such procedure, and there is nothing of the kind suggested by the institutional writers. We cannot introduce any practice by a decision, and, if we could, we should require to lay down a great deal more, and to require a list of witnesses and of productions to be furnished to the panel.

But a summary prosecution must be conducted in a prompt manner, and many things that are required in more important cases cannot be required in summary procedure.

I have no doubt therefore that the Sheriff-substitute was right in not excluding the evidence here. There is therefore no ground for sustaining this appeal.

LORD RUTHERFURD CLARK.—We have to determine a general question, viz., whether a person tried before a Court of summary jurisdiction is required to give notice of a defence of *alibi*. I therefore disregard the special circumstances of the case.

It is certain that there is such a rule in the Court of Justiciary, but it is as certain that that depends on statute. Again, it is certain that the same rule obtains in prosecution in the Sheriff Court in cases tried there with a jury, but the rule there obtains in virtue of an Act of Adjournal. There is no other law requiring such notice.

In my opinion it follows that for trials in Courts of summary jurisdiction the accused is not bound to give notice of the defence of *alibi*. I see no such statutory or common law obligation.

No. 4.

Dec. 14, 1891.
Irving v.
Phyn.

was intended, and that it would have been very difficult to obtain a conviction. Therefore, I do not doubt that what the Legislature intended was to establish a definite number of hours when the nets were to be open and out of fishing order. It follows that in certain states of the tides four tides will be lost to the fishermen instead of three, but this cannot be helped. It is the necessary result of the condition of net-fishing, and of the provisions of the statute.

LORD TRAYNER.—The conviction in this case is of a contravention of the Salmon Fisheries (Scotland) Act, 1868, section 24, and sections 1 and 2 of by-law Schedule D annexed to the Act, the charge against the appellants being, to put it shortly, that they had failed to observe the weekly close time. Now, the weekly close time is fixed by the Salmon Fisheries Act, 1862, in these terms—“The weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning”—and it would not have occurred to me that the Legislature when fixing a close-time could have fixed it in language more absolute or unambiguous than the language of that section. It is said, however, that that language is open to construction, and that in effect it meant, or may mean, not six o'clock on Saturday night to six o'clock on Monday morning, but any thirty-six hours convenient to the tides between Saturday afternoon and Monday forenoon. I cannot put that construction upon the section; the words mean precisely what they say. They do not say that the close time is to extend for thirty-six hours, but for certain specific hours, and if these hours are not observed, then a breach of the statute is committed. The words are precise and unambiguous, and I must hold that the Legislature in using them knew and had in view that in certain districts the tides would vary, but nevertheless provided that the weekly close time was to be everywhere the same. I am the more persuaded that this view is sound by the fact that there is a provision in the statute enabling a person who thinks he is injured by the existing close time to go to the District Commissioners and have the hours changed. As long, however, as it stands, the words of the section are clear and must be obeyed. With regard to the case of *Osborne v. Anderson*, I am not sure that the Judges who decided that case were of opinion that the section of the Act of 1862 was open to construction, as now contended for by the appellants. I think the Judges there were moved by the special circumstances (1) that there had been a long period of local practice which the respondents in that case had been following, and (2) that they were dealing with a verdict of acquittal, which they thought in the circumstances they were not called upon to disturb. But if that case is to be held as settling (and we were told by the appellants that it had been so regarded) that the section of the Act of 1862 is open to the construction and bears the meaning now contended for by the appellants, I cannot agree with it. I concur in the opinion of Lord Rutherford Clark in that case.

LORD WELLWOOD, LORD STORMONTH DARLING, and LORD LOW concurred.

LORD JUSTICE-CLERK.—As your Lordships are agreed upon your judgment, I have no vote, but I may be allowed to express my view, which is in accordance with the opinions expressed by your Lordships. It seems to me that the clause of the statute means that all fishing within the hours of the weekly close time shall be illegal. No words could be more distinct and

the chase, would offend against its provisions. This, the only reasonable interpretation, was the interpretation which had been put on the English and Irish Statute (12 and 13 Vict. c. 92), expressed in the same words, by the English and Irish Judges.¹

No. 9.

Dec. 18, 1891.
Brown v.
Renton.

Argued for the respondent;—It was true that the Scots statute was in the same terms as the English one, but the English and Irish decisions were not binding upon this Court. The words “as aforesaid” in the statute were joined to the words “other animal,” and were obviously meant to refer to the words in the beginning of the section, “whether of domestic or wild nature.”

LORD YOUNG.—This case presents to us exactly the same question as was presented to the Queen’s Bench in the case of *Clark v. Hague*. The question is in no way different although that case depended on an English, and this depends on a Scots statute, because the two statutes were passed for the same purpose by the same Parliament, and are expressed in the same language. Mr Wallace admitted at the outset of his speech that, if we were to construe the statute in the same way as it was construed in England, he could not maintain the conviction. I am of opinion that we should construe it in the same way as the English Judges did, not only in the case to which I have referred, but in another case in 1863, and as the Irish Judges did in a case in their Courts.

It would not be seemly for us to put a different construction on the language of a statute passed by the same Parliament for the same purpose, the language being identical. The argument against the decision which has been reached is quite intelligible, and I can fancy lawyers arriving at different results on the point, but I am of opinion that it is fitting we should adhere to the interpretation which has been put upon the statute in these decisions.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

THE COURT quashed the conviction.

JAMES SKINNER, S.S.C.—CROWN AGENT—Agents.

GEORGE ROBERTSON RATTRAY, Complainer.—*A. S. D. Thomson.*

JOHN WHITE, Respondent.—*A. J. Young.*

No. 10.

Dec. 18, 1891.
Ratray v.
White.

Review—Suspension—Public-Houses Act Amendment Act, 1862 (25 and 26 Vict. cap. 35).—A person who had been convicted of an offence against the Public Houses Acts by trafficking in spirits without a certificate, brought a suspension of the conviction, alleging that the holder of a licence for the premises in question had executed a trust for creditors, that the licence was in force, that the trustee had put him (the complainer) in charge of the business till a purchaser for it should be obtained, and that he was simply acting as the trustee’s servant. He pleaded that the facts involved no contravention, and that the proceedings were oppressive. The Court *refused* the suspension, on the ground that by the Public-Houses Act Amendment Act, 1862, the judgment of the magistrate was final on the facts, and that if the magistrate thought the facts warranted a conviction, there was no oppression.

Observed that if the complainer wished to raise the legal question whether the facts proved warranted the charge of contravention he should have asked the magistrate to state a case.

Opinion that if the facts set forth by the complainer had been found as the

¹ See *Clark v. Hague*, 1859, 2 Ellis & Ellis, 281; *Morley v. Greenhalgh*, 1863, 3 B. & S. 374; *Budge v. Parsons*, *ibid.*, p. 379; *Coyne v. Brady*, 1862, 12 Ir. C. L. Reps. (N. S.) 577.

No. 5.

Dec. 15, 1891.
Boyce v.
Shaw.

that there was nothing in the case to suggest to the magistrate that it was necessary as a matter of justice to inform the appellant of his right to an adjournment, and that the conviction could not be set aside on the ground that he had not done so.

Observed that while there was no legal obligation on a magistrate to inform an accused of his right to an adjournment for forty-eight hours, there might be circumstances in particular cases which might render it proper that he should do so, and that his not having done so might be a material circumstance in considering whether a conviction should be set aside.

Per Lord Justice-Clerk,—"In the case of a first offence, it would be very advisable" to inform the accused of his right to an adjournment.

HIGH COURT.
Lord Justice-
Clerk.
Lord Adam.
Lord Kin-
cairney.
Justiciary
Clerk.

THIS was an appeal by William Boyce, machineman, Glasgow, under the Glasgow Police Act, 1866, sec. 132, to the Circuit Court of Justiciary, at Glasgow, and certified by Lord Adam to the High Court.

The appeal was against a conviction and sentence of fourteen days' imprisonment pronounced by the Stipendiary Police Magistrate (Gem-mell), upon a complaint at the instance of William Shaw, Procurator-fiscal of Court, charging the appellant and William Semple with having, "contrary to the Glasgow Police Act, 1866, sec. 135 (art. 5), thereof, on 10th June 1891, in Wilson Street, Glasgow, been riotous and disorderly in their behaviour by quarrelling and fighting with each other, whereby the lieges were annoyed and disturbed."

The penalty craved was a fine not exceeding £10 each, and, alternatively without payment, imprisonment for a period not exceeding sixty days each, in terms of article 5 of section 135 of the Act of 1866.

The following statements were made by the appellant:—The appellant (who had never been charged with an offence before) was returning home from a neighbour's house, with a man called Semple, shortly after midnight on 9th June, when they were both arrested by two police-officers and lodged in the police-cells. About eleven o'clock on the morning of the 10th they were brought before the magistrate, the charge was read over to them, and they were asked to plead in the usual way. They pleaded not guilty, and, after evidence led, the magistrate convicted them, and pronounced the sentence upon them above set forth, without opportunity afforded to them of being dealt with under the Probation of First Offenders Act, 1887, in the event of the charge being proved against them. The complainer was not prior to the trial informed that he was entitled to have the hearing adjourned for forty-eight hours, of which it was the duty of the magistrate to inform him, and in order that he might prepare for his defence. The sentence was in itself grossly severe. The police-officers were actuated by malice against him.

The reasons for the appeal were, *inter alia*;—"Third, The magistrate failed in his duty to inform the complainer of his right to an adjournment. Fourth, In any case, the sentence of fourteen days' imprisonment, without the option of a fine, was oppressive, and contrary to natural justice for a first offence of the trivial nature alleged; and the complainer was, in any event, also entitled to be dealt with under the provisions of the Probation of First Offenders Act, 1887, for which his relations or law-agent could have instructed circumstances had he had the opportunity of consulting them."

Argued for the appellant;—Under the 11th section of the Summary Procedure Act, 1864 (quoted p. 13, note), there was an obligation upon the magistrate to inform an accused person of his right to obtain an adjournment in order that he might prepare for his trial.¹ The magistrate's neg-

¹ H.M. Advocate v. Goodall, May 3, 1888, 2 White, p. 1, 15 R. (Just. Cases) 82; Pyper v. Walker, July 10, 1885, 5 Couper, 631, 12 R. (Just. Cases) 47;

were nimious and oppressive, and I am of opinion that these are grounds on which this bill of suspension cannot be sustained. It is not open to us to review the sentence of the magistrate on the first of these grounds, such review being expressly excluded by the Public-Houses Amendment Act, 1862, by the terms of which the judgment of the magistrate is made final on the facts. And it follows that we cannot suspend the conviction on the second ground, for if the magistrate thought the facts proved warranted a conviction, the proceedings were neither nimious nor oppressive. The complainer has, I think, unfortunately mistaken the form of his remedy. Under a bill of suspension the objections which can be pleaded against a conviction are those which appear on the face of the proceedings. No such objections appear here, or are said to appear. I fancy the real question which the suspender wished to raise was the legal question whether the facts proved amounted in law to the contravention charged. But this question should have been raised in a case stated by the magistrate. It cannot be raised under a suspension.

I desire, however, to say, to prevent it being supposed that I differ from the observations made by the Court in the decision of the case of *Wylie v. Thom*, July 4, 1889, 2 White, 269, that if the facts proved before the magistrate amounted to no more than what is stated by the complainer in the present suspension, the conviction now in question was not warranted, and that the complainer should have been acquitted of the charge. In the circumstances of this case I think no expenses should be allowed.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT refused the suspension.

MARCUS J. BROWN, S.S.C.—R. P. STEVENSON, S.S.C.—Agents.

PETER BATCHEN, Complainer.—*Salvesen*.
ALEXANDER MORRISON (Procurator-Fiscal of Burgh Court at Elgin),
Respondent.—*C. J. Guthrie*.

No. 11.

Jan. 9, 1892.
Batchen v.
Morrison.

Public-Houses Amendment Act, 1862 (25 and 26 Vict. cap. 35), sec. 20—Illegal trafficking in exciseable liquors—Relevancy.—The Public-Houses Act Amendment Act, 1862, enacts, section 20, that “it shall be lawful for a magistrate upon being satisfied by the personal examination on oath of a credible witness that there is reasonable ground for believing that exciseable liquors are trafficked in” within any “premises not licensed for the sale thereof or by any person not having a licence to sell exciseable liquors in or at such house or premises, or that such liquors are illegally kept for sale or for the purpose of being trafficked in at such house or premises,” to grant warrant to the police to enter such premises, to search for exciseable liquors, “and if the same be found in such house or premises exceeding one gallon, to seize such exciseable liquors, . . . and the person occupying or using the premises where such liquors shall be found, as aforesaid, shall thereby be guilty of an offence. . . .”

Held that to make a relevant charge under section 20 it was not sufficient to set forth that a magistrate, upon being satisfied by the personal examination on oath of a credible witness that there was reasonable ground for believing that exciseable liquors were trafficked in within unlicensed premises occupied by the accused, had granted a warrant to search the premises, and that upon its execution exciseable liquor had been found therein exceeding one gallon, but that it was necessary to set forth in addition that the liquors found were trafficked in or were kept for the purpose of traffic.

No. 5.

Dec. 15, 1891.
 Boyce v.
 Shaw.

only say that, in an isolated case where a magistrate has pronounced what is called a severe sentence, it is not for the Appeal Court to interfere with that sentence on the ground of its severity.

It was said that the trial took place without opportunity afforded to the accused of citing witnesses, but I am afraid that that is just the course of proceeding in every summary case where there is no adjournment asked for.

Every prisoner apprehended by the police over night is brought up for trial next day before the Police Court, unless there is a rule in that Court to adjourn every case if no plea of guilty is tendered, or unless by statute there must be an adjournment.

The appellant here was tried at once without an opportunity being afforded him of communicating with his friends or citing witnesses.

I therefore think the real and crucial question comes to be whether or not the conviction is to be set aside on the ground that the magistrate failed in his duty to inform the appellant of his right to an adjournment.

I am dealing with the case of a person able to take care of himself—a young man of nineteen.

There is no doubt that a person accused is entitled to ask for and obtain an adjournment. Is it the duty of the magistrate in every case to inform a person accused that this is so? I have looked into the matter with great care, and after considering the decisions which have been pronounced in previous cases, I am not prepared to say that in the case of an adult there is any duty upon the magistrate to inform him of his right to an adjournment, although I cannot help saying in passing that in the case of a first offence it would, I think, be very advisable to do so.

Here, however, the only question we have to consider is whether it is a ground for setting aside the conviction that the magistrate did not inform the accused that if he chose he could have an adjournment of forty-eight hours. I have come to be of opinion that that question must be answered in the negative. I therefore move your Lordships to dismiss this appeal.

LORD ADAM.—This case came before me at Glasgow Circuit. I thought then that the appeal was not well founded, but at the request of the appellant, and because I considered it a case of importance, I certified it to the High Court.

The appellant was convicted under the Glasgow Police Act, 1866, particularly section 135, which provides for punishment of persons who had been “riotous and disorderly in their behaviour by quarrelling and fighting with each other whereby the lieges were annoyed and disturbed.” He was sentenced to fourteen days’ imprisonment without the option of a fine. There is no question here of the competency of the magistrate to inflict the punishment. This appeal is brought under the 132d section of that Act, upon the ground, and, as was admitted, the only competent ground, of legal oppression, and the question we have to consider is, whether the circumstances shew there was oppression.

Now, the facts to be gathered from the complaint seem to be these,—This appellant and another lad were apprehended in the streets of Glasgow after midnight. They were lodged in the police cells for the night, and the next day about eleven o’clock they were brought before the magistrate. The complaint was read over to them, and they were asked to plead in the usual way. They pleaded not guilty, evidence was led, the magistrate convicted them, and sentenced them to fourteen days’ imprisonment. Now, so far as I can see, every-

proved that the liquor was kept there for an illegal purpose. Section 20 No. 11.
could not be so construed as to simply mean that anyone might be
convicted provided he had more than a gallon of liquor in his house, if
only he was suspected of selling it. Jan. 9, 1892.
Batchen v.
Morrison.

Argued for respondent;—The terms of section 20 were quite plain, and amounted to this, that if a man had an information sworn against him that there was reasonable ground for believing that he was carrying on an illegal traffic in exciseable liquors, and if a constable with a warrant entered the house and found there more than a gallon of such liquors these facts averred and proved were enough for a conviction.

At advising,—

LORD RUTHERFURD CLARK.—The complaint is laid on the 20th section of the Public-Houses Act, 1862. It sets out (1) that the defender had no licence for the sale of exciseable liquors at his dwelling-house; (2) that more than a gallon of such liquors were found in it; and (3) that they were seized by virtue of a warrant issued by a magistrate on being satisfied by the personal examination on oath of a credible witness that there was reasonable ground for believing that exciseable liquors were being trafficked in within the said dwelling-house. On the allegation of these facts it prays that the defender shall be found guilty of an offence under the Act.

If the charge is relevant, it follows that on the facts alleged being proved the magistrate must convict. It would be inadmissible to enter on any other or further inquiry. The accused might shew that he had a licence; that a gallon of liquor was not found on his premises; that no warrant was issued; that no witness was examined on oath, or that the person who was examined was not a credible witness. He would have no other defence. He would not be allowed to prove that he did not traffic in the liquors which he possessed, and that he had no purpose of such traffic. Such an offer of proof would be set aside as impertinent to the inquiry. Nay more, it was conceded by the counsel for the respondent that if the witness on whose oath the warrant was issued appeared at the trial, and deposed that he had made an entire mistake, it would not avail the accused. Perhaps the more logical legal view is that the magistrate would be obliged to reject such evidence as inadmissible.

It follows that a conviction obtained under such a complaint is based on the reasonable belief of one credible witness examined outwith the presence of the accused. It is based on a mere probability, to the exclusion of all inquiry into the truth, and the accused would be convicted though he had the means of proving with certainty that he had no guilty purpose.

A construction of the statute which enables a conviction to be obtained on such grounds as these is repugnant to every principle of justice. I admit that if it be the true construction we must enforce it. We have no choice but to obey. But I think that I am entitled to say that I shall not adopt a construction so manifestly unjust, unless no other is possible.

The purpose of the statute is to require that only licensed persons shall traffic in exciseable liquors, and to put down the traffic in such liquors by unlicensed persons. Trafficking in such liquors by unlicensed persons is an offence. The possession of such liquors by such persons for the purpose of traffic may reasonably be supposed to come within the purview of the statute. But the mere possession of such liquors is not a contravention of the Act. If it were, most of Her Majesty's subjects would be offenders.

No. 11.

Jan. 9, 1892.
Batchen v.
Morrison.

By the 13th section a certain class of premises are subject to the supervision of the police, and these include licensed hotels, inns, and public-houses, and also the premises of grocers and provision-dealers trading in exciseable liquors. But dwelling-houses are not subject to this supervision, nor any other premises than those enumerated in the section to which I have referred. It is obvious that an illegal traffic might be carried on in such premises without any means of detection unless some remedy were provided. In consequence the 20th section provides for the issue of a search warrant applicable to all premises whatever, when there is reasonable ground for believing that an illegal traffic is carried on. The purpose of the search warrant is to enable the authorities to detect an offence which they believe to have been committed. But, unless there be a plain declaration to the contrary, the offence must consist in the actual truth of those facts which, on the issue of the search warrant, were suspected to exist.

The section proceeds to declare that if on the execution of the search warrant more than a gallon of exciseable liquors is found, "the person occupying or using the premises where such liquors shall be found as aforesaid" shall be guilty of an offence. What is this offence? It cannot consist in the mere possession of the liquor. If we look at the intendment of the Act, it must, I think, consist in the possession of the liquor for the purpose of traffic, for its intendment was to put down unlicensed traffic. On a very literal construction of the words, it is possible to hold that it consists in the liquors being found on the execution of the statutory search warrant. But such a construction is not only repugnant to justice and legal principle, but is also, I think, inconsistent with the purpose of the statute. I cannot therefore adopt it. I cannot hold that the Legislature intended such a manifest injustice. Nor in refusing to adopt this construction do I in any way limit the beneficial operation of the statute. For I hold that the statute was not intended to stop illegal traffic which any witness however credible believed to exist, but such illegal traffic as did in fact exist. Some words may be omitted which were necessary to make the statute clear. But they may, I think, be legitimately supplied by construction. I construe the words "where such liquors shall be found as aforesaid" as involving the truth of the fact, on a reasonable belief of which the search warrant was issued. I can hold no complaint to be relevant which does not allege that the liquors which were seized were trafficked in or were kept for the purpose of traffic. The magistrate may proceed on any presumptions which may arise from the seizure, but it must also be open to the accused to prove that he never trafficked in the liquors, and that he did not keep them for the purpose of traffic.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

THE COURT passed the bill, and suspended the conviction and sentence complained of.

ALEXANDER MORISON, S.S.C.—GIBSON & PATERSON, W.S.—Agents.

JOHN STEWART PHILLIPS, Appellant.—*M'Lennan*.
 JAMES AULD (Procurator-Fiscal of Burgh Court of Greenock),
 Respondent.—*Guthrie*.

No. 12.

Jan. 9, 1892.
 Phillips v.
 Auld.

Public Health—*Public Health Act*, 1867 (30 and 31 Vict. c. 101), sec. 26—*Possession of fish unfit for human food*.—The *Public Health Act*, 1867, enacts, sec. 26, that a sanitary inspector may “enter any premises to inspect . . . any carcase, meat, . . . fish . . . exposed for sale, or which there is probable cause for believing to be intended for human food, and in case any such carcase, meat, . . . fish . . . appear to him to be unfit for such food, the same may be seized, . . . and the person to whom such carcase, meat, . . . fish . . . belong, or in whose custody the same are found shall be liable to a penalty. . . .”

Held that to make a relevant charge of an offence under the section it was necessary to allege that the carcase, &c. was in fact exposed for sale, or was in fact intended to be used as human food, and that it was not sufficient to allege that there was probable cause for believing it to be intended for human food.

A complaint against a fish-merchant under this section set forth that on a certain day “he had” in his shop “exposed for sale, or which there was probable cause for believing to be intended for human food,” certain fish “which were unfit for human food, which fish were seized . . . by the sanitary inspector . . . whereby” the accused “has become liable to a penalty . . .” The accused was convicted “of the contravention charged.” *Held* that the complaint was irrelevant, as it did not state that the fish were exposed for sale, or were, in fact, intended for human food.

Opinion (per Lord Justice-Clerk) that the conviction was bad as a general conviction on an alternative complaint.

JOHN STEWART PHILLIPS, fish-merchant in Greenock, was charged in HIGH COURT. the Sheriff Court there at the instance of the Procurator-fiscal of the Lord Justice-Clerk. burgh, acting on behalf of the Local Authority, under the *Public Health* Lord Rutherford Clark. (Scotland) Act, 1867, with having contravened section 26 of that Act,* Lord Trayner. “in so far as on the 12th day of September 1891 he had, within or near Justiciary Clerk. the shops or premises occupied or used by him at Nos. 32 and 26 Charles Street in Greenock, exposed for sale, or which there was probable cause for believing to be intended for human food, 156 lb. weight or thereby of fish, namely, 102 lb. weight in two boxes at his shop No. 32 Charles Street, and 54 lb. weight on a slab or table within the shop at No. 26 Charles Street, which were unfit for human food; which fish were seized on said date by the sanitary inspector of the burgh of Greenock; whereby the said John Stewart Phillips has become liable, in terms of sections 26th and 105th of said Act, to a penalty not exceeding £10 sterling, and

* The *Public Health* (Scotland) Act, 1867, sec. 26, enacts,—“The sanitary inspector may at all reasonable times enter any premises to inspect and examine any carcase, meat, poultry, game, flesh, fish, fruit, or vegetables exposed for sale, or which there is probable cause for believing to be intended for human food, and in case any such carcase, meat, poultry, game, flesh, fish, fruit, or vegetables appear to him to be unfit for such food, the same may be seized without any warrant; and if it appear to the Sheriff or any two Magistrates or Justices that any such carcase, meat, poultry, game, flesh, fish, fruit, or vegetables are unfit for the food of man, he or they shall, by a writing under his or their hand or hands, order the same to be destroyed, or to be so disposed of as to prevent the same being exposed for sale or used for such food; and the person to whom such carcase, meat, poultry, game, flesh, fish, fruit, or vegetables belong, or in whose custody the same are found, shall be liable to a penalty not exceeding £10 for such carcase, piece of meat or flesh, or for any quantity of fish, poultry, game, fruit, or vegetables, or any refuse thereof, and also to pay all expenses caused by the seizure, detention, or disposal thereof.”

No. 12.

Jan. 9, 1892.
Phillips v.
Auld.

also to pay all expenses caused by the seizure, detention, or disposal of said fish."

The accused stated no objections to relevancy, and pleaded not guilty.

On 21st September 1891 the Sheriff-substitute (Black) convicted him of the offence in the following terms:—"In respect of the evidence adduced, finds the said John Stewart Phillips guilty of the contravention charged, and therefore decerns and adjudges him to pay the sum of £1 of penalty."

Phillips obtained a case.

The questions of law were, *inter alia*,—"(1) Whether a relevant offence under the statute has been libelled? (2) Whether there are alternative charges in the complaint while the conviction is general?"

Argued for the appellant;—(1) There was no relevant charge. Under section 26 of the statute the sanitary inspector had power to seize fish which there was probable cause for believing to be intended for human food. But the Sheriff had concluded that because a seizure was proper the person in whose premises the fish were lying must be liable to a penalty. Something more was required in order to convict than a belief on the part of someone that the fish were intended for human food.¹ (2) The complaint charged more than one offence, while the conviction was general. There was a marked difference between exposing for sale fish unfit for human food and having in one's possession fish which there was probable cause for believing to be intended for human food. The Sheriff should have stated in the conviction on which charge he convicted the appellant.²

Argued for the respondent;—(1) Personal intent on the part of the accused to sell fish unfit for human food was not required to be proved in order to get a conviction; all that was required to be shewn was that he had in his premises fish which there was probable cause for believing were intended for human food.³ The word "such" in the latter part of section 26 of the statute referred to the qualifying words in the first part of the clause. (2) The charge did not contain proper alternative but only different modes of committing the same offence. The offence consisted in the appellant having in his premises the fish described, and it did not matter whether he intended to sell them or not.

At advising,—

LORD JUSTICE-CLERK.—This case is similar to the case of *Batchen* (*supra*, p. 25), already decided by us this morning. The complaint bears that John Stewart Phillips contravened section 26 of the Public Health (Scotland) Act, 1867, in so far as he had in his shops "exposed for sale, or which there was probable cause for believing to be intended for human food," fish which were unfit for human food. On that complaint the Sheriff-substitute pronounced a general finding of guilty.

One of the questions raised before the Court was whether the conviction was

¹ Kennedy v. Cadenhead, Dec. 24, 1867, 6 Macph. 179, 5 Irvine, 539; Nelson v. M'Phee, Oct. 17, 1889, 17 R. (Just. Cases) 1, 2 White, 307.

² De Banzie v. Peebles, March 16, 1875, 2 R. (Just. Cases) 22, 3 Couper, 89; Arthur v. Peebles, June 1, 1876, 3 R. (Just. Cases) 38, 3 Couper, 300; Murray v. M'Dougall, Feb. 7, 1883, 10 R. (Just. Cases) 42, 5 Couper, 215; Scott v. Alexander, Feb. 27, 1890, 17 R. (Just. Cases) 35, 2 White, 471; opinion of Lord Justice-Clerk in Couper v. Lang, Dec. 12, 1889, 17 R. (Just. Cases) 15, 2 White, 398.

³ Dickson v. Linton, June 1, 1888, 15 R. (Just. Cases) 76, 2 White, 51; opinion of Lord Justice-General Inglis in Kennedy, *supra*, 6 Macph., p. 183.

a good one in respect that the charge was alternative, whereas the Sheriff's finding was general. I think there is a great deal to be said for that contention. This is not a case in which there is charged a number of different modes of committing the same offence, but two things are stated in the clause, and sharply distinguished. There might either, on the one hand, be exposed for sale fish unfit for human food, or, on the other hand, there might be possession of fish which were supposed or believed to be intended for human food. That looks like an alternative charge, and if it was necessary for the decision of the case to proceed upon that plea, my inclination would be to hold that the conviction was not a good one.

No. 12.

Jan. 9, 1892.

Phillips v. Auld.

It is, however, not necessary to go into that, because I think that there is another ground on which the conviction must be quashed, in accordance with the decision already pronounced in the case of *Batchen*. This is a complaint which, if relevant, amounts to this, that a man may be convicted of a crime, and punished therefor, if there is a probable cause for the belief that he intended to do something. Here also, as in the case of *Batchen*, seizure accompanied the proceedings. It is plainly one of the objects of the statute that such seizure shall be made by the sanitary inspector, in order not only to preserve evidence, but also to prevent injury to the community by the sale of unwholesome food. Accordingly, the probable cause for believing the fish to be intended for human food is a very good ground for those who are in authority and undertake the responsibility of seizing the fish, but I am not able to hold that any person can be convicted of a crime on evidence that somebody thinks that something is likely to be done, unless the statute makes it absolutely plain that he is to be convicted on such evidence. In the present case, as in the case of *Batchen*, the prosecutor is only bound to prove, under the second alternative of the complaint, that somebody who is a credible witness believes that the fish were intended for human food. That is not a good charge. Before a person can be convicted under this clause of the statute, it must be proved to the satisfaction of the Court that the fish were in fact exposed or in fact intended for human food. If that had been averred, and relevantly charged in this complaint, it is probable, on the evidence stated, that the magistrate would have convicted, and justly convicted, but as it had not been relevantly averred in the complaint, I think we must hold the conviction to be bad, and quash it.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I agree in the conclusion at which your Lordship has arrived. Upon the question whether this is an alternative charge or the statement of an alternative *modus*, I express no opinion.

To the first question, viz, whether there has been libelled here a relevant offence, I think our answer should be "there has not," and that for the reason stated by your Lordship. The words of the complaint are no doubt taken from the 26th section of the Act, but I think the prosecutor has failed to observe that the provisions in the earlier part of the section—where the words are used which he has adopted in the complaint—as to articles of the character described being "exposed for sale," or "which there is probable cause for believing to be intended for human food," refer only to the conditions on which the sanitary inspector may seize the suspected article.

But for anyone to be convicted of an offence under this section of the Act it must be proved, and therefore must first be averred in the charge, that he had

No. 12.

Jan. 9, 1892.
Phillips v.
Auld.

the article in his premises exposed for sale, or that he had it there intended for human food. That is not averred in the complaint before us, and I therefore think the complaint is irrelevant.

THE COURT quashed the conviction.

MILLER & MURRAY, S.S.C.—R. R. SIMPSON & LAWSON, W.S.—Agents.

No. 13.

Jan. 9, 1892.
Hutcheon v.
Cadenhead.

ALEXANDER HUTCHEON AND OTHERS, Complainers.—*Crabb Watt*.
GEORGE CADENHEAD (Procurator-Fiscal of Justice of Peace Court of Aberdeenshire), Respondent.—*J. A. Reid*.

Public-Houses Act, 1862 (25 and 26 Vict. c. 35), sec. 17, and secs. 6, 8, 16—Traffic in liquor in any "place or premises" without certificate—"Place."—The Public-Houses Act, 1862, enacts by sec. 17 that every person trafficking in exciseable liquors "in any place or premises without having obtained a certificate in that behalf" shall be guilty of an offence. A complaint under this section stated that the accused did on a certain date "at a tent in a grass field on the farm of M. traffic in exciseable liquors without a certificate." The accused having been convicted, maintained in a suspension that the complaint was not relevant, because a field was not "a place" capable of being certificated, and therefore sec. 17 of the Act did not apply.

Held (diss. Lord Trayner) that the complaint was relevant, because a particular field was a place for which, under the statute (sec. 6), a special certificate might be granted for a particular occasion, and therefore that sec. 17 applied to the case.

HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clerk.
Lord Trayner.
Justiciary
Clerk.

ALEXANDER HUTCHEON and three other persons, all residing in Aberdeen, were charged before the Justice of Peace Court of Aberdeenshire at the instance of the Procurator-fiscal with an offence against the Public Houses Act, 1862, sec 17,* in so far as they "did, on the 4th July 1891, at a tent in a grass field on the farm of Meadowhead, parish of Newmachar, Aberdeenshire, occupied by Andrew Mackenzie, farmer, traffic in exciseable liquors, namely, beer and porter, or other exciseable liquors, with William Rae, plater, 2 Yeats Lane, Aberdeen, and James Dempster, boilermaker, 6 Upperkirkgate, Aberdeen, and others to the complainer unknown, without having obtained a certificate in that behalf in terms of the Public-Houses Acts Amendment (Scotland) Act, 1862."

An objection to relevancy—that a field was not a "place" for which a certificate under the Act could be obtained—was repelled. The accused were convicted on evidence. They raised a suspension of the conviction, pleading, *inter alia*,—(1) The sentence is illegal and unwarrantable, and ought to be suspended, with expenses, in respect—(a) the charge on which it proceeded was irrelevant; (b) no offence under the 17th section could be committed in an open field.

In their statement of facts the complainers stated that they were the "pic-nic committee" of a trade society which was holding a pic-nic at Meadowhead on the day libelled, that the committee had purchased a certain quantity of beer and stout which was sent to the ground and could be obtained by members of the society who were at the pic-nic on their taking a ticket in addition to the pic-nic ticket, and that there was

* The Public-Houses Act Amendment Act, 1862 (25 and 26 Vict. c. 35), enacts by sec. 17,—“Every person trafficking in any spirits or other exciseable liquors in any place or premises, without having obtained a certificate in that behalf in terms of this Act, shall be guilty of an offence, and on being convicted shall, for each of said offences, forfeit and pay a certain penalty.”

no trafficking in liquor, but only the division of their own property among the members of the society. No. 13;

Argued for the complainers;—An open field was not a place or premises which could be certificated. "Place" was to be interpreted as *ejusdem generis* with premises. "At a tent" was not equivalent to "in a tent," assuming that the pic-nic tent could have been certificated. It had been decided that in order to a conviction under sec. 17, the "place" of the offence must be a place capable of being certificated.¹ A "grass field" or a street was not. If there was any offence at all, it was "hawking" * liquors. That was provided for under sec. 16.†

Argued for the respondent;—A field was a "place." Even if it were held that a particular field was not a sufficient description, the offence was said to be "at a tent" in the field. A field could be certificated for a special occasion such as this pic-nic if the magistrates were applied to and consented.‡ Section 16† did not apply. It applied to hawking in public places, which were admittedly incapable of being certificated.

At advising,—

LORD RUTHERFURD CLARK.—A question of importance was raised by the complainers. They said that on the occasion libelled the liquors were not sold, but were supplied by a club or a society to its members when they were having a pic-nic and games. But that is a question of fact, and we have no jurisdiction to inquire into facts. The magistrate has held that the complainers trafficked in exciseable liquors without a licence, and we cannot review his judgment. If the complainers desired to raise any question of law, they should have applied for a case. They have neglected their opportunity, and we cannot give them any remedy.

¹ Hamilton v. Inglis, May 22, 1879, 6 R. (Just. Cases) 45, 4 C. 244.

* "Hawking" is defined by the 37th section of the Act to "mean and include trafficking in or about the streets, highways, or other places, or in or from any boat or other vessel upon the water."

† Sec. 16.—"Every person hawking spirits or other exciseable liquors shall thereby be guilty of an offence."

‡ Sec. 6.—"On a representation being made to . . . two Justices of Peace of any county . . . by any person holding a certificate for keeping an inn or hotel or public-house, and duly licensed to sell exciseable liquors to be consumed on the premises, that it is intended that any public or special entertainment shall take place therein or in any other place or premises situated within the respective jurisdictions of such . . . Justices during any particular time such . . . Justices . . . may, if he or they shall think fit, and on being satisfied that such inn and hotel or public-house, place or premises, possesses the necessary accommodation, and that the entertainment is for a public or special occasion of a legitimate and proper character . . . grant such person a special permission in writing to keep such inn and hotel or public-house, place, or premises, open and to sell therein on such public or special occasion, and for that purpose only, such exciseable liquors as he may be duly licensed to sell as aforesaid during such time . . . and under such regulations as such . . . Justices of the Peace shall think fit to appoint."

Sec. 8.—"If any person shall be desirous of keeping an inn and hotel, public-house, shop, or premises, for the sale therein of spirits, wines, beer, or other exciseable liquors, whether to be consumed on the premises or not, he shall, previous to the granting to him of a certificate for that purpose, make and duly lodge a certain application."

No. 13.

Jan. 9, 1892.
Hutchinson v.
Caldenhead.

The libel is laid on the 17th section of the Act, and the *locus* is thus described,—“At a tent in a grass field on the farm of Andrew Mackenzie.” The complainers contend that no offence under that section can be committed in an open grass field. It is matter of serious doubt whether we are bound to read the libel so strictly as to hold that the offence was committed outside the tent. But I do not desire to enter on this question, as I think that the case can be decided on other grounds.

The statute provides that every person who traffics in exciseable liquors in any place or premises without having obtained a certificate in that behalf shall be guilty of an offence. I accept the judgment of the Court in the case of *Hamilton*, and in accordance with it I hold that “no offence could be committed unless in a place capable of being so certificated.” The question is, whether a certificate cannot be issued for selling liquors on a field of a farm if the magistrate thinks proper to grant it?

Such a certificate would be a special certificate under the 6th section of the Act. It provides that on the representation of any person holding a certificate for keeping an inn and hotel or public-house that it is intended that any public or special entertainment shall take place therein, or in any other place or premises, the magistrate, on being satisfied that such inn and hotel or public-house or place or premises possess the necessary accommodation, may grant such person a special permission to keep such inn and hotel or public-house, place, or premises open and to sell therein. It is argued that the special certificate must be granted in respect of a house or building, and that it cannot be granted for a field.

I confess that I cannot see any sufficient ground for putting so limited a construction on the Act. Its purpose was to enable liquors to be sold by a licensed person on the occasion of a special entertainment. The words are not limited to houses or buildings, but extend to any place or premises within the jurisdiction of the magistrate—that is to say, to any place or premises wherein a special entertainment may take place. According to their natural meaning, they apply to open fields as much as to houses. It is true that the magistrate must be satisfied that the premises possess the necessary accommodation. But that is a direction for his guidance with the view of due provision being made for safety and order. The word “accommodation” does not to my mind imply that there must be buildings and that buildings can be alone certificated. On the contrary, all that is required of the magistrate is that he shall see that such accommodation shall be supplied as is necessary for the place in which the entertainment is to be held. I cannot hold it to be the meaning of the Act that no entertainment can take place in the open air at which it shall be lawful to sell liquors.

But in this case there was a tent in the field, and it was admitted that a certificate could have been granted for the tent. The argument is that the certificate must be so worded as to permit the sale of liquors within the tent, but not outside of it. I see no reason for holding that the certificate must be so limited. It is a certificate granted on the occasion of a special entertainment, and if there must be some building in order to justify the granting of the certificate, I think that it may be granted for the outside as well as the inside of the building.

It is said that this question is decided in favour of the complainers by the case of *Hutchinson v. Caldhead*. I do not think so. That case related to a sale of liquor on

a public street. It may very well be that a magistrate is not entitled to grant a certificate for the sale of liquors on an open street, but that is a very different matter from the granting of a certificate for the sale of liquors in a private place. It is not easy to conceive that an entertainment of the kind contemplated by the Act could be held in an open street. No. 13.
Jan. 9, 1892.
Hutcheon v. Cadenhead.

Again, it is urged that if any offence was committed by the complainers it was the offence of hawking under the 16th section. But hawking is a trade carried on irrespective of trade premises. A hawker is an itinerant trader who brings the goods to his customers wherever they may be. The interpretation clause is appealed to. It is in these terms:—"The word 'hawking' shall mean and include trafficking in or about the streets, highways, or other places, or in or from any boat or other vessel upon the water." I doubt if the language of this clause can be construed apart altogether from the ordinary meaning of the word which it is intended to define, and I am disposed to think that it means nothing more than that a single act of sale shall be held to be hawking, though that word in its ordinary sense signifies a trade or practice. But the sales which fall within the definition are not the less sales irrespective of trade premises. When sales are made in private premises of any kind, taken among other things for the purpose of sale, I do not think that they are hawking within the meaning of the Act.

But whatever may be the true interpretation of the 16th section there is an offence under the 17th if a certificate could be granted for the place in which the sale was made. As I am of opinion such a certificate could legally be granted, I think that the conviction should be sustained.

LORD TRAYNER.—The suspenders were charged in a complaint brought at the instance of the respondent with having on 4th July 1891, "at a tent in a grass field on the farm of Meadowhead," trafficked in exciseable liquors "without having obtained a certificate in that behalf in terms of the Public-Houses (Scotland) Amendment Act, 1862, contrary to section 17" of that Act. The suspenders were convicted of the offence so charged, and they now seek to have the conviction suspended on the ground, among others, that the charge was irrelevant. I think the suspender's contention is right, and that therefore the conviction should be quashed.

The 17th section of the Act, which the suspenders are said to have contravened, enacts that "every person trafficking in any spirits or exciseable liquors in any place or premises without having obtained a certificate on that behalf in terms of this Act" shall be guilty of an offence. This enactment is not presented now, for the first time, for judicial construction or interpretation. It was settled by the case of *Hamilton* (4 Couper, 244) that trafficking in exciseable liquors "in any place or premises without having a certificate in that behalf," means trafficking in a place or premises capable of being, but which are not, certificated. Now, could any magistrate under the Act before us grant a certificate for selling exciseable liquors "in a grass field"? I think he could not. The two sections of the Act which shew the kind of premises which may be certificated—either by the ordinary or a special certificate—are the 6th and 8th, and the premises there specified—inn and hotel, public-house, shop, &c.—are the premises of some construction, and possessed of some accommodation for the purposes of trafficking in exciseable liquors. In short, the "premises" of the statute are just what are so termed in ordinary popular language, namely, a

No. 13.

Jan. 9, 1892.
Hutcheon v.
Cadenhead.

house or building, or something having the character of a house or building. The form of certificate authorised by the statute supports the same view. The certificate is granted in the case of a hotel or public-house for the sale of exciseable liquors "in the said house, but not elsewhere," and in the case of a licensed grocer he is authorised to "keep premises" for the sale therein of spirits, &c. No other kind of premises can the magistrates licence. But it was said that the 17th section covers more than premises—it prohibits the sale of exciseable liquors "in any place or premises," and it was suggested that this would include a "place" not premises. Even if this were an admissible reading of the word "place," I do not think it would avail the respondent. For read "place" in the widest sense, it must still be a place (according to the decision in *Hamilton's* case) capable of being certificated, which a grass field is not. This extended reading of the word is, however, in my opinion, not admissible. I think the words in section 17 must be read as meaning the same thing as the same words "place or premises" in section 6, where they plainly mean, and only mean, place or premises of the character and description there given. If I am right thus far in my view of the statute, the offence charged was not a contravention of the 17th section of the Act, having been committed in a place which was not capable of being certificated.

The charge, however, sets forth the *locus* of the offence as "at a tent in a grass field." Now, I do not mean to say that magistrates cannot licence such a tent. I will assume that they can. But on that assumption the offence, to contravene section 17, must be committed in the tent; that is, within the place or premises capable of being certificated. That is not charged, and the offence here charged is no more relevant than the charge held irrelevant in the case of *Hamilton*, which was of selling exciseable liquors "at or near the door" of a certain shop which was certainly capable of being certificated. I think the case of *Hamilton* is conclusive of the present, but I would have reached the same result on the construction of the statute even if that decision had not been pronounced. It is unnecessary, in the view I have taken of the case, to offer any opinion on the question whether the charge made against the suspenders could have been maintained as a relevant charge under the 16th section of the Act.

LORD JUSTICE-CLERK.—I concur with Lord Rutherford Clark, and but for the difference of opinion upon the bench I would not have expressed my views upon the case at further length.

Under section 8 of the Public-Houses Acts Amendment (Scotland) Act, 1862, places which can be licensed for a distinct period of a year must plainly be places which are buildings, "inn, hotel, public-house, shop, or premises." There is therefore no doubt that no yearly licence can be granted except for a place which is really a building. The Legislature, however, very properly took into consideration the fact that occasions may occur in which it is desirable or convenient that exciseable liquor should be sold in a place other than a building licensed for a year, and different in character from those specified in section 8. So, under section 6 statutory authority is given to the magistrates to grant a licence to a person who already holds a certificate for an inn, &c., for a special entertainment to be held within any "place or premises" situated within their jurisdiction.

Now, the first thing that strikes one is the distinct change in the mode of

a public street. It may very well be that a magistrate is not entitled to grant a certificate for the sale of liquors on an open street, but that is a very different matter from the granting of a certificate for the sale of liquors in a private place. It is not easy to conceive that an entertainment of the kind contemplated by the Act could be held in an open street. No. 13.
Jan. 9, 1892.
Hutcheon v.
Cadenhead.

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No. 13.

Jan. 9, 1892.
Hutcheon v.
Cadenhead.

house or building, or something having the character of a house or building. The form of certificate authorised by the statute supports the same view. The certificate is granted in the case of a hotel or public-house for the sale of exciseable liquors "in the said house, but not elsewhere," and in the case of a licensed grocer he is authorised to "keep premises" for the sale therein of spirits, &c. No other kind of premises can the magistrates licence. But it was said that the 17th section covers more than premises—it prohibits the sale of exciseable liquors "in any place or premises," and it was suggested that this would include a "place" not premises. Even if this were an admissible reading of the word "place," I do not think it would avail the respondent. For read "place" in the widest sense, it must still be a place (according to the decision in *Hamilton's* case) capable of being certificated, which a grass field is not. This extended reading of the word is, however, in my opinion, not admissible. I think the words in section 17 must be read as meaning the same thing as the same words "place or premises" in section 6, where they plainly mean, and only mean, place or premises of the character and description there given. If I am right thus far in my view of the statute, the offence charged was not a contravention of the 17th section of the Act, having been committed in a place which was not capable of being certificated.

The charge, however, sets forth the *locus* of the offence as "at a tent in a grass field." Now, I do not mean to say that magistrates cannot licence such a tent. I will assume that they can. But on that assumption the offence, to contravene section 17, must be committed in the tent; that is, within the place or premises capable of being certificated. That is not charged, and the offence here charged is no more relevant than the charge held irrelevant in the case of *Hamilton*, which was of selling exciseable liquors "at or near the door" of a certain shop which was certainly capable of being certificated. I think the case of *Hamilton* is conclusive of the present, but I would have reached the same result on the construction of the statute even if that decision had not been pronounced. It is unnecessary, in the view I have taken of the case, to offer any opinion on the question whether the charge made against the suspenders could have been maintained as a relevant charge under the 16th section of the Act.

LORD JUSTICE-CLERK.—I concur with Lord Rutherford Clark, and but for the difference of opinion upon the bench I would not have expressed my views upon the case at further length.

Under section 8 of the Public-Houses Acts Amendment (Scotland) Act, 1862, places which can be licensed for a distinct period of a year must plainly be places which are buildings, "inn, hotel, public-house, shop, or premises." There is therefore no doubt that no yearly licence can be granted except for a place which is really a building. The Legislature, however, very properly took into consideration the fact that occasions may occur in which it is desirable or convenient that exciseable liquor should be sold in a place other than a building licensed for a year, and different in character from those specified in section 8. So, under section 6 statutory authority is given to the magistrates to grant a licence to a person who already holds a certificate for an inn, &c., for a special entertainment to be held within any "place or premises" situated within their jurisdiction.

Now, the first thing that strikes one is the distinct change in the mode of

expression. The words "place or premises" are used instead of the words "inn, hotel, public-house, shop, or premises" mentioned in section 8. Now, place is a very broad expression indeed, and if there was no limitation in the statute there would be nothing to prevent a person receiving a licence under section 6 for a table put down in the public street on a particular day. But the statute, for the purpose of preventing the clause being carried out in an extravagant manner, further prescribes that the magistrates must be satisfied that the accommodation provided is satisfactory. I take that as meaning that the accommodation must be suitable in the circumstances of the particular case, the question of suitability being left to the discretion of the magistrate. I have no doubt that the word "place" must be taken in the fullest sense of the term, and that the only restriction upon it is that the magistrates must be satisfied that the place possesses suitable accommodation in the circumstances. That being so, the question in the present case is this, Is a tent in a grass field not just such a place as is contemplated by the Act? I have no doubt that it is. The whole field might be such a place; it is entirely a question of circumstances to be determined by the magistrates according to their good sense and judgment. In most cases a whole field would not be a proper place to be licensed, the licence might be restricted to a spot under a particular tree, or a space specially marked off as suitable for the purpose. But there is in my mind no doubt that under section 6 the magistrates have power to grant a licence whether the place licensed is a house, a tent, or a portion of a field.

Holding that opinion, I do not think I require to deal with section 17 at all. I do not think the case of *Hamilton* rules the present. That was a case of trafficking in exciseable liquors in a public street, and there is no doubt that a person doing so could not be properly charged under section 17 of the Act. In my opinion this is quite a different kind of case; here the place in question was such a place as the magistrates might in their discretion have licensed, and as no licence was applied for, it was a breach of the statute to sell exciseable liquors in a place not authorised for the sale of such.

I may further remark that this case must be decided entirely irrespective of all questions of facts raised by the complainers. The proper course for parties wishing to appeal to this Court from such a conviction upon the legal decision given by the magistrates on the facts is to obtain a case from the magistrates. Here no such case was applied for, and therefore we cannot deal with any question other than the legal question raised on the complaint itself, and upon that question my opinion is that which I have now expressed.

THE COURT refused the suspension.

WISHART & MACNAUGHTON, W.S.—R. C. GRAY, S.S.C.—Agents.

RICHARD HOUGHTON, Appellant.—*Wilton*.
CHARLES STEUART PHYN, Respondent.—*Dundee*.

No. 14.

Fishing—Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. c. 123), sec. 23—Occupier of fishing in England with landing place in Scotland.—A Phyn fisherman was convicted of a contravention of the Salmon Fisheries Act, 1868.*

Feb. 1, 1892.
Houghton v.
Phyn.

* The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 23, enacts,—“The proprietor or occupier of any fishery shall within thirty-six hours after the commencement of the annual close time remove and carry

No. 14.

Feb. 1, 1892.
Houghton v.
Phyn.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Ld. M'Laren.
Justiciary
Clerk.

It was proved that while he held a licence to fish in the Solway Firth in English waters his landing place (where his nets were found unsecured) was in Scottish waters of the Firth.

The Court *quashed* the conviction, holding that, notwithstanding that his landing place was in Scotland, he was not an "occupier" of a Scottish fishery, to which alone the Salmon Fisheries (Scotland) Act, 1868, applied.

ON 17th November 1891 Richard Houghton, fisherman, residing at Upper Kenziels, in the parish of Annan, Dumfriesshire, was charged in the Sheriff Court of Dumfries and Galloway at the instance of the prosecutor on behalf of the Annan District Fishery Board, upon a complaint to the following effect, "that he being an occupier of a fishery in the Solway Firth, the landing place of which is Annan Waterfoot, in the parish of Annan aforesaid, and within the limits of the district of the River Annan, did, on 25th September 1891, have two drift or whammel nets in a boat at Annan Waterfoot aforesaid, and did fail within thirty-six hours after the commencement of the annual close time in said district, which commenced on 10th September 1891, to remove from said landing place and grounds adjacent thereto the said drift or whammel nets which had been used or employed by him in taking salmon, and effectually secure the same, so as to prevent their being used in fishing until the end of the close time, contrary to 'The Salmon Fisheries (Scotland) Act, 1868,' section 23, whereby" he was liable to penalties.

The Sheriff-substitute (Campion) convicted the accused of the contravention charged, and, at the latter's request, stated a case on appeal to the High Court.

The Sheriff-substitute stated the following facts as proved in evidence:—"That the accused was the occupier of a fishery in the Solway Firth, within the district of the River Eden, under licence from the Eden Fishery Board, dated 12th February 1891, and produced herewith; * that the landing place of said fishery was at Annan Waterfoot, within the district of the River Annan; that on the date libelled in the complaint the police-constables, on searching the boats at said landing place, found in the accused's trawl boat two drift or whammel nets belonging to him, which had been used by him in taking salmon, and which he had failed to remove and secure so as to prevent their being used in fishing until the end of the close time; and that the close time in the district of the River Annan is from 10th September to 24th February."

The questions of law for the opinion of the High Court were,—"(1) Whether the appellant is an 'occupier' of a fishery within the meaning

from such fishery, and from the landing places and grounds adjacent thereto, all boats, oars, nets, engines, and other tackle used or employed by such occupier in taking salmon, and effectually secure the same, so as to prevent their being used in fishing until the end of the close time, with the exception of such boats and oars as may be used for angling, . . . and any proprietor or occupier who neglects to remove and carry away and effectually secure in manner aforesaid any boat, oar, net, engine, or other tackle . . . shall forfeit every engine and thing not removed . . . in compliance with the terms of this section," and suffer a penalty.

* The licence bore that "We, the Board of Conservators appointed for the fishery district of the River Eden, as defined by a certificate of the Board of Trade, dated 6th August 1890, and deposited in the office of the Clerk of the Peace for the county of Cumberland, by virtue of the powers vested in us under the Salmon Fishery Acts, 1861-1873,

"Do hereby license Richard Houghton . . . to fish . . . in any water within the said district in which there is a public . . . right of fishing for salmon."

of the 23d section of 'The Salmon Fisheries (Scotland) Act, 1868'; and (2) Whether, considering the appellant's fishery is in English waters and the landing place in question in Scotland, the appellant could legally be convicted of a contravention of the 23d section of 'The Salmon Fisheries (Scotland) Act, 1868'?"

No. 14.

Feb. 1, 1892.
Houghton v.
Phyn.

Argued for the appellant;—He was not an "occupier" of a Scots fishery, and therefore he was not guilty of an offence under the statute libelled. It mattered not that he landed his fish at a landing place in Scotland.

Argued for the respondent;—The appellant's landing place was in Scotland, and it was there therefore that the offence was committed. If this prosecution had been raised in England, it would have been stated against it that the English Courts could not entertain a prosecution for a *quasi* criminal offence where the *locus delicti* was in Scotland.

LORD JUSTICE-GENERAL.—I am of opinion that this conviction must be quashed. No one can contravene the section libelled except the "occupier" of a fishery in the sense of the Salmon Fisheries (Scotland) Act, 1868. The question whether it is a fishery in Scotland is one of fact, and the Sheriff-substitute has found that this fishery is in England.

It is suggested that because the landing place is in Scotland that that is sufficient to found jurisdiction against the appellant.

I cannot, however, follow that argument, because the person who alone can be convicted of the offence is not a person who has a landing place in Scotland, but who is "occupier" of a fishery in Scotland.

On that short ground I think the first question must be answered in the negative.

LORD ADAM.—I am of the same opinion. This complaint is brought against the appellant for a contravention of the 23d section of the Salmon Fisheries (Scotland) Act, 1868, which enacts that the "proprietor or occupier of any fishery shall, within thirty-six hours after the commencement of the annual close time, remove and carry from such fishery" all nets, &c.

Now, the first question presented to us is, what is the meaning of the words "such fishery"? Do they mean "any" fishery, or do they mean a fishery within Scotland?

I am of opinion that the latter is the true meaning of the words.

To say that because the landing place is a place where the fisherman usually lives, and is the place where he finishes his day's fishing, that that makes it a "fishery" is quite out of the question.

I have therefore no hesitation in concurring with your Lordship.

LORD M'LAREN concurred.

THE COURT answered the first question in the case in the negative, and reversed the determination of the inferior Judge.

THOMAS M'NAUGHT, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

No. 15.

Feb. 1, 1892.
Rodgers v.
Henderson.

OWEN RODGERS, Complainer.—*John Wilson.*

WILLIAM HORN HENDERSON (Procurator-Fiscal for Linlithgowshire),
Respondent.—*Wallace, A.-D.*

Suspension—Oppression—Severity of sentence—Jurisdiction of High Court to interfere—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 29.—A person accused of disorderly conduct was after a trial convicted and sentenced by the Sheriff-substitute to sixty days' imprisonment with hard labour. He brought a suspension of the sentence as oppressive, considering that the offence charged was only a breach of the peace and a first offence, stating that the Sheriff-substitute had not given him the option of a fine, but had inflicted the highest penalty which he could competently inflict.

The Court *refused* the bill, holding that no adequate reason had been stated for interference.

Question whether the Court may suspend a sentence of an inferior Judge on the ground of undue severity.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Ld. M'Laren.
Justiciary
Clerk.

OWEN RODGERS, fireman, Linlithgowshire, and William Sherry, miner, Linlithgow, were charged under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, upon a complaint at the instance of the Procurator-fiscal of Linlithgowshire, which set forth that they "did, on 29th November 1891, in a field on the farm of Ochiltree Place, Linlithgow parish . . . behave in a disorderly manner, struggle and fight together, annoy and disturb the lieges, and commit a breach of the peace."

On 9th December Rodgers pleaded not guilty, and the Sheriff-substitute (Melville), after evidence led, convicted the accused, and sentenced him to sixty days' imprisonment with hard labour.

Rodgers brought a bill of suspension of the conviction and sentence on the ground that the latter was unduly harsh and oppressive, and ought to be cancelled, or at least restricted to a fine.

Argued for the complainer;—The sentence pronounced was oppressive, considering that the offence charged was only a breach of the peace and that the complainer had never been convicted before. He had not been given the option of a fine, and the term of imprisonment in the sentence was the highest to which the Sheriff-substitute could competently sentence him, having regard to section 29 of the Summary Procedure (Scotland) Act, 1864.

Argued for the respondent;—The Court had no jurisdiction to interfere with a sentence pronounced by the Sheriff in his discretion on the ground merely that it was severe. They could only consider whether the sentence was one which the Sheriff could competently pronounce. The appellant's remedy then was an application to the Secretary for Scotland.

LORD JUSTICE-GENERAL.—The question here is whether this sentence is of such severity as to call for interference by way of suspension.

I am of opinion that it is not.

Counsel for the complainer has made a very moderate and brief statement, from which I gather that the offence was of such a nature as to give rise to a question of discretion within pretty wide limits,—the sentence called for might be light or severe according to the view taken by the Judge of the conduct of the persons concerned, and also the circumstances of the district in which the thing occurred.

We are not in the region of reviewing the sentence in the exercise of a discretion as to whether the sentence should be completely fulfilled, or whether

it may better be, in whole or in part, remitted. In dealing with a suspension, the question is within narrower limits, and the complainer must found himself on objections to the sentence of a more definite character before we can be justified in quashing it. I have heard no adequate reasons stated for our interference.

No. 15.

Feb. 1, 1899
Rodgers v.
Henderson.

LORD ADAM.—This is the first case I have seen where the suspension of the sentence is limited to the ground of the severity of the sentence.

We have seen cases where this ground is mentioned as a circumstance to be taken along with other facts in order to justify us in suspending the sentence.

It is unnecessary for us to determine here whether we can competently in any case interfere with the discretion of the Judge in awarding punishment, and I reserve my opinion on the point.

Here I agree that there are no grounds for interfering with the Sheriff-substitute's discretion.

LORD M'LAREN.—I agree that it is undesirable in any way to prejudice the question, if such should ever arise, as to the jurisdiction of this Court to suspend a conviction on the ground that the sentence is altogether disproportionate to the offence, and not within the reasonable discretion of the Judge who pronounced it.

Here the sentence certainly at first sight appears a sharp one, and upon the statement of facts the charge disclosed to us does not differ from an ordinary breach of the peace. But I agree with your Lordships it cannot be said here that there has been such a misuse of discretion or excess of jurisdiction on the part of the Sheriff-substitute as would entitle us to interfere, nor, indeed, am I prepared to say that the sentence was wrong, because we have no record of the evidence.

THE COURT refused the bill.

ROBERT STEWART, S.S.C.—CROWN AGENT—Agents.

ALEXANDER MACDONALD, Appellant.—*Glegg*.
MRS CATHERINE ROSS OR LAMONT, Respondent.

No. 16

Feb. 1, 1899
Macdonald
Lamont.

School—Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 70—Failure to educate child—Mother prosecuted in absence of father.—By section 70 of the Education Act, 1872, it is provided that "it shall be the duty of every school board to appoint an officer to ascertain and report to the school board what parents resident within the parish or burgh have failed and omitted, and are failing and omitting to perform the duty of providing for their children such elementary education as aforesaid . . . and defaulting parents may be proceeded against by the procurator-fiscal on a certificate from the board stating that the parents have without reasonable excuse failed to discharge that duty."

By section 1, "parent" shall include guardian and any person who is liable to maintain or has the actual custody of any child."

A mother was charged on a complaint brought under the Education (Scotland) Act, 1872, with failing to provide efficient elementary education for her child. Her husband, who usually resided in family with her, was, at the date of the complaint, absent from home, having been for six months employed at work at a known address in another county.

Held that, notwithstanding the absence of the husband, the wife was not liable.

No. 16.

Feb. 1, 1892.
Macdonald v.
Lamont.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Ld. McLaren.
Justiciary
Clerk.

MRS CATHERINE ROSS OR LAMONT, wife of William Lamont, and residing at Edrigill, in the parish of Snizort, was charged at the instance of Alexander Macdonald, appointed by and acting for the School Board of that parish in the Sheriff Court of Inverness, Elgin, and Nairn, upon a complaint brought under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and section 70 of the Education (Scotland) Act, 1872. The complaint set forth that the accused, during the period of not less than one month immediately preceding the 1st day of December 1891, did, without reasonable excuse, fail to discharge the duty of providing efficient elementary education in reading, writing, and arithmetic for her child Maggie Lamont, who was between five and fourteen years of age, as specified in a certificate by the school-board of the parish, whereby she was liable to a penalty.

On the case being called in Court on 10th December the accused stated, and the prosecutor admitted at the bar, that she was a married woman, and that her husband, William Lamont, usually resided in family with her and their children at Edrigill; that he occasionally went to the south in search of employment, and was sometimes absent from home and at work in the south for a few weeks, and sometimes for a few months at a time; that he was at present, and had been since June last, employed at work at Garelochhead in Dumbartonshire, and that during that period Maggie Lamont had been residing in her father's house at Edrigill under her mother's care and guardianship.

The Sheriff-substitute (Fraser) was of opinion that William Lamont, and not the accused, was the proper party to be prosecuted, and he therefore, without calling on the respondent to plead, held the complaint irrelevant, and dismissed it.

The prosecutor obtained a case, in which the Sheriff-substitute set forth the facts above narrated, and stated the question of law,—“Whether, on the facts ascertained, the respondent is liable as the mother to be prosecuted for failing to educate her own and her husband's child while her husband is alive, and has his home and domicile with her at Edrigill, though at present and since the month of June last personally temporarily resident in Dumbartonshire?”

Argued for the appellant;—In the circumstances stated the parent responsible for this failure to educate in terms of the Education Act, 1872, was the mother. She was the “parent” “resident” in the parish in terms of section 70 of that Act, and in “actual custody” of the child within the meaning of the interpretation clause. In short, the policy of the Act was not to consider who was the child's legal guardian, but who was the guilty party and had the custody of the child.

There was no appearance for the respondent.

LORD JUSTICE-GENERAL.—The Sheriff-substitute has found as matter of fact that William Lamont, the respondent's husband, usually resides in family with her and their children at Edrigill, and it appears that at present he is engaged in work at Garelochhead, Dumbartonshire, and has been there since the month of June. He had therefore, at the date of the prosecution, a known address, in a neighbouring county.

Now, the question is whether in these circumstances this married woman is to be treated as responsible to a prosecution for failure to educate a child of the married couple.

It is quite plain that the word “parent,” even as defined in the interpretation clause, cannot be stretched this length, that merely because the wife is always resident in the house and the husband is not always resident, therefore she

is to be subject to prosecution for failure to educate her child. This would lead to absurd consequences, and therefore we must be cautious in scrutinising the degrees by which the absence of the husband may create this grave responsibility on the part of the wife. The practical result of the success of the present appeal would be that this woman would have to suffer penal consequences; and as, *prima facie*, it is not the wife but the husband who is liable, I am in no hurry to reach this result.

Now, I cannot say that the facts stated in the case justify us in holding that by occasionally going away from home to obtain work the father has, *de facto*, renounced his position as head of the house, or devolved his duties upon the mother. I cannot say that merely because he is at a known address in Dumbartonshire he is not the parent who is responsible under the statute. In my opinion, there is nothing in the statute which calls for such a construction, and although I can imagine that in more dubious circumstances practical difficulties may arise in carrying out the Act, I do not think that any difficulty arises here.

LORD ADAM and LORD M'LAREN concurred.

THE COURT dismissed the appeal.

ALEXANDER MACDONALD, Solicitor, Portree, Agent.

JOHN DUNCAN, Appellant.—*D.-F. Balfour—Shaw*.
 GEORGE NEILSON (Procurator-Fiscal of Police Court at Glasgow),
 Respondent.—*Lees—A. S. D. Thomson*.

No. 17.

Feb. 1, 1892.
 Duncan v.
 Neilson.

Police—Glasgow Police Act, 1866 (29 and 30 Vict. c. 273), secs. 184, 218, and 219—Job carriage—Using hackney carriages without licence at railway station.—The 184th section of the Glasgow Police Act, 1866, enacts,—“Every person who keeps, uses, or lets for hire within the city any stage or hackney carriage . . . without a certificate or licence . . . shall be liable in a penalty.”

Section 218, after defining “stage carriage,” continues,—“The expression ‘hackney carriage’ shall mean every other wheeled carriage, whatever be its form or construction, which shall stand on hire or ply for a passenger for hire within the city, except a carriage let out to hire as a job carriage by the day, month, or other longer period, or a carriage kept by the proprietor within his own premises unyoked, for the purpose of being let out to hire as a job carriage for any shorter period. The expression ‘job carriage’ shall not include any carriage licensed in pursuance of this Act.”

Section 219 enacts,—“Nothing in this Act . . . shall prevent any carriage proprietor from having one or more ‘job carriages,’ not being licensed carriages, at any railway station within the city.”

The manager of a tramway company in Glasgow was charged and convicted of a contravention of section 184, in respect he used and let for hire two unlicensed hackney carriages. It was proved that the company, who had by lease an exclusive right of entry to the Caledonian Railway Station, had on the occasion libelled the two carriages standing and plying for hire without licences at the station; that they were hired by two passengers to carry them to their respective destinations, and that in neither case had the carriages been let out to hire by the day, month, or longer period, and no previous intimation had been sent to the company by the hirers requiring the company to have them awaiting their arrival at the station. The accused maintained that the carriages were used as job carriages, and that under sec. 219 they did not require to have a licence.

Held that the carriages in question were not job carriages, as defined in section 218, and that therefore sec. 219 did not apply.

No. 17.

Feb. 1, 1892.
Duncan v.
Neilson.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Ld. M'Laren.
Justiciary
Clerk.

JOHN DUNCAN, secretary and manager of the Glasgow Tramway and Omnibus Company, Limited, and the company itself, were charged at the instance of the Procurator-fiscal of the Police Court at Glasgow "with having, contrary to the Glasgow Police Act, 1866," section 184, on 24th November 1891, at the Central Railway Station, Glasgow, kept, used, and let for hire two hackney-carriages without having obtained a certificate or licence from the Magistrates' Committee" for each of the hackney-carriages, which were driven by William Hunter and Philip Crum respectively.

Duncan pleaded not guilty, and, after evidence led, the Magistrate convicted him of the offence charged, and fined him.

Duncan craved a case, in which the Magistrate set forth as follows:—"On the evidence led, I held it proved that on the date libelled the said company had the two carriages libelled (which, in outward appearance, differed from hackney carriages in having no name nor number painted outside, and resembled private carriages), driven respectively by the said William Hunter and Philip Crum, standing and plying for hire at the said railway station; that the appellant had not obtained a licence or certificate for either of said carriages; that both carriages were hired by two passengers arriving by train at said station, to convey, the one to St Enoch Railway Station, and the other to the College, Glasgow; that said passengers were conveyed to their respective destinations, and paid the ordinary hackney carriage fares to the drivers; that in neither case had the carriage been let out to hire by the day, month, or other longer period, and that no previous intimation had been sent by the hirers requesting the company to have the carriages awaiting their arrival at the station.

"On behalf of the appellant it was proved that, under a lease from the Caledonian Railway Company the appellant's company have the exclusive right of entry to the station for their cabs and other vehicles for the use of passengers arriving by the Caledonian Railway Company's trains. An employee of the Tramway Company, and a carriage proprietor, charged with a similar offence, were adduced as witnesses by the appellant to prove that the carriages in question were used as job carriages, and that hitherto it had been the custom to send them to stand for hire within the railway station without challenge; and that they considered they were entitled to do so under provisions of section 219; but I ruled that the section did not authorise or empower them to use unlicensed carriages to ply for general hire, but only to send job carriages to the station on being previously ordered or hired to wait at the station; that were it otherwise, the safeguards prescribed by the Act and the Hackney Carriage Bye-laws would be of no use.

"On the facts held proved as before stated, I held that the two carriages in question were hackney carriages within the meaning of section 218 of said Act, and, being unlicensed, I convicted the appellant of the offence charged, and imposed the nominal penalty of five shillings, with the alternative of a day's imprisonment. The penalty was paid."

The questions of law stated for the opinion of the Court were,—"(2) Were the carriages libelled hackney carriages within the meaning of section 218 of the Glasgow Police Act, 1866? (3) Is a carriage proprietor entitled, under section 219 of said Act, to send job carriages to a railway station to stand therein or ply for hire generally; or (4) Is he only entitled to send job carriages to a railway station when specially ordered or hired? (5) Does the fact of the appellant's company by their lease having the exclusive right of entry to the station, give them any

other or higher privilege than that given to any other carriage proprietor?" No. 17.

Argued for the appellant;—A construction must be put on section 219 which would add something to section 218. Its true intention was to confer a privilege upon job carriages with regard to railway stations which they did not have in any other place. A job carriage was not necessarily a carriage hired by time. Such a carriage could not stand or ply for hire within the city, but it could do so at any railway station by virtue of section 219. Feb. 1, 1892.
Duncan v.
Neilson.

Argued for the respondent;—This was an attempt to carry on the business of hiring hackney carriages without having a licence. The statute was quite plain. In order to escape liability it was incumbent on the appellant to shew under section 218 that the carriages sent to the station were there for hire for a period of not less than a whole day, or that they had been ordered in advance by someone who hired them for a shorter period than a day. Here there were neither of these elements in the hiring, and accordingly the appellant must be held to have contravened the statute.

LORD JUSTICE-GENERAL.—It is contended on behalf of the defenders in this prosecution that the carriages used by them on the occasion libelled were "job carriages" within the meaning of the Glasgow Police Act, 1866. Now, when the Dean of Faculty was examining the statute he was constrained to admit that the definition of "job carriage," upon which he relied, was the extremely comprehensive one that a job carriage should not "include any carriage licensed in pursuance of this Act." It appears to me that that construction is untenable. The practical effect of it would be to render licences entirely optional for the very large class of carriages which ply for hire at railway stations.

It is true that for their own interest, and for the convenience of their traffic, the railway companies, generally speaking, stand on their right to select the cab proprietors whom they are going to admit within their station precincts. But this Act of Parliament does not proceed upon the basis of any such selection, and would equally apply to the case of a railway station where there is free admittance for all carriage owners to go and compete for fares. It would certainly be a very extreme result if the Court were compelled to conclude in favour of that construction, because in one of the most important classes of traffic, and perhaps the one in which such regulation seems to be most needed, it would render licences optional, and by consequence would render the whole enactments on that behalf purely illusory.

But it seems to me that we are not compelled by the statute to arrive at any such conclusion. I think that section 218 does contain a sufficient explanation of what was meant by a "job carriage," without giving to that expression so absolutely comprehensive a sense as the defenders have assigned to it.

In the passage from section 218, quoted in the case, two classes of carriages are dealt with as falling within the exception to hackney carriages. The first case is that of a carriage "let out to hire as a job carriage by the day, month, or other longer period."

In that class the element of time comes very sharply forward. That is the class of yoked carriages which may be found in the street, and in possible competition with others. The other case is that of a carriage kept by the proprietor in his own premises, unyoked, for the purpose of "being let out on hire as a job carriage for any shorter period" than a day.

No. 17.

Feb. 1, 1892.
Duncan v.
Neilson.

It seems to me that these passages afford a sufficient explanation of what is meant by "job carriage" in the sense of the Act. If the carriage is yoked it must be a carriage that offers itself for hire for a day, month, or longer period; but it may be unyoked, and then it is permitted to be without a licence, if the owner waits and finds that someone comes for his carriage unyoked, and then takes it for hire for a shorter period than a day.

The result, I think, then is that in the kind of case with which the Court has to deal, viz., the case of a yoked carriage at the railway station, it can only escape the obligation to have a licence if its terms are that it does not take hire for a shorter period than a day.

The conclusion I have come to is that, inasmuch as these carriages were not already hired for the day or longer period, and were not offering themselves for a day or longer period, therefore they are within the prohibitive clause, and accordingly this conviction is right.

This conclusion seems to me to be entirely consistent with the convenience of all the persons who are instanced by the learned Dean.

Persons who make an arrangement beforehand to hire a carriage to meet them at the station for the day are quite within the section, because the carriage which meets them is hired for a day, and does not require to be licensed, and under section 218 it is quite entitled to its place at the railway station. Being already hired it is not standing or plying for hire.

I think also that a carriage which is not under a previous engagement may under this section lawfully get admittance to the railway station if it offers itself for hire there on the footing that it shall take engagement for a day, but not for a shorter period. That is the case of a yoked carriage which is at the station, and forms an exception to the general prohibition against carriages standing for hire without a licence.

I am of opinion that the case before the Court was a clear contravention of the statute, and that the judgment appealed against was right.

LORD ADAM concurred.

LORD M'LAREN.—I find that the definition of "hackney carriage" includes carriages of every construction, with certain exceptions. The general definition, apart from the exceptions, would clearly include a carriage standing for hire within an owner's yard, and therefore also at a railway station. But the exception includes two cases, viz., vehicles hired for a day or longer period, and vehicles hired at a stable standing unyoked at the time at which they are hired.

I agree that the case does not fall within either of the exceptions. In order to avoid prosecution the appellants must shew either that the vehicles were only at the station for hire for a period of not less than a whole day, or that they had been ordered in advance by someone, and in that case it does not seem to us to be material whether the order is by time or for a journey. What the omnibus company is seeking to do is to carry on the business of hiring hackney carriages without having a licence.

THE COURT dismissed the appeal, affirmed the determination of the inferior Judge, and decerned.

MILLAR, ROBSON, & Co., S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

GEORGE SHARP, Appellant.—*Salvesen*.
GEORGE TODD, Respondent.—*R. L. Orr*.

No. 18.

Feb. 2, 1892.
Sharp v. Todd.

Summary prosecution—Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), sec. 172—Conviction—Suspension.—In a prosecution under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, for a contravention of a provision of the Merchant Shipping Act, 1854, entailing a penalty, the Sheriff, without expressly convicting the accused of the offence charged, gave decree for a certain sum of penalty, and granted warrant for arrestment and poiding. The Court sustained an appeal, on the ground that there was no conviction.

GEORGE SHARP, shipmaster, Aberdeen, was charged in a complaint at the instance of George Todd, fireman, Aberdeen, with concurrence of the Procurator-fiscal, that he did "on 12th September 1891, in Aberdeen, upon payment of the wages due to the complainer, or on 17th September 1891, in Aberdeen, upon the discharge of the complainer, a fireman on board the steamship 'Spray' of Aberdeen, of which the said George Sharp is master, fail to sign and give to the complainer a certificate of his discharge in the form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge, contrary to 'The Merchant Shipping Act, 1854,' particularly section 172 thereof,* whereby he has rendered himself liable to a penalty of not exceeding £10 sterling, together with the expenses of prosecution and conviction, as provided by section 531 of said Act."

HIGH COURT.
Lord Justice-General.
Lord Adam.
Ld. M'Laren.
Justiciary Clerk.

On 17th November 1891 the Sheriff-substitute (Grierson) pronounced this interlocutor:—"The Sheriff-substitute, having heard the agents for the parties and considered the proof adduced, decerns against the defender for payment to the complainer, George Todd, of the sum of 10s. of penalty and £1, 17s. 6d. of expenses, and grants warrant for arrestment and poiding in default of payment, such arrestment and poiding to be carried into effect by sheriff-officers in the same manner as in cases arising under the ordinary jurisdiction of the Sheriff."

Sharp took a case.

Argued, *inter alia*, for the appellant;—(1) Before giving decree, as the Sheriff had done here, for payment of a penalty under a complaint in this form, the defender ought to have been found guilty of the charge. The statutory form was to be found in schedule K, under the 18th section of the Summary Procedure Act, 1864 [both quoted *infra* by the Lord Justice-General]. The omission to use that form was fatal to the conviction. (2) This was a general conviction, proceeding upon an alternative charge. It could not therefore stand.¹

Further objections were pleaded, but it is unnecessary to state the argument regarding these.

Argued for the respondent;—(1) The charge was not really alternative. There was a variation in the modus, but nothing further.² The case was

* The Merchant Shipping Act, 1854, sec. 172, enacted,—“Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge, and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding £10.”

¹ Bell v. M'Phee, July 18, 1883, 10 R. (Just. Cases) 78; De Banzie v. Peebles, March 16, 1875, 2 R. (Just. Cases) 22.

² Bell v. M'Phee, July 18, 1883, 10 R. (Just. Cases) 78; Murray v. M'Dougall, Feb. 7, 1883, 10 R. (Just. Cases) 42; O'Neil v. Campbell, July 18, 1883, 10 R. 76; Maxwell v. Marsland, Jan. 28, 1889, 16 R. (Just. Cases) 48.

No. 18. treated by the Sheriff-substitute as a civil suit. The test whether it was civil or criminal depended upon whether imprisonment was part of the punishment. Where, as here, it was only in execution that imprisonment was permissible, the action was treated as a civil one, and the penalty was regarded in the light of damages.¹ (2) The variation in the judgment of the Sheriff-substitute was not material.

Feb. 2, 1892.
Sharp v. Todd.

LORD JUSTICE-GENERAL.—I am of opinion that this decree cannot stand. The complaint alleges a contravention of section 172 of the Merchant Shipping Act, 1854, and it is important to observe the terms in which the section penalises a contravention. They are these,—“ . . . If any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding ten pounds.”

The complaint quite properly takes the same view of the legal qualities and nature of the contravention, because it craves the Judge to “convict the said George Sharp of the said contravention, and to adjudge him to suffer the penalty provided by the said Act.” Now the first objection that is taken raises the important question whether on a complaint so framed and proceeding upon such a section, it is competent for a Judge, in the exercise of summary jurisdiction, neither to convict nor to assoilzie, but passing over the question whether an offence has or has not been committed, to decern the respondent in the complaint to pay a sum of money.

I am of opinion that that is quite incompetent. In our law, before the Summary Procedure Act, wherever a case had gone to trial, the grounds of the conviction required to be precisely stated, for it was held that the Judge must set out how the conviction was obtained, whether upon evidence or upon a confession, and that it would not do to mix together confession and evidence and arrive at a composite conclusion not articulately stated. I mention this to shew in what a high degree the conviction as distinguished from the sentence of punishment is an important part of the proceedings, and I believe that in your Lordships' experience, which is in these matters much greater than mine, no such omission as we have here has ever occurred before.

But I do not require to go back to the former state of the law, because the Summary Procedure Act of 1864 makes as it were a fresh start upon this matter, and speaks with no ambiguous voice. It is admitted that these proceedings took place, and necessarily took place, under the Act of 1864, which provides a series of forms for judgments appropriate to particular cases. Schedule K contains these forms, and No. 6 is the particular form of judgment suitable to the present case. This schedule is introduced into operation by section 18 of the Act, in these words,—“The sentence of the Court may be in one or other of the forms contained in the schedule K to this Act annexed, or as nearly as may be in such form, according to the nature and circumstances of the complaint, namely,” and then it goes through the cases dealt with in the schedule. Now, it is quite true that these words are directory. I see that cases have occurred in which there were deviations from these forms which were not held to invalidate the sentence,—these deviations being held to be warranted by the words “or as nearly as may be in such form, according to the nature and circumstances of the complaint.”

¹ Summary Procedure (Scotland) Act, 1864, sec. 28; Merchant Shipping Act, 1854, secs. 524 and 538.

The scope of these deviations are clearly set forth in previous decisions where it is laid down that the Court is entitled according to the circumstances to make the necessary, but not more than the necessary, variation where it is impossible literally to comply with the words of the form. But we have not here to deal with a case of variation necessary to adapt this judgment to the circumstances of the case. The variation here is to omit what according to the old law and practice, and according to the statute law now in existence, is treated in each and every case as being the first and most essential part of the judgment, and it is accordingly anxiously and laboriously repeated in each example in the schedule. "The Justices (or Justice or Sheriff or magistrate) in respect of the judicial confession of the said J K (or of the evidence adduced) convict the said J K of the contravention (or offence) charged, and therefore adjudge him to forfeit and pay," and so on—such is the invariable style. Therefore it appears to me that the Act of 1864 is violated, because the plain implication from its laborious repetition of this essential part of the judgment is that that is a part which no one would think of omitting. If there is anything special in this case, I should say it was a clamant call for specification of the offence of which the accused was convicted.

No. 18.

Feb. 2, 1892.
Sharp v. Todd.

In this complaint the prosecutor has charged two alternative offences. It is manifest that there is a great deal to be said against the validity of the first alternative, both as matter of relevancy and on the proved facts of the case. Where there are two alternatives in a complaint, one of which is bad, it is obvious that the accused has a substantial interest to be told on which alternative the conviction proceeds. Here we do not know whether the Judge considered the contravention proved at all or not, or if proved, whether he considered it proved as regarded one alternative or as regarded the other.

It appears to me that this is a case of high importance affecting a general question, and that our judgment may have the effect of calling the attention of Judges of summary jurisdiction to the necessity of articulately stating the conviction upon which alone they are warranted in proceeding to sentence, and that they are not entitled to omit this essential part of the judgment.

LORD ADAM.—Two objections are stated to the Sheriff's interlocutor in this case—first, that it contains no conviction in terms of the prayer of the complaint, and second, that in its terms it is a general conviction, while the complaint is alternative.

I agree with your Lordships that the conviction must be quashed, or rather, I should say, that the judgment of the Sheriff cannot stand.

This complaint bears to be under the Summary Procedure Act, 1864, and section 18 of that Act and relative schedule provide examples of findings in complaints under that Act. All these examples provide that there shall be a finding expressly convicting or acquitting the accused.

I think it is idle to say that this is a matter of slight importance, the provisions of the Summary Procedure Act of 1864, under which this complaint bears to proceed, not having been fulfilled. I think the judgment must be set aside. The imposing of the penalty is the consequence of the conviction, and if there is no conviction there can be no imposition of a penalty. I may say that this is the first case in which I have seen a penalty decerned for without a conviction.

LORD M'LAREN.—I think it is important in considering what is necessary to

No. 18.

Feb. 2, 1892.
Sharp v. Todd.

the substance of the conviction that we should clearly distinguish between those proceedings which are carried on before a Sheriff or magistrate without a jury and those in which the conviction is the result of an investigation by a Judge and jury. In the latter case, if the prisoner pleads guilty, he is sentenced on his own confession, and there is no conviction or finding that the party is guilty. But if in the course of the trial the prisoner tenders a plea, he is found guilty in respect of his confession, or failing that on the evidence. In summary convictions, where the magistrate performs the duty of judge and jury, it is necessary before coming to the operative part of the judgment awarding sentence that it should be stated whether the accused is convicted on his confession or upon evidence; and above all, it must be stated that he is convicted of some offence.

In the present case there is no conviction to support the decerniture. I agree with your Lordship that this is a deviation from the statute which affects the substance of the decree, because on a strict consideration of the decree it may possibly have proceeded upon some other view than that an offence had been committed.

I was reading yesterday the judgment of the Lord Justice-Clerk in the recent Clyde collision case (*Parker v. Barrie*, 16 R. (Just. Cases) 5), and his Lordship there makes reference to a remark of mine in a previous case to this effect. I said that notwithstanding the provision of the forms of indictments in the recent statute, an indictment ought to set forth that something which we could recognise as a crime had been committed. The Lord Justice-Clerk says that if that had been the view of the Court he would have accepted it, however contrary to his impressions and convictions. But as it rested only on my authority, he had no hesitation in disregarding it. I do not find that his Lordship's opinion to that effect was concurred in by other Judges, but I must at least assume that it is not clear that an indictment must necessarily disclose a crime. I am glad to hear from your Lordships that a conviction must shew that a crime has been committed, because if it were possible that a sentence could follow on an indictment which did not state a crime, and with a conviction which did not state that the law had been contravened, I should begin to doubt whether I was living in a free country.

THE COURT pronounced this interlocutor:—"Sustain the appeal, reverse the determination of the inferior Judge, and decern: Find appellant entitled to expenses, which modify to seven guineas."

BOYD, JAMESON, & KELLY, W.S.—WM. OFFICER, S.S.C.—Agents.

No. 19.

Feb. 16, 1892.
Walker v.
Lamb.WILLIAM WALKER, Appellant.—*Asher—Hunter*.ROBERT LAMB (Procurator-Fiscal at Aberdeen), Respondent.—*Ura*.

Police—Public Health—The Aberdeen Police and Water-Works Act, 1862 (25 and 26 Vict. cap. cccii.), secs. 140-145—Statute—Construction.—A person was convicted of a contravention of section 140* of the Aberdeen Police Act,

* The Aberdeen Police and Water-Works Act, 1862 (25 and 26 Vict. cap. cccii.), sec. 140, enacted,—“Every person who permits to exist or remain in or upon any land, building, or place, open, covered, or enclosed, and owned or occupied by him or under his control within the limits of this Act, any pool, watercourse, ditch, gutter, drain, privy, water-closet, urinal, cesspool, or ashpit, so foul as to be injurious to health or offensive to the occupiers of any adjoining premises, or who keeps any animal in or upon any such land, building, or place so as to be injurious to health, or offensive to such occupiers, or who permits to

1862, upon a complaint which set forth that he permitted to remain on a piece of land occupied by him in Aberdeen a large quantity of paraffin, "which was injurious to health and offensive to the occupiers of premises adjoining." It was proved that the paraffin was offensive and injurious to the health of his neighbours. No. 19.
Feb. 16, 1892.
Walker v. Lamb.

Held that the words "any matter or thing whatever injurious to health or offensive to" the occupiers of adjoining premises were to be read as meaning any matter or thing *ejusdem generis* with those specified, and did not apply to goods stored for commercial purposes, although they might be injurious to health and offensive to the neighbours, and conviction *quashed*.

ON 29th September 1891 William Walker, grocer, Gallowgate, Aberdeen, was charged upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of the Procurator-fiscal of Court, which set forth that he did, "during the period between 26th August 1891 and 28th September 1891, permit to remain in or upon an enclosed garden or piece of land occupied by him, and situated at the back of premises, No. 25 Constitution Street, Aberdeen, a large quantity of paraffin, which was injurious to health and offensive to the occupiers of premises adjoining, contrary to section 140 of the Aberdeen Police and Water-Works Act, 1862," "and that he is liable to a penalty." HIGH COURT.
Lord Justice-Clerk.
Ld. Wellwood.
Ld. Stormonth Darling.
Justiciary Clerk.

The accused objected to the relevancy of the complaint, in respect that the charge libelled did not constitute an offence under the section libelled.

The magistrate (M'Kenzie) repelled the objection, and the accused having pleaded not guilty and evidence having been led, the magistrate convicted him of the contravention charged, and fined him, holding "that the large quantity of paraffin stored in the garden or piece of ground was both injurious to health and offensive to the occupiers of premises adjoining within the meaning of the section."

Walker appealed upon a case stated by the magistrate, in which the following facts were set out:—"It was proved that an enclosed garden or piece of land, situated at the back of No. 25 Constitution Street, formerly part of the garden belonging to that house, had been let to the appellant for the purpose of, and was occupied by him, and used as a store for paraffin, and that at the first date mentioned in the complaint, viz., 26th August 1891, about 1200 barrels, each containing 40 gallons of paraffin, had been stored there, which had been reduced to about 900 barrels at the second date mentioned in the complaint, viz., 28th September 1891; and that the garden or piece of land was open, and in no way covered in. The shortest distance between the barrels and dwelling-houses was about 20 feet; that it was proved by a number of the occupiers of adjoining properties that the smell arising from the paraffin was noxious and nauseous, and very offensive to them; that some of them, who were in perfect health before the paraffin had been stored there, had since suffered from headaches, sickness, and want of appetite; and that they complained verbally and

exist or remain in or upon any such land, building, or place any accumulation of manure, or any matter or thing whatever injurious to health or offensive to such occupiers, shall, for every such offence, be liable to a penalty not exceeding forty shillings."

Section 145 enacted,—“Every person who has or keeps or suffers to be kept within any house . . . or other place any dog . . . which shall be a nuisance or annoyance to any of the inhabitants in the neighbourhood, and does not prevent the continuance of such nuisance or annoyance by removing such dog or other animal or otherwise, within such time as the magistrate shall determine, shall be liable in a penalty.”

No. 19.

Feb. 16, 1892.
Walker v.
Lamb.

in writing to the sanitary inspector of the city, who requested the appellant to remove the cause of complaint, but that he had failed to do so.

"It was established by medical evidence that the symptoms above described were caused by the offensive odour of the paraffin, and that the continued inhalation of air so impregnated with paraffin was undoubtedly injurious to health; that paraffin was poisonous, but that very small quantities would not be injurious to health."

The questions of law for the opinion of the High Court were,—"(1) Whether the said complaint is relevant? (2) On the facts proved, was the appellant guilty of the offence charged?"

Argued for the appellant;—There was no contravention of the 140th section of the Aberdeen local Act, and further that section could not be founded on to support a conviction of the offence libelled. It was said that the storing of paraffin was "a matter or thing injurious to health" in the sense of the section. But the section, in the earlier part of it, was directed against certain specified offences, such as keeping drains, animals, and heaps of manure in an uncleanly state, and the words "matter or thing," in the later part, must, according to a familiar rule of construction,¹ be taken to refer to things *ejusdem generis* with the offences already particularly specified. If that was so, then the words did not include the storing of paraffin, because it was not said that it was stored in an uncleanly way. Indeed, nothing manufactured or used in connection with trade could be brought into the Act. The complaint for such an offence as this ought to have been framed under section 16 of the Public Health Act, 1867 (30 and 31 Vict. cap. 101), and following sections.

Argued for the respondent;—On a sound reading of the 140th section of the statute, it referred to whatever was brought on to ground situated near a dwelling-house of an offensive nature or injurious to the health of the neighbours. It was not disputed that the paraffin was both offensive and injurious to health.

At advising, the opinion of the Court was delivered by

LORD STORMONTH DARLING.—We must assume, on the facts presented to us, that the storing of from 900 to 1200 barrels of paraffin in the back-garden in question was not only offensive to the neighbours but injurious to health, and if so, it would be strange, after so much sanitary legislation, if there were no statutory remedy. But the question is whether the complaint discloses an offence under section 140 of the Aberdeen Police Act of 1862. I am of opinion that it does not.

The section is directed against any person who "permits to exist or remain" in any place within the burgh of Aberdeen certain things (such as drains, privies, cesspools, or ashpits) so foul as to be injurious to health or offensive to the occupiers of adjoining premises, or who keeps any animal, "so as to be injurious to health or offensive to such occupier," or who "permits to exist or remain" in any such place "any accumulation of manure, or any matter or thing whatever, injurious to health or offensive to such occupiers." The storage of paraffin in large quantities is said to fall within the latter category as being an accumulation of a "matter or thing," injurious to health and offensive to the neighbours, permitted to exist or remain in this back-garden within burgh.

If the whole of the section were in terms as general as its concluding words, it would be difficult to resist this argument. But *specialia derogant generalibus*. The offences specified in the section seem all to resolve themselves into keeping

¹ Anderson v. Aberdeen Agricultural Hall Co., May 16, 1879, 6 R. 901.

premises in a foul or dirty state. It is so expressly as to the drains, privies, &c., and the accumulation of manure suggests the same idea, for the offence consists in the excessive retention of what ought at frequent intervals to be removed. Even the reference to the keeping of an animal seems to be limited to the case where an animal is kept in such a dirty state as to be offensive or injurious to health. This, I think, clearly appears from the fact that there is a separate section (the 145th) which provides for the case of an animal (such as a howling dog) which is a "nuisance or annoyance" to the neighbourhood from its own behaviour, as distinguished from the manner in which it is kept.

No. 19.
Feb. 16, 1892.
Walker v.
Lamb.

Accordingly, it seems to me that the general words towards the end of the section, "any matter or thing whatever injurious to health or offensive to such occupiers," must be read as meaning merely any matter or thing *ejusdem generis* with those which have been already specified. If so, the simple storage of an article of commerce like paraffin is not covered by the section. We are not told, and cannot assume, that the offence arose from any want of care or cleanliness in the manner of storing the paraffin. Indeed, it would appear that the storing of any large quantity, however it may be done, is calculated to be offensive to the sense of smell and injurious to health.

The Public Health Act, 1867 (30 and 31 Vict. cap. 101), sec. 16, and following sections, provides for the "removal, or remedy, or discontinuance, or interdict" of "any work, manufactory, trade, or business injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health," but the procedure provided by the Act requires that the application shall be made only to the Sheriff, and on medical certificate, or a requisition in writing by ten inhabitants of the district. There may be very good reasons for providing that a trade or business should not be put down without these precautions being taken, although mere want of cleanliness in the mode of keeping premises within burgh may be reached by a more summary procedure.

Even if no statutory enactment applied, I cannot doubt that, if any person lays down on his premises what is so offensive as to be injurious to health, he may be interdicted from doing so at common law. But I think we should decide nothing more than this, that the circumstances disclosed in this case do not justify a prosecution under section 140 of the Aberdeen Police Act. I am therefore for quashing the conviction.

THE COURT quashed the conviction.

THOMAS DALGLEISH, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

JOHN LANG, Appellant.—*Lees—A. S. D. Thomson.*
DANIEL MUNRO, Respondents.—*Asher—Younger.*

No. 20.

Mar. 9, 1892.
Lang v.
Munro.

Statute—Construction—Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), secs. 45 and 46—Glasgow Police Acts, 1862 and 1866.—The provisions of the Glasgow Police Acts, 1862 and 1866, dealing with underground dwellings, exact certain requirements from which, however, they exempt such dwellings as are registered in pursuance of the Acts.

The Public Health Act, 1867, contains similar but enlarged provisions relating to underground dwellings, but without the exemptions.

In a prosecution under the Public Health Act for contravention of these provisions in the case of an underground dwelling in Glasgow, held that it was not a good defence that the dwelling was registered under the Glasgow Police Acts.

No. 20.

Mar. 9, 1892.
Lang v.
Munro.

HIGH COURT.
Lord Justice-
General.
Lord Adam.
Lord M'Laren.
Justiciary
Clerk.

THE clerk to the Glasgow Police Commissioners, who were the Local Authority for the city of Glasgow under the Public Health Act, 1867, brought this petition and complaint under the 45th and 46th sections* of that Act against Daniel Munro, house-factor, Glasgow. The petition recited "that Daniel Munro, house-factor, 39 Hope Street, Glasgow, the owner of the two cellars, vaults, or underground rooms after mentioned, has, since the 11th day of July 1891, let separately other than as a warehouse or storehouse, or has suffered to be occupied as a dwelling-house the two cellars, vaults, or underground rooms situated at 38 Catherine Street, Glasgow, . . . which are not entirely open on one or other of their sides, and which have less than one-third of their height above the level of the street or ground adjoining the same, or otherwise have not three feet at least of their height from the floor to the ceiling above the said level, with an open area of 2 feet 6 inches wide from the level of the floors of such vaults or rooms up to the level of the said street or ground, notwithstanding that the said local authority, on 10th July 1891, issued and gave notice to the said Daniel Munro, . . . that the letting of such cellars, vaults, or underground rooms as dwelling-houses was prohibited from that time forth, contrary to sections 45 and 46 of the Public Health (Scotland) Act, 1867," whereby he had become liable in a penalty not exceeding 20s. for every day during which such cellars, vaults, or rooms were so occupied after conviction of the first offence.

It was admitted that the two houses in question were registered under the provisions of the 375th, 376th, and 377th sections of the Glasgow Police Act, 1862.†

* The Public Health Act, 1867, section 45, enacted,—“It shall not be lawful to let separately, except as a warehouse or storehouse, or to suffer to be occupied as a dwelling-house, any cellar whatsoever, or any vault or underground room (not being entirely open on one or other of its sides), which vault or room shall be less in height from the floor to the ceiling than 7 feet, in the case of houses built prior to the passing of this Act, or less in height than 8 feet, in the case of houses built subsequently to the passing hereof, or which shall be less than one-third of its height above the level of the street or ground adjoining the same, or otherwise shall not have 3 feet at least of its height from the floor to the ceiling above the said level, with an open area of 10 feet 6 inches wide from the level of the floor of such vault or room up to the level of the said street or ground, or which shall not have appurtenant thereto the use of a water-closet or privy and ashpit, or which shall not also have a glazed window made to open to the full extent of the half thereof, the area of which is not less than 9 superficial feet clear of the frame, and a fireplace with a chimney or flue, or which vault or underground room, being an inner or back vault or cellar let or occupied along with a front vault or room as part of the same letting or occupation, has not a ventilating flue (unless such inner or back vault or room shall be part of a house built before the passing of this Act), or which shall not be well and effectually drained by means of a drain,” &c.

Section 46 enacted the penalty “for letting underground dwellings.”

† The Glasgow Police Act, 1862, section 375, enacted,—“Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease, or to use or suffer to be used, for the purpose of sleeping in, any apartment, unless one-third at least of its height is above the level of the turnpike road, or public or private street or court adjoining or near to it, and unless there be in front of at least one-third of every window in such apartment, including any turnpike road, or public or private street or court, a free space equal to at least one-half of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon it.”

Section 376 enacted,—“Any person who lets, or who takes on lease, any apart-

The respondent pleaded that the dwelling-houses in question having been registered under the local Acts could not be subjected to the provisions of the Public Health Act founded on. No. 20.

The Sheriff-substitute (Birnie), on 14th January 1891, gave effect to that contention, and assailed the respondent. Mar. 9, 1892.
Lang v.
Munro.

The clerk to the Police Commissioners obtained a case for the opinion of the High Court. The question of law stated was,—“Can the two sections of the Public Health Act founded on by the complainer and appellant be applied to the two dwelling-houses complained of?”

The case narrated that it was admitted by the respondent (1) that the two houses in question were occupied as dwelling-houses; (2) that if the two sections of the Public Health Act founded on did apply to them, they, as dwelling-houses, stood condemned, as not having the conditions required by the said sections in the respects mentioned in the complaint; and (3) that he had received notice of prohibition as specified in the complaint; but that it was pleaded that that Act could not apply in consequence of the provisions of the Glasgow local Police Acts above quoted.

Argued for the appellant;—The Public Health Act, 1867, was not a tentative or experimental statute. It was a remedial statute and swept away all local peculiarities. It removed the exception contained in the Glasgow Police Acts, which were prior to it, and were in no way saved by it. The conditions of the underground dwelling struck at by the Public Health Act were more exhaustive than those in the local Acts, and some of them were enlarged. The limitations contained in the latter were therefore by implication removed.¹ This argument was strengthened by the fact that in section 16, subsection (d) of the Public Health Act, a special exception was made in the case of Glasgow from the provisions of that section. Further, section 104 of the Public Health Act, enacted that “all powers given by this Act shall be deemed to be in addition to, and not in derogation of, any powers conferred by Act of Parliament not hereby repealed.” The Glasgow local Acts were clearly within the view of the Legislature when they passed the Public Health Act, for the Police Commissioners under any local Act were by section 5 made the Local Authority.

Argued for the respondent;—The sections of the Public Health Act under which this prosecution had been brought, and the corresponding provisions of the local Acts, dealt not so much with the sanitary state of the underground dwellings in question as had been suggested as with their architectural requirements. In the general Act there were no doubt provisions in regard to drainage, &c., but the structural conditions required

ment for the purpose of sleeping in, which is not in conformity with the said provision, or which does not fall within the exceptions hereinafter specified, shall be liable to a penalty not exceeding £5, and any person who uses, or suffers to be used, for the said purpose any such apartment, shall be liable to a penalty not exceeding 5s. for every day or part of a day during which any such apartment is so used or suffered to be used.”

Section 377 enacted, that the provisions in question should not apply, *inter alia*, “to any apartment which in any part of the three years preceding the term of Martinmas 1861 was used for the purpose of sleeping in, if the proprietor of such apartment desires to retain the power of so letting or using it, and registers it in pursuance of the provisions hereinafter contained.”

The Glasgow Police Act of 1866, sections 370, 371, and 372, contained similar provisions.

¹ *Bramston v. Mayor of Colchester*, 1856, 6 Ellis & Blackburn, 246; *Duncan v. Scottish North-Eastern Railway Co.*, 1870, L. R., 2 Scot. Appa. 20, 8 Macph. (H. L.) 53.

No. 20.
 —
 Mar. 9, 1892.
 Lang v.
 Munro.

by the general and local Acts were very similar. The general Act could not be held to repeal by implication the special exemption conferred on registered dwellings by the local Acts. Where there was no absolute inconsistency between the two Acts, it was not to be inferred that the provisions of a general Act derogated from those of a special Act. In passing the former, the Legislature was not to be presumed to have in view special cases already dealt with. *Generalia specialibus non derogant*.¹ The distance of time was so very brief that it was not intelligible that the Legislature should intend to take away by a general Act passed in 1867 a privilege conferred by a local Act passed in the previous session.

At advising.—

LORD JUSTICE-GENERAL.—The petition of the appellant, from which the respondent has been assolized in the Court below, was laid under the 45th and 46th sections of the Public Health (Scotland) Act, 1867. The latter of these sections merely states the penalty for the offence created by the former, which declares that it shall not be lawful to let separately, except as a warehouse or storehouse, or to suffer to be occupied as a dwelling-place, any cellar whatsoever, or any vault or underground room, which does not fulfil certain enumerated conditions as to space, air, light, drainage, heat, and ventilation. It is admitted that the two of those conditions which are specified in the petition are not fulfilled by the dwellings which are the subject of complaint. The defence is that the dwellings in question having been registered in accordance with certain provisions of the Glasgow Police Act, 1862, could not be subjected to the provisions of the Public Health Act, 1867.

The question thus raised is of considerable importance, and requires somewhat close attention.

The first thing to be ascertained is what was done by the Glasgow Police Act of 1862. Now, that statute is made up of an immense number of provisions on all the multifarious subjects which come under its title, using the term in its most comprehensive sense; it deals with the constitution of the local governing body, its members, rates, officers, and courts; with fires, public-houses, weights and measures, pawnbrokers, cabs, fireworks, porters, cleansing, lighting, sanitary objects, the edile jurisdiction, streets, sewers, buildings, and markets.

In the part headed "Buildings—their erection, alteration, and use," there occurs as the 375th section a provision that, except as after mentioned, it shall not be lawful to let or use, for the purpose of sleeping in, any apartment unless one-third at least of its height is above the level of the street, and unless there be in front of at least one-third of every window in the apartment a free space equal to at least one-half of the height of the wall in which it is placed; and section 376 provides a penalty. The excepting clause from this provision is the 377th; it exempts from the application of this prohibition any apartment which in any part of the three years preceding Martinmas 1861 was used for the purpose of sleeping in, if the proprietor desires to retain the power of so letting or using it, and registers it in pursuance of certain clauses which follow, providing the machinery of registration. It is under these provisions that the respondent's house is registered; and the question is, does this registration avail him against a prosecution under the 45th section of the Public Health Act, 1867?

¹ Hardcastle's Statutory Law, 174; Thorpe v. Adams, 1871, L. R., 6 C. P. 125, Bovill, C. J. p. 135; Fitzgerald v. Champneys, 1861, 30 L. J. Chan. 777; London and Blackwall Railway Co., v. Board of Works for Limehouse District, 1856, 3 Kay & Johnston, 123, at p. 128.

Now, before considering the relation of the two statutes—the local and the general—it is well, for greater accuracy, to compare the two sections which, the one in the local Act and the other in the General Act, declare the offence. They are, as already mentioned, the 375th in the local Act, and the 45th in the general Act. It will be found that while the local Act demands two things in underground dwellings, the general Act demands nine, and that even as regards the two of which the subject-matter is the same, the provisions are not identical. One of them, that relating to the one-third above ground, is in substance the same; the other, which relates to the air space in front of the windows, is different as to the amount required.

No. 20.
Mar. 9, 1892.
Lang v.
Munro.

Now, the first and most obvious remark on the respondent's argument is that the privilege of registration set up in the local Act does not profess to do more than protect against the specific penal provisions of that Act, viz., sections 375 and 376, to which it creates an exception; and some process of reasoning is required to make this registration avail as a protection against the provisions of a subsequent and general Act. To give full justice to the argument of the respondent, which I am now to consider, it may be right to add that in another Glasgow Police Act of 1866 which repealed that of 1862, the clauses in the Act of 1862 are re-enacted. This, however, very slightly, if at all, affects the argument.

The point, then, for the respondent is that the 45th section of the General Act of 1867 (so far as the two matters go, which are the subject of this prosecution) relates to the same subject-matter as the section in the local Act from which he has a statutory exemption. The argument is that the Legislature, having in 1862 dealt with this subject, and conferred the exemption, and having (as the respondent adds) re-enacted it in 1866, is not to be held to have abrogated this local exemption in 1867, when, dealing with the same subject in a general Act, it again re-enacts substantially the same prohibitions. The general doctrine which the respondent invokes is that in a general Act the Legislature is presumed to have only general cases in view, and not particular cases, which have been already provided for by a special Act.

At best this is no more than a presumption; and it is necessary to examine the Public Health Act itself to ascertain its relation to local statutes, and particularly to the Glasgow Police Act. Now, when this is done, it becomes clear that the Public Health Act is intended to apply to places having local Police Acts, and in particular that it speaks with full remembrance of the particular provisions of the Glasgow Police Act. The former of these propositions is demonstrated by the 5th section, which imposes the duty of executing the Act, in places within the jurisdiction of police commissioners or trustees exercising the functions of police commissioners under any general or local Act, on those police commissioners or trustees. Those bodies are created the local authorities to execute the Act; and by the 104th section it is provided that all powers given by the Act (viz., the Public Health Act) shall be deemed to be in addition to, and not in derogation of, any powers conferred by Act of Parliament not thereby repealed; and such last-mentioned powers may be exercised in the same manner as if this Act had not passed, but without prejudice to the powers conferred by this Act. It is thus plain that, instead of contemplating only general cases, this Act does contemplate particular cases, which had already been provided for by special Acts.

That Glasgow and its local arrangements were in view of the Legislature in passing the Public Health Act is strikingly proved by section 16 (d), where the

No. 20.

Mar. 9, 1892.
Lang v.
Munro.

city of Glasgow is excepted from a provision fixing the minimum distance of dunghoops from the municipal boundaries. It is plain that this was done in order to allow Glasgow to retain the more flexible arrangements provided in section 354 of the Glasgow Police Act, 1866.

I hold it therefore to be clear that the sanitary system contained in the Public Health Act was intended to apply to Glasgow, and that where it was intended to relax or vary those provisions in their application to Glasgow, such relaxation is expressed in the Act.

And now, coming to closer quarters, I ask, does it not follow that section 45 of the Public Health Act, upon which this prosecution is rested, applies to at least some dwellings in Glasgow? I take the case of buildings not registered. If they are the subject of a prosecution under this clause, exactly such as the present, their only defence could be, that inasmuch as the local Act dealt with the subject although not quite in the same way, therefore the general Act did not apply. But this defence is hopeless, looking to the fact that the Legislature, as I have already shewn, has applied the Public Health Act to places which have local Acts, and in the case of Glasgow has done so with the local Act, so to speak, open before them.

I take next the case of registered dwellings; and I suppose a prosecution under the Public Health Act for non-compliance with one of the seven new conditions prescribed by that Act. On the principles already laid down I see no answer to a prosecution.

Coming next to the case in hand—a prosecution of a registered dwelling for non-compliance with the absolute and universal requirement of the conditions, which under previous legislation could only be exacted in buildings not registered—what is the theory of the defence? It must be that the case of these registered houses having been considered in 1862 and in 1866, they got an immunity, and that it is not to be held that rights of property so protected are further infringed in 1867. But it appears to me that the previous steps in the argument have already swept away the ratio of this defence. If those registered houses have by the Act of 1867 been subjected to the seven new requirements, that is in quality as definite an encroachment of the settlement of 1862 and 1866 as to do away with the distinction between registered and unregistered dwellings in regard to the two old requirements. The truth is, once it is admitted or established that the Public Health Act applies to Glasgow, the result follows that it applies on its own terms, and not on the terms of the local Act. Nor is this repugnant or surprising. In the Glasgow Police Act, as already noticed, sanitary provisions are merely a part of a general local scheme, which had to be adjusted and pared down to meet conflicting local interests concerned in the establishment of a common administration. In that case it is natural that different interests should be protected or conciliated as here. But in 1867 the Legislature was moved by the declared desire to establish a general sanitary system over Scotland, the provisions of which, by virtue of their universality, should improve public health. Every sanitary scheme necessarily involves interference with the rights of property, as exercised before it is passed, whether those be recognised or established by statute or not. I think it quite intelligible that when all over the country new restraints were being imposed on the use of property, no special sanctity should have been perceived in those dwellings which had under local arrangements received a protection against local legislation. These considerations confirm rather than produce the opinion which I have reached on the statutes

themselves, that the question stated in the case must be answered in the affirmative, and that the judgment of the Court below was wrong.

No. 20.

Mar. 9, 1892.
Lang v.
Munro.

LORD ADAM.—This complaint is brought under the 45th and 46th sections of the Public Health Act. The respondent does not dispute that if that Act applies to his case he has contravened it, but he pleads that the Act cannot apply in consequence of certain provisions of the Glasgow Police Act of 1866 which are set forth in the case. That Act lays down certain rules as to the letting of such underground dwellings as the one in question, similar to but not the same as those of the Public Health Act, and it continues an exemption from its application in favour of certain houses which are upon a register made up by the Sheriff under the previous Glasgow Police Act of 1862. The provisions of the Act of 1862, under which the register was made up, are set forth in the case. The Sheriff has held that because these houses have been registered in the register established by the Act of 1862, and continued by the Act of 1866, sections 45 and 46 of the Public Health Act cannot apply to them. We have not the reasons of the Sheriff's judgment, but I do not think it can have proceeded on any other ground than this, that the Public Health Act does not apply to the case, because Glasgow has a local Act, although of prior date, dealing with the same subject-matter. After a careful consideration of the provisions of the Public Health Act it seems to me clear that it did not repeal, nor was it intended to repeal, any existing local Police Act. But I think it is equally clear that the Act does apply to all boroughs whether they have a local Police Act or not. Your Lordship has referred to the 16th section which shews that it had the local Act of Glasgow in view. Local Acts are also referred to in other sections. Section 71, for example, which vests sewers within a district in the local authority provides that "Nothing in this Act contained shall affect the rights of any person or persons to the property or management of any sewers in virtue of any existing local or general police statute," the reason of the exception being that otherwise the Public Health Act would have applied. Accordingly I should have arrived at the same conclusion upon a construction of the Act as it expresses itself in the 104th section, where it provides that "All powers given by this Act shall be deemed to be in addition to and not in derogation of any powers conferred by Act of Parliament not hereby repealed, or any law or custom, and such last-mentioned powers may be exercised in the same manner as if this Act had not passed, but without prejudice to the powers conferred by this Act." The position of matters, then, appears to me to be this. I think it was within the power of the Local Authority to have proceeded against this house under the clauses of the local Act if it had not complied with the conditions imposed by that Act. In that case the privilege of registration would have applied and would have exempted from prosecution. But I think it was equally open to them to proceed under the Public Health Act for the violation of the provisions of that Act, and if the violation be established the penalties must follow, unless there is some provision in the Act exempting the respondent from prosecution. I cannot see that a privilege of exemption from prosecution under the local Act can be held to exempt from prosecution under the public Act, which contains no such privilege.

I agree that it is not surprising that the Legislature should have provided as it has done. The Public Health Act was passed with regard to the health of the whole community, and contains such provisions as were thought desirable for effecting that purpose, and there appears no reason why the inhabitants of

No. 20.

Mar. 9, 1892.
Lang v.
Munro.

Glasgow or of Edinburgh, because these cities have local Acts, should be put in a different position from the inhabitants of other places.

LORD M'LAREN.—I concur in the judgment proposed, and have very little to add. The question how far a right conferred under an Act of Parliament is affected by supervenient legislation is an interesting, and sometimes a delicate question. We were referred to authorities in the decisions of the English Courts to the effect that such a right would in general not be affected by subsequent Acts of the nature of local legislation unless it appeared from the terms of the subsequent Act of Parliament that the cases already dealt with were intended to be included in its provisions. Now that may be a very good principle where the two Acts of Parliament to be considered are both of the nature of local and personal Acts, such as railway legislation and municipal legislation, because Acts of Parliament of that kind are very much like decrees. They proceed upon the application of persons interested, and are generally granted if unopposed, unless there be anything in them contrary to public policy, which the Speaker or the Chairman of Committee might disallow of his own motion. Therefore it is very right that if a private individual has made a contract with a railway company, and that contract has been embodied in an Act of Parliament, not necessarily putting it as a contract, but imposing building conditions or the like—it is quite right, I say, that the person whose contract has been ratified by Parliament should be entitled to trust to it, and to assume—unless he gets notice to the contrary—that his particular case is not intended to be covered by the general words of any new bill that may be applied for. And if the new powers are expressed in general terms, I should highly approve of the principle which received effect in those cases relating to railway legislation for London, that the individual who already had the Parliamentary contract was not intended to be affected by general words in an Act obtained at the suit of the other contracting party. I can conceive that the same principle might apply to local legislation obtained at the instance of municipal corporations who, perhaps, have not always the same regard for individual interests which Parliament is supposed to have. At all events these interests are not under their protection, and they are under the protection of Parliament when dealing with public questions. But I think that the principle which I have endeavoured to explain is in general inapplicable to supervenient public legislation. I think that anyone who has notice of a public bill affecting his interests must apply to have a clause inserted protecting his interests if he conceives that he is entitled to such protection.

In all cases as to the application of a public Act of Parliament the safe rule is to determine its application, as your Lordship has proposed to do, by an analysis of the clauses of the Act itself, and the evidence which these afford of the state of knowledge of Parliament of the various interests which the Act proposes to affect. There is also another consideration distinguishing the two classes of cases which I think not unimportant. I mean that as a general rule Parliament will not give power to corporations, whether trading or non-trading, to take away private rights without making compensation. Accordingly, when the city of Glasgow first proposed to suppress a certain class of houses as being in their view insanitary, doubtless opposition was offered. It was possibly foreseen that, unless some compromise was effected, the power desired would not be given, because it was not proposed to give compensation to the owners of such houses. Accordingly this arrangement was

made, that all persons whose houses might be liable to exception under the Act should be permitted to register a claim of exemption within a certain time. But it by no means follows that if the matter had been brought before the Legislature, they would have seen it to be in accordance with the general principles which govern their proceedings, to make an exception of those registered houses from the operation of the Public Health Act, because in public Acts laying restrictions on individual rights for the public benefit it is not necessary or usual to give compensation. That, I think, is only done where the hardship to individuals would be very great, as in the case of slaughtering cattle and some other cases which readily occur to me. But where the interference is slight, each person must suffer the inconvenience and expense which is caused by the statute in consideration of the public benefit which he along with others derives from the operation of the statute. Now, the Public Health Act makes no exceptions, and makes no provision for compensation, and I am of opinion that it must receive effect according to its terms, and that the mere registration for the purposes of exemption from the operation of the Glasgow local Acts gives no protection against the operation of clauses of a more comprehensive character introduced into Acts applicable to the country at large.

No. 20.

Mar. 9, 1892.
Lang v.
Muuro.

THE COURT accordingly answered the question in the affirmative, reversed the determination of the inferior Judge, and remitted to him, finding no expenses due.

CAMPBELL & SMITH, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

D. RUSSELL & COMPANY, Pursuers (Respondents).—*Shaw*—*T. B. Morison*.
MRS GEORGINA MURRAY, Defender (Appellant).—*J. Wilson*.

No. 21.

Mar. 9, 1892.
Russell & Co.
v. Murray.

Sheriff—Jurisdiction—Review—Small-Debt Act, 1837 (1 Vict. c. 41), sec. 31.
—A defender in the Small-Debt Court having objected to the Sheriff-substitute's jurisdiction upon the ground that she had no residence within the county, he, after a proof, repelled her objection, and decerned against her.

Held (1) that the defender was entitled to appeal to the High Court under the 31st section of the Small-Debt Act, 1837, on the ground of "defect of jurisdiction" of the Sheriff-substitute, and (2) that the case should be remitted to the Sheriff to inquire into the facts, and to report.

THIS was an appeal at the instance of Mrs Georgina Murray under the 31st section of the Small-Debt Act, 1837,* against a decree of the Sheriff-substitute (Hamilton) of the Lothians and Peebles, pronounced against the appellant in the Small-Debt Court at Edinburgh in a summons at the instance of D. Russell & Company, Oil Mills, Burntisland. The ground of the appeal was that the appellant was not subject to the jurisdiction of the Court, as her only residence was in Fife.

HIGH COURT.
Lord Justice-General.
Lord Adam.
Lord M'Laren.
Justiciary Clerk.

* The Small-Debt Act, 1837 (1 Vict. c. 41), sec. 31, enacts,—“It shall be competent to any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary, or where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh, . . . provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff,” &c.

No. 21.

Mar. 9, 1892.
Russell & Co.
v. Murray.

The appellant made the following statements in her appeal:—"On 9th September 1891 the respondents took out a small-debt summons against her for £7, 13s. in the Edinburgh Small-Debt Court. In the summons she was erroneously designed as residing at 'Piershill House, Jock's Lodge,' and the summons was executed by posting a copy to her addressed to her at Piershill House. She did not reside there, and had no domicile of citation there. The service copy of the summons was received by her daughter-in-law, Mrs Murray, who, on opening the envelope containing it and finding it was intended for the appellant, sent it back to the Sheriff-clerk at Edinburgh.

"When the case was called on 23d December, objection was taken on behalf of the appellant to the jurisdiction of the Court, on the ground that she was in no way subject to the jurisdiction of the Court, and proof was adduced upon the question of jurisdiction.

"The appellant and four other witnesses deponed, and it is the fact, that the appellant did not reside within the counties of the Lothians and Peebles, and in particular did not reside at Piershill House, Jock's Lodge, but that her only residence was in Morton Place, Aberdour, in the county of Fife. As matter of fact it is the case that the appellant has resided in Aberdour since Whitsunday 1890 continuously, with the exception of a few days at a time when she has been visiting one or other of her children. No counter evidence was led by the respondents, and no ground was stated to sustain the jurisdiction of the Court. Nevertheless, the Sheriff-substitute repelled the objection to jurisdiction, allowed a proof on the merits, and on 13th January 1892 pronounced the decree complained of."

Argued for the appellant;—Her appeal was founded upon "defect of jurisdiction" of the Sheriff-substitute in the sense of section 31 of the Small-Debt Act, 1837. She was prepared to shew, if she were allowed a proof, that the Sheriff-substitute's judgment sustaining jurisdiction was ill-founded. The fact that he had decided in favour of his own jurisdiction did not debar the appellant from pleading the Small-Debt Act.¹

Argued for the respondents;—The judgment of a Sheriff-substitute upon a question of fact affecting his jurisdiction must be held as final.² At all events, the Court would only interfere where upon the face of the proceedings before him there appeared to be an irregularity.³ In *Burrell's* case the Sheriff had given judgment on the evidence of a single witness. In the present case the Sheriff-substitute had considered the evidence of five witnesses.

At advising,—

LORD JUSTICE-GENERAL.—This appeal against a small-debt decree is brought on the ground that the defender was not subject to the jurisdiction of the Sheriff of the Lothians and Peebles who granted it. This objection was stated in the Court below, and proof was adduced on the question of fact, the appellant alleging, as she does now, that her only residence was in Fife, and that she had not been absent thence since Whitsunday 1890, with the exception of a few days when she has been visiting one or other of her children, that she did not reside within Midlothian, and had no domicile of citation at the house of her daughter-in-law, where the service copy of the summons was left. On the evidence the

¹ *Burrell & Son v. Foster*, Nov. 2, 1868, 1 Couper, 103; *Graham v. Mackay*, Feb. 25, 1845, 7 D. 515, 17 Scot. Jur. 240, affd. March 13, 1848, 6 Bell's App. 214, 20 Scot. Jur. 340.

² *Edward v. The Inverness and Aberdeen Junction Railway*, April 24, 1862, 4 Irvine, 185.

³ *Moncrieff's Review in Criminal Cases*, p. 253.

Sheriff decided that he had jurisdiction, and he granted decree. There is, of No. 21.
course, no record of the evidence.

In view of the cases cited by the appellant, and having regard to the terms of the statute, the fact that the Court below heard evidence and decided upon that evidence in favour of its own jurisdiction, does not exclude the present appeal, which is under the 31st section of the Small-Debt Act, 1837. It is necessary that we should, in order to dispose of the appeal, become possessed of the facts; and I therefore propose that we should remit to the Sheriff of the Lothians and Peebles to inquire and report as to the facts relating to the appellant's plea of no jurisdiction.

Mar. 9, 1892.
Russell & Co
v. Murray.

LORD ADAM.—I am of the same opinion. The only difficulty is as to the course which we should follow. As to the competency of the appeal there is no doubt. One of the grounds of appeal under the Act is defect of jurisdiction on the part of the Sheriff, which is the precise ground of the appeal here. The question was one of fact. The Sheriff-substitute heard evidence and came to the conclusion that the appellant was resident in the Lothians, and that therefore he had jurisdiction. The question is as to the course which we should follow. We had an example in the case of *Burrell* of an appeal taken under the same circumstances. In that case the Court adopted a course which, looking to the value of this case, I am not prepared to follow. In that case the Court remitted the case to the Second Division of the Court of Session to inquire and report. To remit a case of the value of £7, 16s. for inquiry in that way would, I think, be inexpedient. We cannot, I think, have a proof in this Court, but the Act gives us power to remit to the Sheriff with instructions. I think that is the most expedient course, and that we should send the case to the Sheriff to report.

LORD M'LAREN.—Defect of jurisdiction is one of the grounds of appeal which are specified in the Small-Debt Act, and it is not disputed that the question raised in this case is a proper one for us to consider. Where the jurisdiction depends upon fact, the question can only be settled by evidence. I am not prepared to say that in no circumstances could this Court take a proof in open Court under an appeal. But certainly it has been the habit of this Court, where inquiry into facts was necessary in summary cases, to make a remit to the Sheriff, and it appears to me that the course your Lordship proposes is the proper course in a case of this kind.

THE COURT pronounced this interlocutor:—"Remit to the Sheriff of the Lothians and Peebles to inquire and report as to the facts relating to the appellant's plea of no jurisdiction."

LACHLAN M'INTOSH, S.S.C.—PETER MORISON, S.S.C.—Agents.

HER MAJESTY'S ADVOCATE.—*Ferguson, A.-D.*—

A. O. M. Mackenzie.

ELIZABETH SCOTT.—*Salvesen.*

No. 22.

Mar. 29, 1892.
Her Majesty's
Advocate v.
Scott.

Culpable homicide—Child-birth—Neglect to call for assistance—Indictment—Relevancy.—An indictment against a woman set forth that having been delivered of a child at a certain place she did then and there compress the throat of the child, and did suffocate and kill him; or otherwise, that being delivered of the child, she did refrain from calling for assistance when the time of her being delivered had arrived, in consequence whereof the child died.

No. 22.

Mar. 29, 1892.
Her Majesty's
Advocate v.
Scott.

Held (per Lord Young) that the second alternative charge was *irrelevant*.

Opinion, that if a child dies of suffocation or other cause consequent upon the mother's reckless neglect at the time of her delivery to call for assistance which is at hand, she is guilty of culpable homicide.

Culpable homicide—Child not completely born.—Observed (per Lord Young) that injuries causing the death of a child which has breathed and cried may constitute the crime of culpable homicide, although at the time the injuries are inflicted the child is not completely born.

Proof—Culpable homicide—Letters of panel.—In the course of the trial of a woman for the culpable homicide of her infant child her counsel proposed to put in evidence certain letters written by her to her mother prior to and during her pregnancy which shewed that she had suffered from irregularity of menstruation prior to and subsequent to her becoming pregnant. The object of the evidence was to shew that she was ignorant of the probable period of her confinement, and that her labour had come upon her unexpectedly.

Held (per Lord Young) that the letters were *inadmissible* as evidence for the panel.

HIGH COURT.
(Perth.)
Justiciary
Clerk.

ELIZABETH SCOTT was indicted, in the High Court of Justiciary at Perth, on the charge "that having, on 5th February 1892, been delivered of a male child, you did then and there compress the throat of your said child and suffocate him, and did kill him, or otherwise that at time and place above libelled you, being delivered of a male child as aforesaid, did refrain from calling for assistance when the time for your being delivered had arrived, in consequence whereof the said child died."

Counsel for the panel objected to the relevancy of the second alternative charge in the indictment, in respect that no crime, either at common law or under a statute, was therein set forth.

Argued for the Crown;—The objection proceeded in part upon a misapprehension, as no charge was attempted to be made under the Concealment of Pregnancy Act (49 Geo. III. c. 14). What was charged was the crime of culpable homicide, and that crime was relevantly charged under the alternative charge in the indictment.¹ It might be argued from *Martin's* case that it was unnecessary to set forth in the indictment the facts stated in the alternative charge, and that if these facts were proved it would be the duty of the jury to return a verdict of culpable homicide, although the alternative charge were omitted from the indictment. But the specification of the facts upon which the Crown relied, contained in the alternative charge, was to the advantage of the accused. The charge was also consistent with the older practice, for in June 1614 Janet Brown was convicted of child murder, "in respect she went out to the fields and so neglected the ordinary help for being delivered."²

LORD YOUNG.—I do not require to call for any answer here. It is said that the alternative charge is a good charge at common law. Now, the common law is just the customary law, and though we are now in the year 1892, there is no instance of such a charge having ever been preferred against a prisoner, and therefore it cannot be a charge under the customary law. As I remarked in the course of the Advocate-Depute's speech, the circumstance that assistance is at hand if a woman chooses to call for it, and that she refrains from doing so, may be a material and conclusive circumstance in a case of this kind. If a woman chooses to take upon herself the task of her own delivery, with a reckless disregard of the child's safety and life, and the child dies, either suffocated

¹ H.M. Advocate v. Martin, Jan. 29, 1877, 3 Couper, 379, per Lord Justice-Clerk, 381.

² Hume's Comm. p. 292.

or strangled in consequence of her failure to do what it was her duty to do, that would, I think, amount to the crime of culpable homicide, but a charge that a child died in consequence of the mother having refrained from calling for assistance is, in my opinion, as a charge by itself, not a good charge, and I am not prepared to sustain it at this time of day.

No. 22.

Mar. 29, 1892.
Her Majesty's
Advocate v.
Scott.

The Court sustained the objection stated to the alternative charge.

The panel pleaded not guilty, and a jury was empannelled.

In the course of the trial Dr Stewart senior and Dr Stewart junior who had made a *post-mortem* examination of the body of the child, deposed that, in their opinion, the child was born alive, and that death was caused very shortly after birth by suffocation, consequent on compression of the windpipe. Both doctors stated that they were of opinion, as the whole result of their examination, and particularly on account of the full establishment of respiration, that the child had been completely born alive, and that death was the result of strangulation by the hand, the marks on the neck being just such as would be produced by violence. Both doctors had attended the accused after her delivery. Dr Stewart deposed that panel had stated to him that she "had killed it" (the child), adding, "I did it trying to save myself." Dr Stewart junior said that panel had stated to him that the child had cried, and that she had killed it. In cross-examination both doctors admitted that it was not impossible that a child might cry before the process of birth was completed, and that the injuries might have been inflicted before the child was completely born.

Dr Snedden was examined for the defence. He had not seen the body. He was of opinion that a child might cry before it was completely born; that the accused might have caused the injuries in question in delivering herself; and that alternatively they might have been wilfully inflicted before the child was completely separated from the body of its mother.

In the course of the case for the defence counsel for the panel proposed to prove and put in evidence two letters from the panel to her mother, one written prior to and the other during her pregnancy, to shew that the panel had suffered from irregularities of menstruation prior to pregnancy, and that for a considerable time after she became pregnant she was ignorant of her condition. The object of the proposed evidence was to assist in proving that the panel was ignorant of the probable period of her confinement, and that her labour had come upon her unexpectedly.

LORD YOUNG refused to allow the letters to be put in evidence.

In his address to the jury counsel for the panel argued that the injuries had been innocently inflicted in self-delivery, and that in any case, unless they were proved to have been inflicted after complete delivery, there could be no conviction of culpable homicide.¹

LORD YOUNG—in charging the jury.—If the child was killed and the prisoner is to blame for its death, then she is guilty of culpable homicide. If you think that she is not blameworthy you will acquit her, she is entitled to that. If, on the other hand, you think that she went on from the conception to the birth of the child desiring to hide her shame, and refrained from calling for assistance when assistance was at hand—it is ridiculous nonsense to say that a girl who was able to get up and go about in a house where a family and establishment of servants were living could not have got assistance had she called for it—and took upon herself to assist herself, and in the agony of child-birth grasped the

¹ Jean M'Allum, Oct. 11, 1858, 3 Irvine, 187.

No. 22.

Mar. 29, 1892.
Her Majesty's
Advocate v.
Scott.

throat of the child with the result of causing its death—I cannot say to you that she is not blameworthy, or that her blameworthiness does not amount to culpable homicide. The amount of her blame it is for the Court to determine, and it is also for the Court to determine the amount of punishment which is to follow upon it.

If, then, you think no blame attaches to the prisoner you will, as I have said, acquit her. But if you think that blame does attach to her, then culpable homicide is the name for that blame, resulting as it did in the death of a child which had both breathed and cried. It does not matter the least if the injuries were inflicted when the child was partly in its mother's body, though no suggestion of that kind was made by the girl herself.

THE JURY unanimously found the panel not guilty, and the Court assolized the panel *simpliciter*, and dismissed her from the bar.

CROWN AGENT—R. OSBORNE PAGAN, W.S., Cupar—Agents.

No. 23.

Mar. 29, 1892.*
Simpson v.
Board of
Trade.

THOMAS SIMPSON, Complainer.—*M'Lennan.*

THE BOARD OF TRADE, Respondent.—*Johnston—C. K. Mackenzie.*

Jurisdiction—Finality clause—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 542.—Held that sec. 542 of the above Act declaring that all orders, decrees, and sentences pronounced under the authority of the Act should be final and not subject to suspension except on the ground of corruption or malice, did not exclude a suspension on the ground that the prosecutor had no authority under the statute to prosecute, and that the complaint and conviction were not in terms authorised by the statute.

Jurisdiction—Sheriff—Summary Procedure—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 520.—The Merchant Shipping Act, 1854, sec. 520, provides that, “for the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.”

A seaman was charged in the Sheriff Court of Renfrewshire with a contravention of the 255th section of the Merchant Shipping Act, 1854, in so far as he had at Brisbane and Melbourne respectively wilfully and fraudulently made a false statement of his own name to the masters of two ships, the one belonging to the port of Melbourne, and the other to the port of Glasgow. *Opinions* that under the provisions of the Merchant Shipping Act, 1854, the Sheriff had jurisdiction to entertain the charge.

Instance—Prosecution—Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), sec. 531—Board of Trade.—The Merchant Shipping Act, 1854, sec. 531, enacts that in Scotland summary prosecutions under that Act may be brought “at the instance of the Procurator-fiscal of Court, or at the instance of any party aggrieved with concurrence of the Procurator-fiscal of Court.”

By the 6th section of that Act the Board of Trade were empowered “to carry into execution the provisions of the Act.”

Held that a complaint against a seaman for contravention of the 255th section of that Act was not competently brought at the instance of the Board of Trade with consent and concurrence of the procurator-fiscal.

Conviction—Sentence—Summary Procedure (Scotland) Act, 1864, sec. 18 (6).—The Summary Procedure Act, 1864, sec. 18, subsec. 6, enacts, that in cases where, under the authority of any Act of Parliament, a penalty is or shall be declared to be recoverable by arrestment, poinding, or distress and sale, or imprisonment, or by any combination of these forms of diligence other than before provided for, the judgment may be expressed in form No. 6 of sched. K, so far

* Decided Feb. 3, 1892.

licable, "and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in the said form No. 6." Form No. 6 in sched. K, after giving a form of judgment with warrant of poinding and sale, and a form of warrant of imprisonment to be issued after the officer's report, continues,—"If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say: And in respect it is inexpedient to issue a warrant of poinding and sale [or of arrestment, poinding, and sale], ordain instant execution by imprisonment, and grant warrant to officers of Court to apprehend," &c.

Opinions, that a conviction (under subsec. 6) ordaining instant execution by imprisonment, and not setting forth that it was inexpedient to issue a warrant of poinding and sale, was invalid.

Oppression—Suspension.—*Opinions* that certain circumstances attending a conviction of a seaman for an offence against the provisions of the Merchant Shipping Act, 1854, did not amount to oppression on the part of the Board of Trade.

On 17th September 1891 Thomas Simpson, seaman, residing in Greenock, was served with a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of the Board of Trade, "with consent of and concurrence of Robert Blair, Procurator-fiscal of the Sheriff Court of the Lower Ward of Renfrewshire." The complaint charged him with having "contravened 'The Merchant Shipping Act, 1854,' or part thereof, and particularly section 255 thereof, in so far as he did (1) on 19th December 1890, at Brisbane, on being engaged to serve as a seaman on board the ship or vessel 'Grasmere' of Melbourne, wilfully and fraudulently and falsely state to the master of the 'Grasmere,' or other person engaging him, that his name was 'J. Scott,' and was on said false statement engaged as a seaman on the 'Grasmere' aforesaid; and (2) on 24th March 1891, at Melbourne, on being engaged to serve as a seaman on board the ship or vessel 'Fiery Cross' of Glasgow, wilfully and fraudulently and falsely state to the master of the 'Fiery Cross,' or other person engaging him, that his name was 'J. Scott,' and was on said false statement engaged as a seaman on the 'Fiery Cross' aforesaid, whereby for each of the said contraventions he has incurred a penalty not exceeding £5 sterling, together with the costs of prosecution, and failing payment, to imprisonment."

Simpson was cited to appear to answer to the complaint on the 21st, but before that day he had left Greenock in a vessel, the "Persis," on which he had accepted an engagement as an able seaman for a foreign voyage. On the 21st the acting Sheriff-substitute (Black) pronounced this conviction:—"In absence, convicts the said Thomas Simpson of the contraventions charged, and therefore adjudges him to forfeit and pay the sum of £10 of penalty, with £1, 10s. of expenses, and in default of immediate payment thereof, adjudges him to be imprisoned for the space of thirty days from the date of his imprisonment, unless said sums shall be sooner paid, and grants warrant to officers of the law to apprehend and convey the said Thomas Simpson to the prison of Greenock, thereafter to be dealt with in due course of law."

Simpson did not return to Greenock until 27th December following, and on the 29th, after claiming at the shipping office the wages he had earned on the voyage from which he had just returned, he was apprehended and put in prison, from which he was released on payment of the amount of the fine and expenses.

He then lodged a reponing note against the decree under the 539th section of the Merchant Shipping Act, which, on 8th January following,

No. 23.

Mar. 29, 1892.

Simpson v.
Board of
Trade.HIGH COURT.
Lord Justice-
General.
Lord Adam.
Ld. M'Laren.
Justiciary
Clerk.

No. 23.
 —
 Mar. 29, 1892.
 Simpson v.
 Board of
 Trade.

was dismissed by the Sheriff-substitute as incompetent, on the ground that the decree had been implemented by payment.*

He then brought a suspension of the sentence, stating the following pleas;—1. The conviction, sentence, and warrant complained of should be suspended in respect that—(1) the Sheriff had no jurisdiction to entertain said complaint; (2) the complaint is incompetent, irrelevant, and wanting in essential specification; (3) the pretended conviction is incompetent, illegal, and inept; and (4) the whole proceedings were irrelevant, illegal, and oppressive, and contrary to natural justice. 2. Generally in the circumstances, the proceedings should be suspended, the respondents should be ordained to repay to the complainer the penalty and expenses paid by him, and should be found liable in expenses.

He made the following statement:—(Stat. 1) The complainer went in April 1890 on a voyage to Brisbane, Australia. On arriving there he obtained work on shore, and continued at this work for fully six months, and while engaged at it was called by his associates by the name of "Scott," in consequence of his Scotch extraction. "The complainer did not repudiate the name, his mother's maiden name being 'Scott.' In December 1890 the complainer decided to take another voyage, and called at the shipping office at Brisbane, where he was engaged to serve as a seaman on board the 'Grasmere,' on a voyage to New Zealand and back to Melbourne. He was engaged as an able seaman, but did not produce any previous discharges as seaman when engaged. His engagement did not take place on board the 'Grasmere.' When engaged, he gave the name of 'J. Scott,' the name by which, as above stated, he was then generally known. He had no object in view in changing his name, and in particular, he had no false or fraudulent purpose in changing it. On arrival at Melbourne, he obtained a discharge under the name of 'J. Scott.' He then looked out for a vessel bound for the United Kingdom, and was successful in obtaining an engagement on board a vessel so bound, namely, the 'Fiery Cross,' to the master of which, Captain Casey, he was previously known under his name of Simpson. His engagement took place in Flinders Street, Melbourne, and he signed an agreement at the shipping office at Melbourne, and he was there asked by the shipping master to produce his last discharge. He accordingly exhibited said discharge from the 'Grasmere,' and was placed on the articles of the vessel as 'J. Scott,' without being asked any questions about his name. When the 'Fiery Cross' reached Queenstown, in the United Kingdom, the captain was ordered to proceed to Dieppe to discharge, and there the complainer received from Captain Casey a discharge under the name of 'J. Scott,' and also a separate certificate under the name of 'Thomas Simpson.' The complainer ultimately reached Greenock on 24th July 1891."

The complainer thereafter, on 17th September, accepted an engagement on the "Persis," in order to obtain which he had had to produce his previous discharges, which shewed his change of name, for which he gave the explanation stated above. The matter having been reported to the Board of Trade by the Superintendent of the Mercantile Marine, the complaint in question was served upon him, but being under orders to be on board the "Persis" next morning, he informed the sheriff-officer of this engagement and joined the ship next morning.

In support of the plea of oppression, he stated:—(Stat. 13) "The whole of the proceedings above detailed were most irregular, illegal, and oppressive, and most prejudicial to the complainer. The respondents' officials, without previous notice to the complainer, and in the knowledge that he was to join his ship at six o'clock on the morning of 18th September,

* See section 539 of Merchant Shipping Act, 1854, *infra*, footnote to p. 69.

served said complaint on him at 10.30 P.M. on the previous night, and had a diet fixed thereunder for a date at which they well knew that the complainer, unless he committed a gross breach of contract, was bound to be absent with his ship. They failed to inform him of his liability to be convicted and sentenced in absence, and further failed to inform the Sheriff-substitute, when the date for trial arrived, of the reason for the complainer's absence. On the contrary, they moved for sentence, although well aware that the complainer had sailed in the 'Persis'; also that, had he been present, they had not a single witness available to prove the circumstances of the alleged contraventions. They deliberately took advantage of the complainer's absence to obtain an unfounded conviction against him. Further, on the complainer's subsequent apprehension, they obtained from him payment of the penalty and expenses, in manner above set forth, well knowing that he was ignorant of his right to have the cause reheard,* and they failed to inform him of his said right, as they were bound to have done. And finally, when the complainer did discover his right to a rehearing, the respondents prevented him from getting the benefit of that right by pleading that the decree had been fully implemented."

No. 23.

Mar. 29, 1892.
Simpson v.
Board of
Trade.

Argued for the complainer;—(1) This was a case of gross oppression; although the Sheriff could not entertain a plea of that kind, the Court were entitled to do so.¹ (2) The Sheriff had no jurisdiction to entertain the case. The charge was brought under the 255th section of the Merchant Shipping Act,[†] and the alleged offences were said to have been committed at Brisbane and at Melbourne. It was not stated that they were offences by the laws of these places. No doubt section 109 of the Act enacted that the 255th and other sections in the part of the Act dealing with "masters and seamen" should apply "to all sea-going British ships wherever registered of which the crews are discharged, or whose final port of destination is in the United Kingdom, and to the owners, masters, and crews of such ships." But it did not appear, and was nowhere enacted, that these provisions applied to the colonies. The "legislative authorities in any British possession" had power under the 288th section of the Act to apply or adapt them to any British ships "registered at, trading with, or being at any place within their respective jurisdictions," but there was nothing libelled to shew that this had been done. In any view this argument was applicable to the first offence which was charged as having been committed at Brisbane. (3) No statutory offence under the 255th section had been set forth. There was no fraudulent device libelled, and no facts and circumstances alleged to shew that the statement made had been wilful or fraudulent. The complaint really proceeded upon the assumption that it was a contravention of the statute for a seaman to change his name under any circumstances. No one was named as having been defrauded; further, it was not said that the alleged false statements had been made to anyone. The complaint therefore did not in law justify a

¹ Mackenzie v. Macphee, Jan. 28, 1889, 2 White, 188, L. J.-C. Moncreiff, 216, 16 R. (Just. Cases) 53; Ritchie v. Pilmer, Dec. 20, 1848, John Shaw's Reps. 132.

* The Merchant Shipping Act, 1854, sec. 539, enacted that "if a defender who has been duly cited shall not appear at the time and place required by the citation he shall be held as confessed, and sentence or decree shall be pronounced against him in terms of the complaint, with such costs and expenses as to the Court shall seem fit; provided always that he shall be entitled to obtain himself reponed against any such decree at any time before the same be fully implemented by lodging with the Clerk of Court a reponing note," &c.

† The Merchant Shipping Act, 1854, sec. 255, enacted,—“If any seaman on or before being engaged . . . wilfully and fraudulently makes a false statement of his own name, he shall incur a penalty not exceeding £5. . . .”

No. 23.

Mar. 29, 1892.
Simpson v.
Board of
Trade.

conviction.¹ (4) Further, the instance was defective. The 531st section of the Act provided that in Scotland prosecutions were to be brought in a summary way "at the instance of the Procurator-fiscal of Court, or at the instance of any party aggrieved, with concurrence of the Procurator-fiscal of Court."* There was no statement to the effect that the Board of Trade had been in any way aggrieved. Accordingly, the prosecution must necessarily be at the instance of the procurator-fiscal. It had been long settled that his concurrence was not enough when his instance was required.² This complaint was at the instance of the Board of Trade, for which there was no warrant in the Act. (5) The complaint and conviction were fundamentally bad. Neither contained any statement of the alternative penalty to imprisonment, failing payment, viz., "execution by arrestment, poinding and sale" as provided by section 18, subsection 6 of the Summary Procedure (Scotland) Act, 1864,† and by the 538th section of the Merchant Shipping Act itself.‡ It might be that diligence was inex-

¹ Kidger v. Macphee, Nov. 22, 1888, 2 White, 107, 16 R. (Just. Cases) 24; Nelson v. M'Phee, Oct. 17, 1889, 2 White, 307, 17 R. (Just. Cases) 1; Rae v. Linton, Dec. 11, 1874, 3 Couper, 67, 2 R. (Just. Cases) 17.

* The Merchant Shipping Act, 1854, sec. 531, provided,—“In Scotland all prosecutions, complaints, actions, or proceedings under this Act, other than prosecutions for felonies or misdemeanours, may be brought in a summary form before the Sheriff of the county, or before any two Justices of the Peace of the county or burgh where the cause of such prosecution or action arises, or where the offender or defender may be for the time, and when of a criminal nature or for penalties, at the instance of the Procurator-fiscal of Court, or at the instance of any party aggrieved, with concurrence of the Procurator-fiscal of Court; and the Court may, if it think fit, order payment by the offender or defender of the costs of the prosecution or action.”

² Mitchell v. Scott, June 24, 1873, Arkley, 315.

† The Summary Procedure (Scotland) Act, 1864, sec. 18, enacted,—“In cases of conviction or judgment against the respondent in prosecutions and proceedings under this Act, the sentence of the Court may be in one or other of the forms contained in the Schedule (K) to this Act annexed, or as nearly as may be in such form according to the nature and circumstances of the complaint, viz., . . .

“(6) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment, and also in cases where, under the authority of any Act of Parliament, such penalty is or shall be recoverable by action, civil process, or diligence, the judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said schedule . . . and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in the said form No. 6.”

Schedule K, No. 6, supplied the form of a conviction with warrant for poinding and sale, and a form of warrant for imprisonment to be used after the officer's report. Then followed this note:—“If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say: And in respect it is inexpedient to issue a warrant of poinding and sale [or of arrestment, poinding, and sale], ordain instant execution by imprisonment, and grant warrant to officers of Court to apprehend,” &c.

‡ The Merchant Shipping Act, 1854, sec. 538, provided,—“In Scotland all sentences and decrees to be pronounced by the Sheriff or Justices of the Peace upon such summary complaints shall be in writing; and where there is a decree for payment of any sum or sums of money against a defender, such decree shall contain warrant for arrestment, poinding, and imprisonment in default of payment,

pedient, but in that case under the section the Sheriff was bound to have applied his mind to it, which he had not done.¹ Imprisonment for debts under £3, 6s. 8d. was abolished by the Act 5 and 6 Will. IV. c. 70, and the penalties here being limited to £5 each, imprisonment was incompetent.²

No. 23.

Mar. 29, 1892.

Simpson v.

Board of Trade.

Argued for the respondent;—(1) There had been no incompetency in the procedure in the case. A contravention of the 255th section of the Merchant Shipping Act had been charged, and the complainer not having appeared as required by his citation, was “held as confessed” in terms of the 539th section. Under the 542d section all sentences “pronounced under the authority of this Act” were final, and the only review permissible was on the ground either of corruption or malice “within fourteen days of the date of the order, decree, or sentence complained of.” All the arguments which could be stated against the conviction had been urged before the Sheriff on the reponing note, and whether the Sheriff was right or wrong, his judgment was final under the 542d section of the Act.³ (2) On the question of title, the 531st section of the Merchant Shipping Act enacted that the procurator-fiscal, or the party aggrieved, with his concurrence, “may” bring a complaint in a summary way. Assuming that that section by itself did not justify the Board of Trade in bringing this complaint with the concurrence of the procurator-fiscal, it was further provided by the 6th section of the Merchant Shipping Act of 1853 that the Board of Trade were the department who were “to carry into execution the provisions” of the Act, and by the 31st section of the Merchant Shipping Act Amendment Act, 1873 (36 and 37 Vict. c. 85), it was provided that “in any legal proceedings under these Acts the Board of Trade may take proceedings in the name of any of their officers.” The present instance was therefore all that was required.⁴ (3) On the question of jurisdiction, the contravention charged was contained in Part III. of the Merchant Shipping Act, 1853, relating to masters and seamen, and by section 109 Part III. of the Act applied to all ships registered in the United Kingdom, and in any British possession “wherever the same may be,” and by section 520 “every offence shall be deemed to have been committed in any place in which the offender may be.” Further, by section 531 any prosecution may be brought “where the offender may be for the time.” By section 543, it was provided that the general provisions, with respect to jurisdiction, so far as not inconsistent with the special rules for the conduct of legal proceedings and the recovery of penalties in Scotland should extend to proceedings and penalties in that country.⁵ (4) In regard to the sentence which had been pronounced, the warrant for it was to be found in section 538 of the statute, and in section 18 (6) and Schedule K of the Summary Procedure Act, 1864. Under the form of sentence given in Schedule K (3) of the latter Act, imprisonment came in lieu and in default of the penalty. The debt in question was not to be treated as a civil debt, and imprisonment was really an alternative to the fine.⁶ The words “shall authorise execution by arrestment” in the 6th

such arrestment, poinding, or imprisonment to be carried into effect by sheriffs-officers or constables, as the case may be, in the same manner as in cases arising under the ordinary jurisdiction in the Sheriff or Justices.”

¹ Thomson v. Wardlaw, Jan. 23, 1865, 5 Irvine, 45; Galt v. Ritchie, July 16, 1873, 2 Couper, 470.

² Walker v. Trades Lane Co., Dec. 22, 1865, 4 Macph. 268, 38 Scot. Jur. 143.

³ Moncreiff's Review in Criminal Cases, 247, 300.

⁴ M'Kelvie v. Barr, Dec. 3, 1860, 3 Irv. 631, 33 Scot. Jur. 48.

⁵ Regina v. Lopez, 1858, 7 Cox. C. C. 431.

⁶ Moncreiff's Review in Criminal Cases, p. 19; Lawson v. Jopp, Feb. 16, 1853, 15 D. 392, 2 Scot. Jur. 236.

No. 23. subsection of section 18 of the Summary Procedure Act, 1864, were equivalent to "do not exclude," and ought not to be extended further.¹
 Mar. 29, 1892. At advising,—
 Simpson v. Board of Trade.

LORD JUSTICE-GENERAL.—This being a sentence pronounced or purporting to be pronounced by the Sheriff in Scotland under the authority of the Merchant Shipping Act of 1854, it is protected by a very strong clause, sec. 542, which renders such decrees final except upon a very few and narrow specified grounds. But it was very properly admitted by Mr Mackenzie that in order to give any sentence or decree that protection it is necessary that it should be pronounced within the limits of the statute, and accordingly this sentence is impeached by the complainant upon certain grounds, review upon which is not excluded by section 542.

I shall mention four points which have been raised by Mr M'Lennan, and I take first, merely because he first opened upon that, the allegation of oppression. I do not think that the case on this head is made out even on the statements by the learned counsel for the appellant. The officials of the Board of Trade seem to have acted with zeal in this matter, probably because a high estimate had been formed of the importance of the case, higher perhaps than might have been formed by those who were less conversant with the departmental working of the system. But I do not think, and it is right perhaps, especially in dealing with a department of Government, to say that I do not think the case of oppression has been made out.

The next point is raised as to the jurisdiction of the Court. Now, the jurisdiction which has been exercised on this occasion is a highly artificial one, and it is somewhat singular that the circumstance that the vessel "Grasmere," which was at Brisbane in December 1890, was a registered ship at Melbourne, which is within the jurisdiction of another Colonial Government, is really the point which founds the jurisdiction of the Sheriff-substitute of the counties of Renfrew and Bute. But one can quite understand the concatenation of causes which render it possible for jurisdiction thus and there to be exercised, because the fact that a merchant ship is out of the jurisdiction of its own Government makes it at all events highly intelligible, and probably highly expedient, that the supereminent power of the British law should afford a remedy against the violation of provisions which by the clauses referred to by Mr Mackenzie are distinctly applied to that class of ships. Therefore, without going further into this, I think the attack upon jurisdiction has failed.

But then it is further alleged that this complaint is not a statutory proceeding under the Merchant Shipping Act of 1854, because it is a complaint, not of a procurator-fiscal or a person alleging himself to be aggrieved, with the consent of the procurator-fiscal, but it is a complaint of the Board of Trade for Great Britain and Ireland with the consent and concurrence of the procurator-fiscal. Now, I may say at the outset I believe it to be quite settled that the mere consent and concurrence of the procurator-fiscal will not supply the place of his instance if his instance be a statutory requirement for such a prosecution. When one turns to inquire what is the right of the Board of Trade to prosecute in such a complaint, it appears that the area for discussion is limited to the two clauses—clauses 531 and 6—of the Act. Clause 6 gives to the Board of Trade in very general terms the power of superintendence of the provisions of the Act. The words are,—“The Board of Trade shall be the

¹ Murray v. Jones, June 17, 1872, 2 Couper, 284.

department to undertake the general superintendence of matters relating to merchant ships and seamen, and shall be authorised to carry into execution the provisions of this Act and of all other Acts relating to merchant ships and seamen in force for the time being, other than such Acts as relate to the revenue." But when we come to what after all is merely a portion of a comparatively limited part of the Act,—namely, legal procedure,—we find that there is a series of clauses devoted to legal procedure in Scotland which contain very specific provisions as to the mode of prosecuting offences, and when we come to this complaint one naturally asks—What is the authority for a summary complaint for the punishment of offences created by this statute? The answer to that is section 531. Now, the substantive enactment of section 531 is, that complaints "other than prosecutions for felonies or misdemeanours may be brought in a summary form before the Sheriff." In short, this section is one which legalises summary prosecutions for offences created by the Act.

No. 23.
Mar. 29, 1892.
Simpson v.
Board of
Trade.

The prescribed condition of a summary prosecution seems to be this, that it shall be at the instance of the Procurator-fiscal of Court, or at the instance of any party aggrieved, with concurrence of the Procurator-fiscal of Court. It has been pointed out by the counsel for the Board of Trade that the section is permissive, and that is quite true. But what it permits is summary prosecutions, and as one of the terms and qualities and conditions of the prosecution it secures this, that the summary prosecution which is authorised is a summary prosecution at the instance of the procurator-fiscal, or of a party aggrieved, with the consent of the procurator-fiscal. Now, this is not a complaint at the instance of the procurator-fiscal, but at the instance of the Board of Trade, and I find it impossible, where we have a specific provision relating to this limited subject-matter of summary prosecutions, to hold that to be over-ridden by a very general clause which concerns administration primarily and not prosecution—I mean clause 6.

We are familiar with the fact that the Legislature has, especially in more modern Acts than this, authorised prosecution at the instance of some of the Government departments. But then that may be a most appropriate provision, and I should not at all have questioned the propriety of a clause in this Act which enabled the Board of Trade to prosecute for what are really departmental offences. But here we must limit ourselves to the provisions of the Act which is founded upon, and this Act does not contain a power to the department to act as prosecutor. I rather think that the counsel for the Board of Trade did not press seriously the suggestion that the Board of Trade might be regarded as a party aggrieved. I think it is quite clear that the Board of Trade is not a party aggrieved in the sense of this statute, which plainly enough refers to individuals aggrieved. It would be a most extraordinary and unwarrantable stretch of such language to represent the department of Government which was concerned with the administration of the Act as aggrieved by the violation of some of its provisions. I think that quite untenable, and if it were needful to pursue the idea, there is no allegation of grievance in this complaint, and I do not think that on the statute itself the mere contravention of one of the provisions constitutes a grievance in the sense of this Act, or that the Board of Trade can be fairly described as a party aggrieved. Therefore I am bound to say that I think that this complaint is bad, and that this is a defect entering completely into the essence of the proceedings and fatally vitiating them. An objection of this kind is not excluded by the wide terms of sec-

No. 23.
Mar. 29, 1892.
Simpson v.
Board of
Trade.

tion 542, because if the view I have stated be well founded, this was not a proceeding under the Act founded upon.

That is enough for the decision of the case, because the conviction must be quashed. But another point has been argued to us, and I think the parties are entitled to our judgment upon it. It is pointed out that this conviction adjudges the person complained against to forfeit and pay a sum of £10 of penalty with £1, 10s. expenses, and in default of immediate payment thereof, adjudges him to be imprisoned for the space of thirty days. Now, I think that that is an error, and I think again that it is a fatal error. The Act does not authorise the imposition of a penalty with imprisonment failing immediate payment; it authorises the Judge in certain cases to pronounce a sentence of that kind, but only in certain cases. The normal and appointed procedure—and here I am referring to the Summary Procedure Act as well as the Act immediately before us, namely, the Act of 1854—is the imposition of a penalty, and failing payment of the penalty, execution by arrestment and poinding, and then, and only then, imprisonment. Now, what the Sheriff has done is—he has missed out the intervening remedy of ordering execution by arrestment and poinding, and his sentence expressly bears that unless the complainer pays, imprisonment shall follow without any attempt being made to recover by arrestment and poinding. Now, how is the matter dealt with in the Summary Procedure Act of 1864? It is agreed that we are under the 6th subsection of section 18, and that the part of Schedule K which has been referred to applies to the case in hand. The effect of the section and the schedule taken together is this, that if at the hearing, as the schedule says, it shall appear that the issuing of a warrant of arrestment and poinding and sale would be inexpedient, then in place of the warrant the magistrate may order imprisonment. Now, the learned counsel for the Board of Trade very properly admitted that if the magistrate proposes to make imprisonment follow immediately on the failure to pay, he must apply his mind to that question, and must consider whether the circumstances of the case warrant the omission of the intermediate remedy. That admission, which is a most appropriate one to have made, because it is inevitable from the terms of the statutory enactments, brings us to this point, that here is an essential part of a sentence pronounced which does not appear on the face of the sentence itself. The case as we now have it is that the magistrate has felt himself entitled to depart from the normal and proceed to the abnormal form of sentence, and that he has not set out in the sentence anything about the consideration of that question. Now, I find that under the Act which we have to construe all sentences must be in writing, and the sentence of imprisonment, which is only authorised in the circumstances which I have described as specified in the statute, is not in writing, because the term and condition upon which it is made to follow is not to be found in the sentence at all. The schedule of the Act of 1864 may be departed from so as to adapt the case to circumstances which are not provided for or directly contemplated by the statute, but it may not be departed from when the state of the facts is exactly that contemplated by the Act, and where we are asked to assume that the Sheriff has considered a question which he has omitted even to mention in his sentence. Therefore, in my opinion, that is a fatal objection to the sentence; and I think it a matter of high importance that magistrates should not abridge the number of steps by which imprisonment is reached as a punishment of a statutory offence. In this case, for aught that appears, this £10 might have been recovered by an arrest-

ment and poinding, and no necessity have arisen for imprisonment. I mention that, however, merely as illustrating the expedience and importance of the statutory provisions. Upon this, therefore, as well as upon the bad instance, I think the conviction must be quashed.

No. 23.

Mar. 29, 1892,
Simpson v.
Board of
Trade.

LORD ADAM.—This is a complaint brought at the instance of the Board of Trade with consent of the Procurator-fiscal of the Sheriff Court of the Lower Ward of Lanarkshire, against a seaman of the name of Simpson for contravening the 255th section of the Merchant Shipping Act of 1854. That clause provides,—"If any seaman on or before being engaged wilfully and fraudulently makes a false statement of the name of his last ship, . . . or wilfully and fraudulently makes a false statement of his own name, he shall incur a penalty not exceeding £5." It is the last branch of that clause that the suspender here is said to have contravened. Now, the case was followed by conviction in these terms—[reads.] Of course these proceedings are protected, as your Lordship has pointed out, by very strict clauses against appeal, and there is no appeal, generally speaking, on the merits. Mr M'Lennan, for the suspender, stated, I think, four or five different objections to the proceedings which had taken place; and I must say with reference to all of these objections, if well founded, I think they lead to the result that this conviction should be set aside, because they all go to shew that the proceedings complained of were not taken under the authority of the Act, and that they could not have been protected by the Act.

The first of these objections was that in this matter the Board of Trade, the complainers, had acted with gross oppression. I concur with your Lordship that there is no case of oppression, and I need not say any more about it.

The next point was that the Sheriff Court of Renfrewshire had no jurisdiction to try the case. As I understand Mr M'Lennan, that was upon this ground, that both the acts complained of which were alleged to have been contraventions of the Act were committed in a colony, Australia, and that the Sheriff of Renfrewshire had no jurisdiction over an offence committed out of his territorial jurisdiction. I agree with your Lordship that the Act does confer jurisdiction upon the Sheriff just as if the offence had been committed in his own jurisdiction. I do not think that is a good objection.

The next objection is that the complaint does not set forth any statement of a statutory offence. It is said that the complaint merely repeated the statutory words of complaint, but did not set forth any particular facts and circumstances to shew that the statement alleged to have been made had been wilful and fraudulent. It is in all cases a question of circumstances whether the party complained of has fair notice of the charge against him. I confess that in such cases as this I do not see that anything else was required, and I should not have proposed to have sustained the objection on that ground.

That brings us to what is the most serious plea to be dealt with in this case, namely, whether under the 531st section of this Act the Board of Trade was entitled to insist upon this complaint. Upon that matter I agree with your Lordship. It is said to be the practice in England that the Board of Trade prosecutes. I am not familiar with prosecutions in England, and that matter has no influence upon my mind. We are here dealing with Scottish legal procedure, and we must apply it to the circumstances of this case. This is a summary prosecution taken under the Summary Procedure Act of 1864. Now, the 531st section of the Act which authorises such procedure is this—[reads.]

No. 23.

Mar. 29, 1892.
Simpson v.
Board of
Trade.

This complaint is not at the instance of the Procurator-fiscal of Court; and if it is not at his instance, then, according to this section, it must be at the instance of a party aggrieved, with the concurrence of the procurator-fiscal. Now, the Board of Trade does not appear to be a party aggrieved. I think it is idle to say that a public body in the meaning of this section is a party aggrieved by the proceedings here. I concur with your Lordship that the 6th section of the Act, which gives general powers to the Board of Trade, cannot, and did not, apply to this particular section, which specifies the parties at whose instance, and it appears to me at whose instance only, proceedings can be taken. I agree with your Lordship on that ground also, that the Board of Trade have no title to insist in this complaint; and that being so, it is clearly not protected by the section of the Act which has been referred to.

That leaves only the last ground, which was an objection both to the form of the complaint and the form of the sentence. It is founded, as I understand, upon the terms of the Summary Procedure Act and the 538th section of the Merchant Shipping Act, which enacts,—“In Scotland all sentences and decrees to be pronounced by the Sheriff or Justices of the Peace upon such summary complaints shall be in writing; and where there is a decree for payment of any sum or sums of money against a defender, such decree shall contain warrant for arrestment, poinding, and imprisonment in default of payment, such arrestment, poinding, or imprisonment to be carried into effect by sheriffs-officers or constables, as the case may be, in the same manner as in cases arising under the ordinary jurisdiction in the Sheriff or Justices.” The objection to the form of the complaint was that the suspender was entitled to have all the alternatives set forth which it was competent for the Sheriff to inflict, and that it was bad because it should have set forth that failing payment the sum might be recovered by arrestment and poinding, and that it was only in default of that that the Sheriff was entitled to imprison. And the same objection applies to the conviction, which sets forth,—“In absence, convicts the said Thomas Simpson of the contraventions charged, and therefore adjudges him to forfeit and pay the sum of £10 of penalty, with £1, 10s. of expenses, and in default of immediate payment thereof, adjudges him to be imprisoned for the space of thirty days from the date of his imprisonment, unless said sums shall be sooner paid, and grants warrant to officers of the law to apprehend and convey the said Thomas Simpson to the prison of Greenock, thereafter to be dealt with in due course of law.” As your Lordship has pointed out, the Sheriff is entitled to find so and so liable for so and so, and failing payment, that there shall be arrestment and execution by poinding, and following that imprisonment. But there is a dispensing power to the Sheriff if it shall appear that a warrant of arrestment and poinding would not be expedient; and the objection here is that it does not appear on the face of this conviction that the Sheriff followed the terms pointed out to him in the Act, and that there is nothing to shew that he ever applied his mind to the circumstances, or that he knew that it was necessary for him to do so. Probably, as Mr M'Lennan said, the form of the complaint misled him. I think this is a good objection; I think it is fatal to the conviction that it does not set forth what it was required to set forth.

LORD M'LAREN.—It is necessary that we should keep in view in disposing of this suspension that the subject-matter of the prosecution has been withdrawn altogether from our cognisance. These regulations of the Merchant Shipping

Act, although very important to commercial interests, are not considered as likely to raise questions of legal difficulty suitable for the determination of the High Court of Justiciary, and accordingly the administration of this branch of the penal law is committed entirely to Sheriffs and magistrates, and no review is permitted. Accordingly, if it should appear that this is a case brought under the Merchant Shipping Act, we have no power to review it. If, on the other hand, it appears that the case has not been brought in the exercise of the powers of that statute, it is equally clear that we may review the sentence on its merits, because it is admitted that there is no common law jurisdiction on the part of the Sheriff to try offences of this character. Now, in order that the prosecution may truly represent this as a case under the statute, it must appear that we have a prosecutor of the character contemplated by the statute, a complaint in terms of the statute, and a conviction in accordance with the sentence which the statute authorises. The exception that is taken to the proceedings is on the ground that every one of these requisites is wanting.

No. 23.
Mar. 29, 1892.
Simpson v.
Board of
Trade.

I shall consider the points, as your Lordships have done, very briefly in this order.

On the first point I am clearly of opinion that we have not a prosecutor under the statute. It is perfectly useless for the purposes of this case to consider how prosecutions under the Merchant Shipping Act are to be conducted in England and Ireland, or the colonies, because under the 531st section the mode of prosecution in the Courts of Scotland is prescribed, and the prosecutor is to be either the procurator-fiscal or a party aggrieved. Now, we only know of two titles to prosecution, namely, private interest and public interest, and each of these is recognised in the section. If a shipowner, for instance, could qualify a case of patrimonial injury through some wrong done to him by a sailor contrary to the Act, no doubt he would have a title to prosecute, but it is clear enough that the Board of Trade have sustained no patrimonial injury. The interest which they very properly seek to safeguard is the public interest, and while it may be very right that such prosecutions should be promoted by the Board of Trade they can only do so by making representations to the proper department of the Crown Office, and calling for a prosecution in the public interest in the manner prescribed by the Act. That ground of decision would be quite sufficient to support the appeal, because a defect in the prosecutor's title goes to nullify the whole proceedings.

On the question of the relevancy of the case, I am not disposed to apply a more critical test to summary prosecutions under the statute than we should apply to indictments in our own Court. Now, as it is no longer necessary to use the words falsely and fraudulently in an indictment in this Court, I hardly think it can be necessary in a complaint under the statute to set forth the circumstances constituting the fraud, which is no longer considered to be a necessary ingredient in an indictment or complaint. Therefore, seeing that the time and place are properly set out, and that the defender had all the information given to him necessary to enable him to prepare for his defence, I should think this is a good complaint. With regard to the conviction, I agree with your Lordships that it is very important, wherever imprisonment is immediately or contingently authorised as part of a sentence, that a Judge should take care not to exceed the limits which the statute authorises. That becomes especially important where the penalty in the first place is a pecuniary penalty, because imprisonment for debt in the general case having been abolished, it may very

No. 23.

Mar. 29, 1892.
Simpson v.
Board of
Trade.

well be that it is not intended by the Legislature to authorise imprisonment as a mode of recovering a penalty until other and milder measures have been tried. Now, under the Summary Jurisdiction Acts, wherever it is ascertained from the special statute that the penalty is to be recoverable as a civil debt, then the sentence is to contain a warrant of arrestment and poinding, imprisonment being authorised only as an ultimate remedy failing recovery of the penalty by other means. But to meet the case of a man who is known to be impecunious a dispensing power is given to the Judge to dispense with arrestment and poinding so that imprisonment may immediately follow. I am of opinion that the Sheriff has no power to omit this part of the sentence—I mean the words dispensing with poinding and sale—because it must appear from the sentence that he has applied his mind to the case and has been satisfied that this is a case for immediate imprisonment, and not one where poinding should first be tried. We are told in this case that the sailor had money to pay the penalty, and that there were wages due which could have been recovered in the hands of the employer and the penalty paid. I think there is here also such a variation in the sentence from that authorised by the statute that we cannot consider this as a sentence in terms of the statute which would be final and not subject to review.

On these grounds I am of opinion that this bill of suspension must be allowed and the sentence suspended.

THE COURT accordingly quashed the conviction.

MILLER & MURRAY, S.S.C.—DAVID TURNBULL, W.S.—Agents.

No. 24.

May 23, 1892.
Lamb v.
Threshie.

DAVID LAMB, Complainer.—*Comrie Thomson—Rhind.*
JOHN MORTON THRESHIE, Respondent.—*Dickson—Maconochie.*

Process—Competency—The Lotteries Act, 1823 (4 Geo. IV. cap. 60), sec. 67—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), sec. 3, subsec. 2.—The Lotteries Act, 1823, provides by sec. 67, that “If any person shall be brought before any two or more Justices of the Peace, . . . where any offence against this Act shall have been committed, and shall be convicted . . . and shall be adjudged a rogue and vagabond, then and in every such case such Justices shall . . . order such offender to be sent to the house of correction . . .” for a space of not more than six months, nor less than one month.

The Summary Procedure Act, 1864, sec. 3, subsec. 2, authorises proceedings to be taken under the forms of that Act in every case in which a person has committed any offence for which “under the provisions of any Act of Parliament he is liable upon summary conviction before any . . . Justices or Justice to be imprisoned or fined or otherwise punished.”

Held that offenders against the Lotteries Act, 1823, were liable to summary conviction in the sense of sec. 3, subsec. 2 of the Summary Procedure Act, 1864, and that therefore it was competent to prosecute them under the latter Act.

Bute v. Moir, Nov. 24, 1870, 9 Macph. 180, 1 Couper, 495, *distinguished*.

Observations on the meaning of the words “summary procedure.”

Process—Lottery—Lotteries Act, 1823 (4 Geo. IV. c. 60), secs. 41, 62, and 67.—The Lotteries Act, 1823, sec. 41, provides that if any person shall sell a ticket or chance in any but an authorised lottery, such person “shall for every such offence forfeit and pay the sum of £50, and shall also be deemed a rogue and vagabond . . . and shall be punished as such in the manner herein-after directed.”

Section 62 provides that prosecutions in Scotland for pecuniary penalties under this Act shall only proceed at the instance of Her Majesty’s Advocate, and before the Court of Exchequer.

Section 67 provides that if any person shall be brought before two Justices under the Act, and “shall be convicted of any offence or offences against this Act

by such Justices, and shall be adjudged a rogue and vagabond, then such Justices shall, and they are hereby required to order such offender to be sent to the house of correction " for a space of not more than six months, nor less than one month. No. 24
—
May 23, 1892.

In a suspension of a conviction by two Justices of a contravention of the Act it was contended that the Justices were only entitled to proceed in cases where the Court of Exchequer had already declared the accused to be a rogue and a vagabond. *Held* that the Justices had an independent jurisdiction to try offences against the Act under section 67, and that the conviction was valid. Lamb v.
Threshie.

ON 13th February 1892 David Lamb was served with a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, at the instance of the Procurator-fiscal of the Justice of Peace Court of the county of Lanark. The complaint set forth that the accused had been guilty of an offence within the meaning of the Act 4 Geo. IV. cap. 60, entitled "An Act for granting to His Majesty a sum of money to be raised by lotteries," so far as the same has not been repealed, and particularly sections 41 and 67* thereof, in so far as on the 26th of January 1892, and within the "tent occupied by him at or near to Bridgeton Cross, in the city of Glasgow and county of Lanark, he did sell to each of Alexander Gordon and David Winter, detective officers in Glasgow, one ticket or chance in a lottery not authorised by the Act of Parliament aforesaid or by any other Act of Parliament to be sold, viz., one ticket or chance, number 1910, to the said Alexander Gordon, and one ticket or chance, number 322, to the said David Winter, in a lottery in which six prizes of 10s. each, six prizes of 5s. each, and twelve prizes of 2s. 6d. each were put up, which lottery was then and there drawn. Such offence is the first offence, whereby the said David Lamb is liable to be deemed a rogue and vagabond and to be sent to the house of correction, there to remain for any space of time not exceeding six calendar months, nor less than one calendar month." The case was tried before two Justices of the Peace for the county of Lanark. HIGH COURT.
Lord Justice-
Clerk.
Lord Kin-
cairney.
Ld. Stormonth
Darling.
Justiciary
Clerk.

After evidence led the accused was convicted of the offence charged, and adjudged a rogue and vagabond, and sentenced to imprisonment for a period of one calendar month.

Lamb presented a bill of suspension and liberation to the High Court, in which he, *inter alia*, stated as follows:—"It was and is incompetent for the Justice of Peace Court to entertain a complaint such as that pre-

* 4 Geo. IV. cap. 60, sec. 41, provides,— "And be it further enacted that if any person or persons shall sell any ticket or tickets, chance, or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorised by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid . . . such person or persons shall for every such offence forfeit and pay the sum of £50, and shall also be deemed a rogue and vagabond, or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed."

Section 67 provides,— "That if any person shall be brought before any two or more Justices of the Peace for the county, city, liberty or place where any offence against this Act shall have been committed, and shall be convicted of any offence or offences against this Act by such Justices, and shall be adjudged a rogue and vagabond, then and in every such case such Justices shall, and they are hereby required to order such offender to be sent to the house of correction, there to remain for any space of time not exceeding six calendar months, nor less than one calendar month." The section further provided that the proceedings should not be subject to appeal.

No. 24.
 May 23, 1892.
 Lamb v.
 Threshie.

ferred against the complainer. No jurisdiction is conferred upon the Justices by statute to try such a case, and they have no jurisdiction at common law. In dealing with lotteries, the Justices only possess a restricted jurisdiction, the terms of which must be specified as qualifying conviction of an accused. The Court of Exchequer is the Court of first instance, and the Justice of Peace Court can only entertain and dispose of a complaint after the case has been tried in the Court of Exchequer,* and the jurisdiction of Justices of the Peace in such a case is strictly limited and administrative, amounting only to the power of inflicting the punishment provided by the statute.

Assuming the competency of the prosecution in the Justice of Peace Court antecedent to or independent of a prosecution in the Court of Exchequer, such prosecution is incompetent under the Summary Procedure Act, 1864,† or any statute subsequent thereto in date dealing with summary prosecution. The offence charged against the complainer is serious in character and involves most serious consequences to him, requiring, as it does, as a condition of conviction that, in addition to the punishment of imprisonment for a possible period of six months, he should be adjudged a rogue and vagabond—an adjudication which would attach to him a lifelong stigma and disgrace. There is nothing in the Summary Procedure Acts warranting such a prosecution, and the statute alleged to have been violated, the Lottery Act, does not authorise expressly or by implication summary prosecution. Summary prosecutions are limited to certain cases expressly provided for, and are not to be extended to cases to which they do not apply.

The complainer pleaded, *inter alia*;—(2) It being incompetent to charge the complainer with the offence preferred against him without *ante omnia* a prosecution and conviction in the Court of Exchequer in terms of the statute alleged to have been violated, it was incompetent for the Justices of the Peace to entertain the complaint against him, and the conviction and sentence following thereon ought to be suspended as

* 4 Geo. IV. cap. 60, sec. 62, provides,—“That all pecuniary penalties for any offence against this Act . . . shall when recovered go and be applied to the use of His Majesty, his heirs or successors; and from and after the commencement of this Act it shall not be lawful for any person or persons whatever . . . to commence or enter, or cause or procure to be commenced or entered, or filed, or prosecuted, any action, suit, bill, plaint, or information for the recovery of any pecuniary penalty or penalties inflicted by this Act, unless the same be commenced, entered, filed, and prosecuted in the name of His Majesty’s Attorney-General in the Court of Exchequer at Westminster if such offence shall be committed in England, . . . or in the name of His Majesty’s Advocate-General in the Court of Exchequer in Scotland if such offence shall be committed in Scotland; and if any action, suit, bill, plaint, or information shall be commenced or entered in any other person’s name or names than as is before mentioned, the same and all proceedings thereupon had are hereby declared to be null and void, and the said Court or Courts where such proceedings shall be so commenced shall cause the same to be stayed, any law, custom, or usage to the contrary notwithstanding.”

† The Summary Procedure Act, 1864 (27 and 28 Vict. c. 53), sec. 3, provides that the provisions of that Act may be applied to . . . “(2) All proceedings to be taken before any Sheriff, Justices, or Justice, or magistrate in Scotland for the prosecution of any person who has committed or is charged with having committed any offence or act for which, under the provisions of any Act of Parliament he is liable upon summary conviction before any Sheriff, magistrate, Justices, or Justice, to be imprisoned or fined, or otherwise punished, or to be ordered to do or perform any act, and to be imprisoned in default of performance.”

craved. (3) Assuming competency otherwise, it was incompetent to take proceedings for violation of the statute founded on under the Summary Procedure Acts, and therefore the whole proceedings ought to be suspended *simpliciter*. No. 24.
May 23, 1892.
Lamb v.
Threahie.

Argued for the complainer;—(1) The offence was not one which could competently be tried under the Summary Procedure Act, 1864. The respondent founded on subsection 2 of section 3, but that section was inapplicable. There was no provision in the Lotteries Act for trying the offence summarily, and further, the nature of the punishment enjoined excluded the notion of summary trial.¹ (2) It was incompetent to proceed before the Justices to have a person adjudged a rogue and vagabond for an offence under section 41 of the Lotteries Act, and punished under section 67, unless there was previous conviction and fine by the Court of Exchequer under the 62d section.²

Argued for the respondent;—It was competent to try this offence under the forms of the Summary Procedure Act, 1864. Offenders under the Lotteries Act could be convicted “summarily” before the Justices within the meaning of subsection 2 of section 3 of the Summary Procedure Act. It was true that the Lotteries Act did not expressly use the word “summary,” but the word was clearly implied. The Court which was to try offenders was *prima facie* a Court of summary jurisdiction, the procedure was of a summary nature, and review by appeal was excluded. That distinguished the case from that of *Bute v. More*, where the statutes against Sabbath profanation clearly anticipated a trial before a higher Court than the Justices, and further expressly provided for an appeal. Further, there was nothing in the nature or gravity of the punishment which made the cases under the Act unsuitable for summary trial. The Police Courts daily adjudged persons to be rogues and vagabonds, and there were various statutes under which Justices of the Peace could award a longer term of imprisonment than sixty days, *e.g.*, the Apprentices Act, 4 Geo. IV. c. 34, and the Prevention of Crimes Act, 1871 (34 and 35 Vict. c. 112). Here the power to do so was expressly given. Lord Young’s view in *M’Allister’s* case was unsound. There was nothing in the Lottery Act to lead to the conclusion that proceedings in the Exchequer Court were a condition precedent to proceedings before the Justices. To give effect to Lord Young’s view would simply be to expunge section 67 out of the Act. Lord Adam’s opinion in the case was sound.

At advising,—

LORD JUSTICE-CLERK.—There are three points raised in this bill of suspension which are of importance and of some difficulty.

The first is that under the Act Geo. IV. cap. 60, it is provided that any person who sells tickets in any lottery shall forthwith pay a fine of £50, and shall also be deemed a rogue and vagabond, and be punished “in the manner hereinafter provided.”

By clause 62 of the Act it is provided that the penalty of £50 is only to be sued for and judgment given for it in the Court of Exchequer.

It is maintained on the part of the complainer that unless the person accused is first sued for the penalty of £50 proceedings cannot be taken against him for having him declared a rogue and vagabond, and for having him subjected to punishment. I think Mr Comrie Thomson and Mr Rhind went even further,

¹ *Bute v. More*, Nov. 24, 1870, 9 Macph. 180, 43 Scot. Jur. 65, 1 Couper, 495.

² *M’Allister v. Douglas*, March 20, 1878, 5 R. (Just. Cases) 30, 4 Couper, 28, per Lord Young, p. 37 of 4 Couper.

No. 24. and argued that it must be the Court of Exchequer which must find him to be a rogue and a vagabond.
May 23, 1892. I find no ground in the Act for holding, nor anything to indicate, that the two subclauses dealing with a person accused must be taken the one with the other, or indeed that both must be taken at all.
Lamb v. Threshie.

The Act prescribes that if there is a suit for a penalty it shall be a suit before the Court of Exchequer. It is quite clear that any proceedings for the recovery of the penalty of £50 before any other Court than the Court of Exchequer would have been incompetent.

I think that all the Court of Exchequer would do in such a case would be to find that there had been a contravention of the Act and to impose a penalty of £50, and the jurisdiction and functions of the Court would have been exhausted by that procedure.

On the other hand, section 67 of the Act provides that if any person is brought before two or more Justices for an offence against the Act, and shall be convicted of any offence or offences against the Act, and by such Justices should be adjudged a rogue and a vagabond, then and in every such case the Justices shall do certain things.

I find no indication whatever that the Justices, when a person is brought up for trial under section 67 of the Act, have anything to with the question whether there have been proceedings in the Court of Exchequer or not. In my opinion they would not be entitled to refuse to exercise their jurisdiction until they had ascertained whether the Court of Exchequer had done anything or not, nor would they be entitled to look at anything the Court of Exchequer had done if the jurisdiction of that Court had been invoked by the Lord Advocate.

Clause 67 says distinctly that the Justices are to try cases brought before them, and I see nothing to indicate that they are to do anything else than try the cases in the ordinary way, viz., they are to consider whether any offence against the Act has been committed, which of course they can only consider upon evidence led before themselves, and if they consider that the evidence justifies them in doing so, they must convict the accused.

I therefore have no doubt or difficulty whatever in holding that the Justices cannot be held to have acted illegally because no proceedings had previously been taken in the Court of Exchequer, and because no proceedings in that Court were placed before them.

It seems to me that the contention of the complainer simply amounts to this, that the Justices are only to act as an administrative body to inflict a punishment in respect of something which has been found by some other Court. That would be a most anomalous and absurd mode of dealing with a case, and a mode which, so far as I know, is utterly unknown in any Court procedure within this realm. It was contended that the Justices should have had brought before them the fact that the Court of Exchequer had held the accused guilty under clause 41 and had declared him a rogue and a vagabond, and that therefore they must punish him. That would be a procedure without any precedent, and it certainly would require very clear, distinct, and emphatic enactments in any Act of Parliament to induce any Court to hold that that was what was meant by its enactment. Therefore the first point which is based upon the argument that no case can be brought before the Justices until it has been previously brought before the Court of Exchequer, I set aside without difficulty.

The next point raised is that this case could not be tried under the Summary Jurisdiction Acts. A great deal has been said by the complainer's counsel about the magnitude of the case and its very great importance to the parties, and the case of *Bute* has been founded upon. If I thought that it ruled this case, I should give effect to it. But I must say I see no resemblance between the two cases. In *Bute's* case the prosecutor endeavoured to charge certain persons with an offence against the laws relating to Sabbath-breaking, and to bring them within the jurisdiction of a summary Court by restricting the demand for penalties to a punishment suitable to the summary Court. The Court held that was not competent, and I am not surprised that they should have reached that result.

No. 24.

May 23, 1892.
Lamb v.
Threahie.

It was pointed out that many of the offences embraced in these Acts were offences of a serious kind to be dealt with by severe and—according to our present ideas—cruel methods of punishment, and as there was no Act of Parliament whereby such offences could be brought within the ordinary jurisdiction of the summary Courts, the Court held that it could not be so brought but must be raised on indictment before a jury. This case is the opposite, for I find that the Legislature has provided that the Court to try the case is not to be a Court with a jury, but the lowest Court in the scale of jurisdiction and importance.

It was said that the matter was of very vast importance to the accused, that it is a very serious thing to be stamped as a rogue and vagabond. These are arguments which might very well have been addressed to the Legislature by any Member of Parliament when the Act was passed or to the Legislature now, but they were not arguments which can have any weight whatever with this Court when it is seen that, great or small, the questions which might be raised in such cases are, by the express terms of the Act, to be remitted to the disposal of two Justices of the Peace. I can only say in addition that I do not see the great importance of the questions here raised. The question whether a man is to be declared a rogue and vagabond is a question which is decided every day in Courts of exactly similar jurisdiction to that of the Court prescribed by the Act of George IV. It is not a question which ever comes before a Court of superior jurisdiction, but a question really to be decided by the local magistrate upon an investigation conducted by himself.

To consider then the question whether this is a case under clause 67 of the Act of George IV. which could be tried in a summary manner under the Summary Jurisdiction Acts of 1864 to 1881, we are at once brought face to face with this, that in none of the statutes is there any definition whatever of the words "summary jurisdiction." It seems throughout all these Acts of Parliament to be assumed as perfectly well understood what the expressions "summary jurisdiction" and "summary prosecution" mean, and the Acts which have been passed had been intended to apply to a procedure already existing which went by the name of summary procedure.

Now, we have only three modes of criminal procedure in this country—one is trial by jury, applicable both to the Supreme Court and to the Sheriff Court. and although in one Court criminal letters were formerly used, still the formalities were exactly the same in both Courts, and now the form of indictment has been applied to all jury cases. The peculiarity of that procedure is that it is an indictment with a long *inducias*, with notice of the productions and the names of witnesses, and no conviction can follow against a citizen on evidence except

No. 24.
May 23, 1892.
Lamb v.
Threshie.

on the verdict of his peers. The second mode of trial took place upon six days' *inducie* before the Sheriff, a procedure which has never been abolished, but which has, I think, died a natural death, for during the last thirty years there has never been to my knowledge any case so conducted. And there remains a further jurisdiction, in which there are no *inducie* and no notice of witnesses, and so far as I know there is no other way in which one can explain the words "summary jurisdiction" or "summary procedure" except that it is a procedure on a complaint without *inducie* and without indictment, and further without any notice to the party of the names of the witnesses that are to be called against him, and the productions to be used in evidence, and without the accused being represented by legal advisers unless he chooses to provide himself with them. That is, I think, what is meant in the Acts of Parliament when they speak of summary procedure and summary jurisdiction.

Now, does the Court to which this offence is relegated fall within that category? I think it does. It is a Court in which one or more Justices are to sit, and there are in the Court of the Justices no *inducie*, no indictment, and no lists of productions or witnesses. The Act of 1864, which is a very comprehensive Act, was intended to regulate the procedure of all Courts of summary jurisdiction including Justice of Peace Courts; and subsection 2 of section 3 of that Act is the subsection applicable to this case. It seems to me, therefore, that all the procedure here was perfectly general and correct.

It was made part of the complainant's case that the Act of Parliament was only an old remnant of an old Act of Parliament passed to protect the public revenue, which at that time was aided by Government lotteries. The object of the original Act undoubtedly was to secure the King's revenue at a time when it was not thought improper for the Crown through its advisers to carry on lotteries for the purpose of raising money; that was long ago put an end to, but Parliament has seen fit to retain upon the statute book that clause constituting it an offence to carry on lotteries. The Legislature undoubtedly thought that in repealing the other parts of the statute it was for the public weal that the parts of the statute making lotteries illegal should be retained, so that individuals should not carry on money lotteries, as was apparently done in this case.

I have come without any real doubt or difficulty to the conclusion that this conviction must stand as being a summary conviction under the Act of 1864, against the form and substance of which nothing can be alleged.

LORD KINCAIRNEY.—I am of the same opinion. On the question whether the proceedings should have commenced in the Court of Exchequer, I concur with your Lordship, and also in the opinion of Lord Adam in the case of *M'Allister*, whose reasoning I consider conclusive and take leave to adopt.

The question as to the competency of proceeding under the Summary Procedure Act is to my mind considerably more difficult. It appeared in the argument to be brought to this, whether the case falls under subsection 2 of section 3 of the Act of 1864, and that question seems to come to this, whether prior to the Summary Procedure Act a person charged with the offence under the Lottery Act of which the complainant has been convicted would have been liable to summary conviction. If he would have been liable, then the subsection applies, and the forms of the Summary Procedure Acts are thereby rendered competent. If he would not, the subsection does not apply, and the objection

would fall to be sustained. I think we must hold that a person charged in a Justice of Peace Court prior to the Procedure Act would have been liable to summary conviction. A Justice of Peace Court is, generally speaking, essentially a Court of summary jurisdiction, and its ordinary procedure is summary. I incline to think that convictions by Justices might, without impropriety, be termed summary convictions. When the statute commits the trial of offences which it creates to Justices of the Peace, the implication is that they may deal with them by summary conviction according to their usual practice. The exclusion of appeal also is characteristic of summary procedure. We have no information that Justices of the Peace have been in the custom of disposing of such cases where the complaint is proved in any other way than summarily. It may be that in some cases written pleadings may be usual or proper, and that other cases—I suppose a great majority—are disposed of without pleadings. We have no information as to that before us. But even in a case where there have been or should have been such pleadings, it appears to me that a conviction might not the less be properly termed a summary conviction.

We were referred to the case of *Bute v. More*. It appears to me, however, that that case does not apply. The particular offence charged in that case was held unsuitable for summary trial. Possibly it could not have been tried by Justices of the Peace at all. The offence here is of a totally different kind, and it really appears to me impossible to hold that an offence is unsuitable for summary trial for which the Justice of Peace Court is the selected statutory tribunal.

LORD STORMONTH DARLING.—I concur, and have only a word or two to add. The only question of difficulty, as it seems to me, is, whether this case falls under subsection 2 of section 3 of the Summary Procedure Act of 1864,—that is to say, whether the Lottery Act itself made offenders against it liable to summary conviction.

Now, as to that I am mainly influenced by two considerations. In the first place, the Act directs that proceedings shall be taken before two Justices, and proceedings before Justices are generally of a summary nature.

In the second place the Act expressly provides at the end of section 67 that the proceedings shall not be subject to appeal, which goes far to shew that it was not intended to keep a record of the evidence.

THE COURT refused the bill.

JOHN VEITCH, Solicitor—CROWN AGENT—Agents.

THOMAS DAVID TORRANCE, Defender (Appellant).—*G. W. Burnet*.

JAMES MILLER, Pursuer (Respondent).—*Macfarlane*.

No. 25.

Procedure—Appeal—Competency—Penalty—Expenses—Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101), secs. 16 and 17—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), secs. 2 and 3.—A local authority petitioned a Sheriff under the Public Health Act, 1867, to have a person ordained to remove from certain premises a nuisance, “and failing his doing so within such period as the Court shall appoint, to find him liable in a penalty not exceeding 10s. per day during his failure to comply with the order of Court, and to find him liable in expenses.” The Sheriff granted decree, finding that the nuisance existed at the date of the presentation of the petition: “Finds that the said nuisance having now been removed, it is unnecessary to

May 23, 1892.
Torrance v
Miller.

No. 24.
May 23, 1892.
Lamb v.
Threshie.

No. 25. dispose of the prayer of the petition; therefore dismisses the same: Finds the defender liable in expenses," and remitted to the Auditor to tax and report.
May 23, 1892. The defender craved, but was refused a case under the Summary Prosecutions
Torrance v. Appeals Act, 1875, and presented a note to the High Court under section 5 of
Miller. that Act "for an order" upon the Sheriff "to shew cause why a case should not be stated."

The Court refused the note on the ground that if the petition was a "cause" within the meaning of section 2,* it had not been "determined" in the sense of section 3 of the Act.

Opinion per curiam that in any view an appeal under the Summary Prosecutions Appeals Act, 1875, was incompetent, in respect that the petition was not a "proceeding for the recovery of a penalty" within the meaning of section 2 of the Act.

Opinion of Lord Justice-General (Inglis) in Lee v. Lasswade Local Authority, Nov. 2, 1883, 5 Couper, 329, 11 R. (Just. Cases) 1, approved of.

HIGH COURT. ON 24th February 1892, James Miller, sanitary inspector of the
Lord Justice- Northern District Committee of the County Council of Ayrshire, presented
Clerk. a petition in the Sheriff Court of Ayrshire, at Kilmarnock, in which he
Lord Kin- prayed the Court "to find that within or near the premises therein
cairney. described there exists a nuisance within the meaning of sections 16 and
Ld. Stormont 17 of the Public Health (Scotland) Act, 1867, viz.:—An ashpit in such
Darling. a foul and filthy condition as to be injurious to health; to find that "Thomas David Torrance, writer, Glasgow," is the author of said nuisance, to ordain him to remove and discontinue the same, and for that purpose to drain and cleanse the said ashpit, and, failing his doing so within such period as the Court shall appoint, to find him liable in a penalty not exceeding 10s. per day during his failure to comply with the order of Court, and to find him liable in expenses."

Torrance lodged answers on 27th February, in which he objected to the pursuer's title to sue, and further, *inter alia*, maintained that at the date of the presentation of the petition there was no foul or filthy matter in the ashpit, it having been cleaned out on 11th February.

On 16th March 1892, the Sheriff-substitute (Hall) pronounced this interlocutor:—"Repels the defender's plea of no title to sue: Finds that at the date of presentation of the petition a nuisance existed on the property mentioned in the prayer thereof: Finds that the defender was the author of said nuisance within the meaning of section 3 of the Public Health (Scotland) Act, 1867: Finds that at the date of the presentation of the petition it had not been brought to the pursuer's knowledge, or to the knowledge of the Northern District Committee of the County Council of Ayrshire, that the defender had taken or was about to take any steps for the removal of the said nuisance: Finds that the said nuisance having

* The Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. cap. 62), enacted,—

Section 2,—". . . 'Cause' means and includes every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge."

Section 3,—"On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction or complaint under such Act, by himself or his agent applying in writing within three days after such determination to the inferior Judge to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court of law. . . ."

now been removed, it is unnecessary to dispose of the prayer of the petition: Therefore dismisses the same: Finds the defender liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns." No. 25.
May 23, 1892.
Torrance v. Miller.

Torrance craved a case under the Summary Prosecutions Appeals Act, 1875. The Sheriff-substitute having refused to state it, Torrance presented a note to the High Court for an order upon the Sheriff-substitute, under section 5 of the Act, to shew cause why a case should not be stated.

Argued for the appellant;—The Sheriff-substitute ought to be ordained, in terms of section 5 of the Summary Prosecutions Appeals Act, 1875, to shew cause why a case should not be granted. This was a "cause" in the sense of section 2 of the Act, for a penalty was concluded for. The case was entirely different from the cases of *Lee v. Local Authority of Lasswade*¹ and of *Couper v. Lang*.² In these cases the decisions turned upon the fact that under the petitions under consideration no penalty could have been recovered without the institution of further and separate proceedings. It was a great hardship that the appellant, when the petition against him had been dismissed, should be found liable in expenses. They far exceeded any penalty which could competently be inflicted *eo nomine*.

Argued for the respondent;—The Sheriff-substitute had properly refused to state a case. No appeal was competent, because the petition was not a "cause" in the sense of section 2 of the Act. It was not a prosecution for an offence, the existence of a "nuisance" on one's premises not constituting an offence. It was not a proceeding for the recovery of a penalty. The money fine craved in the petition was not a criminal penalty in the statutory sense, but only a civil compulsitor to enforce the order of a civil Court. The stage of the proceedings at which the Sheriff might have been asked to apply the so-called penalty had not been reached. So far therefore as the proceedings had gone, there was nothing criminal in their character. It was substantially the same as if there had been no crave for the so-called penalty, for the inferior Judge had not had to apply his mind to that part of the petition.

But assuming that the petition was a "cause" within the meaning of the section, it had not been heard and determined in the sense of section 3. There was no decerniture for the taxed amount of expenses, and the question of expenses was the only matter the appellant had any interest to submit to review.

LORD JUSTICE-CLERK.—If it were necessary for us to decide the question raised on the case of *Lee* which has been cited to us, I must say that I should be inclined to follow the opinion of the Lord Justice-General in that case, and to hold that the case before us is not one of a criminal nature, and not one in which a penalty is concluded for, and therefore not a "cause" under the Summary Prosecutions Appeals Act.

The procedure here was begun for the purpose of enforcing sanitary arrangements within a county district, and one of the modes of doing this was to obtain an order for removal of a nuisance, and if this order is not obeyed and the nuisance removed, then a fine may be imposed for the failure. It does not appear to me to be a penalty in respect of a crime, but rather a civil compulsitor, the Court being given the power, if the order is not obeyed and the nuisance removed, to impose a pecuniary penalty.

¹ *Lee v. Lasswade Local Authority*, Nov. 2, 1883, 5 Couper, 329, 11 R. (Just. Cases) 1.

² *Couper v. Lang*, Dec. 12, 1889, 2 White, 393, 17 R. (Just. Cases) 15.

No. 25.

May 23, 1892.
Torrance v.
Miller.

There is, however, a clear distinction in this case which will enable us to decide it without dealing with that point. We are here not dealing with a concluded case. The Sheriff-substitute has found the appellant liable in expenses, and has remitted the account to the Auditor to tax. That is not an operative judgment. It is only an order for the adjustment of the expenses. There is no conclusion for a money payment. Therefore there seems to me to be nothing in the judgment of the Sheriff-substitute which can be appealed against at the present stage. On that ground I would propose to your Lordships to refuse this note.

LORD KINCAIRNEY concurred.

LORD STORMONTH DARLING.—I concur, and though the ground of judgment proposed by your Lordship is a narrow one, it seems to me necessary to decide this case upon it.

Even if the case had come to us after the Auditor's report had been received and a precise sum decerned for, the opinion of the late Lord Justice-General in the case of *Lee* would have led to the conclusion that this was not a "proceeding for the prosecution of an offence or the recovery of a penalty" in the sense of section 2 of the Summary Prosecutions Appeals Act of 1875, and in that opinion I agree.

THE COURT refused the note.

CARMICHAEL & MILLER, W.S.—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

No. 26.

May 24, 1892.
Donald v.
Hart.

EDWARD WOODFORD DONALD, Complainer.—*W. Thomson.*
GEORGE HART (Procurator-Fiscal of Renfrewshire), Respondent.—
C. N. Johnston.

Complaint—Conviction of an aggravation not charged.—A man was charged upon a complaint which set forth that he did drive a horse and van against a woman, "and knock her down and fracture her skull, to the danger of her life." The prayer was for conviction of the "said crime." A conviction followed, finding the accused "guilty of the crime charged, aggravated as charged."

The Court *quashed* the conviction.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Trayner.
Justiciary
Clerk.

EDWARD WOODFORD DONALD, van-driver, Glasgow, was charged before Sheriff-substitute (Cowan) at Paisley, upon a complaint at the instance of the Procurator-fiscal of the Court, which charged the accused that he "did, on 4th February 1892, in Paisley Road, Glasgow, Renfrewshire, drive a horse and van against Elizabeth Young, and knock her down and fracture her skull, to the danger of her life." In the prayer the Court was prayed to convict the accused of "the said crime."

On 14th April 1892 the Sheriff-substitute, in respect of the evidence adduced, found the accused "guilty of the crime charged, aggravated as charged," and therefore adjudged him to be imprisoned for thirty days.

Donald presented a bill of suspension and liberation, and it was argued, *inter alia*, for him;—The complaint contained no mention of "aggravation," but merely charged the accused with an offence. The Court must then quash the conviction, which convicted of an aggravation not charged in the complaint.

Argued for the respondent;—The words in the conviction were "aggravated as charged." The Sheriff-substitute had therefore found the accused guilty of nothing beyond what was charged in the complaint. He had treated the words "to the danger of her life" as an aggravation of the offence of knocking down the woman and fracturing her skull.

LORD JUSTICE-CLERK.—I think we can dispose of this case upon the terms of No. 26. the conviction.

The prosecutor here has stated certain things together in his complaint, viz., Donald v. May 24, 1892.
that the accused did “drive a horse and van against Elizabeth Young, and Hart.
mock her down and fracture her skull, to the danger of her life.”

These are the facts, and they are stated as one crime.

There is no suggestion of any aggravation whatever. The words “aggravated” or “aggravation” are not used in the complaint. The prosecutor states the facts as being one crime, and the prayer, which is a most important part of a complaint in an inferior Court, calls upon the magistrate to convict the accused of the crime charged without any mention of any aggravation.

The Sheriff-substitute, in giving judgment and in his conviction, finds the accused guilty of the crime charged “aggravated as charged.” Neither the complaint nor the prayer justify the words “aggravated as charged.” It may be very plain, as a mere matter of speculation, what these words mean. It may be that driving against this woman was, in the mind of the Sheriff-substitute, the crime charged, and the aggravation may in his mind have been that she was knocked down and her skull fractured to the danger of her life. We may speculate on this, but we do not know what the aggravation was, and we are not entitled to speculate upon this matter.

I am of opinion that the Sheriff could not convict of any aggravation under this prayer and complaint, and I therefore cannot sustain the conviction.

LORD YOUNG.—I asked to see the original proceedings in this case in order to observe whether the words “aggravated as charged” were part of the printed form of the conviction. I find this is not so; the words have been added in writing. I agree in thinking it would be unsafe to sustain a conviction from which it appears that the Judge was thinking of an aggravation which is not in the complaint. It is not only the crime which is taken account of, but also the aggravation which may go to increase the punishment. The Sheriff may have been under some misapprehension, and I think it would be unsafe to allow this conviction to stand.

LORD TRAYNER.—I agree in the result at which your Lordships have arrived. I think the complaint asks for the conviction of the accused of a specified crime. The Sheriff in finding the accused “guilty of the crime charged” exhausted all that was asked of him, and when he went on to find the accused guilty of an aggravation he proceeded *ultra petitem*.

THE COURT passed the bill, suspended the conviction and sentence complained of *simpliciter*, and decerned.

J. DOUGLAS GARDINER & MILL, S.S.C.—CROWN AGENT—Agents.

HUGH PETER DUFFIE, Appellant.—*Comrie Thomson—Ure.*
ALEXANDER M'CORMICK, Respondent.—*Jameson—Clyde.*

No. 27.

May 24, 1892.
Duffie v.

Burgh—Footpath by side of turnpike road—Police Commissioners—Jurisdiction—Turnpike Roads (Scotland) Act, 1831 (1 and 2 Will. IV. c. 43), sec. 96—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. c. 51), secs. 47 and 123.—Section 96 of the Turnpike Roads (Scotland) Act, 1831, enacts that*

* 1 and 2 Will. IV. c. 43, sec. 96, enacts,—“If any person shall ride upon any footpath or causeway, on or by the side of any turnpike road made or set

No. 27. if any person shall drive any horse or carriage of any description upon any footpath or causeway on or by the side of any turnpike road made or set apart for the use or accommodation of foot-passengers, he shall be liable in a penalty.
May 24, 1892. *Duffie v. M'Cormick.* The Roads and Bridges (Scotland) Act, 1878, by section 123,* provides that section 96 of the Turnpike Roads (Scotland) Act, 1831, shall be incorporated with the Act.

Section 47 of the Roads and Bridges (Scotland) Act, 1878, enacts that "from and after the commencement of this Act the highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges, and be subject to the same liabilities in reference to such highways and bridges . . . as the trustees under this Act possess . . ."

A turnpike road, forming the main street in a burgh, had on either side of the carriageway strips of ground of varying breadth popularly known as loanings. Down to 1878 the Turnpike Road Trustees maintained the carriageways of uniform breadth in the centre of the street but did nothing for the loanings, which, however, had been for over forty years maintained as footpaths by the town-council and latterly by the Police Commissioners.

Held that the Turnpike Road Trustees could, prior to the Act of 1878, have prosecuted, under section 96 of the Act of 1831, any person driving carts or carriages on the loanings, and that the Police Commissioners being now vested with the control of the highways within the burgh under section 47 of the Act of 1878, were entitled to institute a similar prosecution under section 123 of that Act.

HIGH COURT.
 Lord Justice-Clerk.
 Lord Young.
 Lord Trayner.
 Justiciary Clerk.

HUGH PETER DUFFIE, grocer, Rutherglen, was charged under the Summary Jurisdiction (Scotland) Acts, 1864 to 1881, in the Burgh Police Court, at the instance of the Procurator-fiscal of Court, upon a complaint which charged him that he "has been guilty of an offence within the meaning of the 'Roads and Bridges (Scotland) Act, 1878,' particularly section 123 thereof, which incorporates with said Act section 96 of the Act passed in the first and second years of the reign of His Majesty King William the Fourth, chapter 43, in so far as on the 3d day of March 1892 the said Hugh Peter Duffie did, contrary to the said Roads and Bridges Act, unlawfully drive a horse, yoked to a spring van, being a carriage within the meaning of the said Acts, upon the loaning, being a footpath set apart for the use of foot-passengers on the south side of the highway in the burgh of Rutherglen, and forming the Main Street of the said burgh, in the parish of Rutherglen and county of Lanark, at that part thereof opposite or near to his shop there, situated at 210 Main Street aforesaid, whereby the said Hugh Peter Duffie is liable to forfeit and pay a penalty."

Duffie was convicted, and appealed on a case stated by the magistrate, in which the following facts were narrated:—"It was proved that the Main Street of Rutherglen consisted partly of a public carriageway of uniform breadth, situated in the centre of the street, and bounded on

apart for the use or accommodation of foot-passengers, or shall lead or drive any horse, ass, mule, swine or cattle, or carriage of any description, or any wheelbarrow, truck, or sledge, or any single wheel of any waggon, cart, or carriage apart therefrom, upon any such footpath or causeway, . . . he shall forfeit and pay any sum not exceeding fifty shillings."

* The Roads and Bridges Act, 1878, sec. 123, enacts that, *inter alia*, section 96 of the Act 1 and 2 Will. IV. c. 43, shall be "hereby incorporated with this Act, and from and after the commencement of this Act in any county shall extend and apply to all the highways made or to be made within such county, and, except in so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated . . . within the same."

either side by gutters and kerbs. Prior to the passing of the Roads and Bridges Act of 1878 this carriageway was turnpike, under the control and management, and solely maintained and metalled, by the Road Trustees. On each side of the greater part of the carriageway, and separated therefrom by the gutters and kerbs, there are strips of ground popularly known as loanings. These loanings, which are of very irregular breadth, have been for many years made, maintained, and set apart as footpaths, were originally private plots, in some cases enclosed by walls, belonging to the owners of the dwelling-houses abutting on the street, and extended out from the houses to the gutters and kerbs of the highway. When these plots were gradually and from time to time removed or abandoned, from forty to sixty years ago, they became footpaths, and have ever since been maintained as such. Excepting that portion of the loanings paved or hornised by the owners, which in some cases extends out to the gutter of the highway, they have been so maintained as footpaths, first by the town-council and latterly by the Police Commissioners, out of the common goods and rates, by the magistrates annually putting ashes on them, but they were never formed, maintained, or set apart for carriage traffic. The Road Trustees, while they had charge of the carriageway, never did anything for the loanings, maintaining the carriageway only. They were succeeded in this by the magistrates and council, as Police Commissioners, in 1878, when by the Act of that year the entire control and management of the carriageway vested in them. Under the Police Act of 1862 the owners of houses on the sides of the streets have from time to time been required to form and maintain footways of varying breadth, as fixed by the Commissioners, on that part of the footpaths close to their houses, the remainder of the loanings between those parts made by the owners and the gutters and kerbs on the sides of the highway continuing to be maintained by the Commissioners by ashing them as footpaths. The public lamps are and have always been placed thereon, and trees have recently been planted on a part of them, and these loanings or footpaths have from time immemorial been extensively used as footpaths by the public. At one part on the north side of the street the kerbs were recently renewed by the Commissioners, and three openings left by them in the kerbs to admit of carriages entering for the delivery of heavy goods. At that part of the street opposite to the old churchyard there are no loanings, and the gutter and kerb of the highway approaches within a distance of from ten feet, gradually narrowing down to four feet from the wall of the graveyard, this being the only path for foot-passengers at that part of the street, and at other parts there are no footpaths except a very narrow path of not more than two feet, and in front of some old houses in the street there are no footpaths, the gutter and kerb being quite close to the building line. For some years back (one witness spoke to about ten) certain drivers of brewers' and bakers' vans, chiefly from Glasgow, have occasionally been in the habit of crossing the gutters and kerbs, separating them from the carriageway, and driving along these loanings or footpaths sometimes from one end to the other. This has increased to such an extent of late that the Commissioners, for the purpose of protecting the foot-passengers, sometime ago resolved that it should be discontinued by enforcing the statute, and one month's public notice was given of this resolution. Several persons have recently been convicted of using these loanings or footpaths for vehicular traffic."

No. 27.

May 24, 1892.
Duffie v.

M'Cormick.

The questions of law for the opinion of the High Court were:—
 "(First) Is the charge as set forth in the complaint relevant? and
 (Second) Does there exist any question of civil right in favour of the respondent to exclude the prosecution of the offence charged?"

No. 27.

May 24, 1892.
Duffie v.
M'Cormick.

Argued for the appellant;—The complaint was irrelevant. Whatever jurisdiction the Police Commissioners possessed under section 47 of the Act of 1878 was confined to the carriageway. They had never done anything for the loanings. The complaint did not state by whom the loanings were set apart as footpaths. If the Commissioners had proceeded under the 149th section of the Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101), they might have enforced the keeping of the footpaths clear under section 251 of that Act. (2) This was a question of civil right to be settled by an action in a civil Court and not by a police prosecution.

Counsel for the respondent was not called on.

LORD JUSTICE-CLERK.—It appears to me that this case is one of really no practical importance whatever. That the arrangement of street, road, and footpath in the place referred to in this case must be made and regulated by the Magistrates of Rutherglen nobody doubts. Now, they have made a certain regulation, and if that regulation is an outrage upon the inhabitants, and upon the comfort or rights of the inhabitants, the present Magistrates and Town-council of Rutherglen will be certain to suffer for it at the proper time. But in the meantime they have the responsibility and the duty of making these regulations. Now, they have made a regulation in regard to a certain space between the edge of the old turnpike road and the houses running along that turnpike road in the burgh of Rutherglen, and we are told in the case that that space between the old turnpike road and the houses has, as a matter of fact, for the last forty years and upwards, been used as a footpath by the inhabitants of Rutherglen. In accordance with that fact the magistrates have come to the conclusion that it is advisable that it should not be used for anything else, and they have issued orders accordingly. The appellant here has disputed these orders, and understanding, I presume, that it was a test case, he has brought this case for the purpose of review.

In these circumstances I can have no doubt that the magistrates had jurisdiction to deal with the case, and the only question which can raise any difficulty is, whether they have proceeded under the proper statute? In point of fact they have acted under the Roads and Bridges Act of 1878. Now, under section 47 of the Roads and Bridges Act the Police Commissioners were the authority which came in place of the old road trustees, and they had a power of punishment conferred upon them, for by section 96 of the General Turnpike Act, incorporated in section 123 of the Roads and Bridges Act, it was declared, *inter alia*, that if any person should drive any horse or carriage of any description "upon any footpath or causeway on or by the side of any turnpike road made or set apart for the use or accommodation of foot-passengers," that person should forfeit and pay a sum not exceeding 50s. It appears to me to be perfectly clear upon this case that this piece of ground just outside the gutter of the old turnpike road passing through the burgh of Rutherglen, which has been proved as matter of fact, and which we must accept as having been proved, to be a footpath, and which the inhabitants have used as such for over forty years, is under those clauses 96 and 123 a footpath by the side of a turnpike road. And I cannot see how we can exclude the jurisdiction of those who have charge of the road from carrying out the provisions of the statute by which anybody who drives with a vehicle upon the footpath which is at the side of the turnpike road may be dealt with and punished.

It is quite true that as this is a burgh, and as practically this turnpike road forms part of a broad street running between rows of houses of the burgh, the Magistrates of Rutherglen might have dealt with it in another capacity, viz, in their capacity as magistrates of police, protecting the inhabitants of the burgh by making such regulations for the conduct of the traffic between the sides of that street as they might think proper. But I do not think that they are thereby excluded from dealing with this case in their capacity as having charge of the road going through the burgh. They having charge of the road going through the burgh are under those clauses entitled to enforce penalties against any person who drives on the footpath which is by the side of the turnpike road under their charge. Therefore I think that the appeal should be dismissed.

No. 27.
May 24, 1892.
Duffie v.
McCormick.

LORD YOUNG.—I think that in the view which your Lordship has expressed, and which, in my opinion, is the right view, the case is not without interest and importance.

I took the liberty of pointing out in the course of the argument that, in my opinion, we are not here concerned with any question of property or property title; we are concerned only with the fact that the High Street running through the burgh of Rutherglen consists of a carriageway of a certain breadth limited by gutters and kerbstones on either side; and on the side of these kerbstones, away from the carriageway, there is a strip of ground on either side of varying breadth, originally consisting of what, in the language of the place, and probably of other places, were called loanings, but which the proprietors of the ground from forty to sixty years ago gave up and threw into the road or street so as to form as much part of the High Street of Rutherglen as the carriageway in the centre. And it is set forth in the case, and we must take it as a fact, that for from forty to sixty years this strip of varying breadth has been maintained and used as a footpath. This footpath is of unusual breadth at some places. In one of those photographs which have been shewn to us it is stately and magnificent, the breadth being sufficient to admit of trees being planted with a passage upon either side. But we must take the fact that it has been used and maintained as a footpath.

We are further informed in point of fact that lately, “for some years back, certain drivers of brewers’ and bakers’ vans, chiefly from Glasgow, have occasionally been in the habit of crossing the gutters and kerbs separating them from the carriageway and driving along these loanings or footpaths, sometimes from one end to the other. This has increased to such an extent of late that the Commissioners, for the purpose of protecting the foot-passengers, sometime ago resolved that it should be discontinued by enforcing the statute, and one month’s public notice was given of this resolution.”

Now, the statute which it occurred to the Commissioners it was according to their duty to enforce in the interests of the public safety was the Roads and Bridges Act, which I will explain my view of, as it raises the only question of any considerable difficulty in the case. But before noticing it further, I merely wish to repeat emphatically what I have said more than once in the course of the argument, that it is not merely within the power, but according to the duty of the municipal authorities of a burgh with a police establishment, to make a very primitive separation—with which we are all familiar—between that part of the way which is devoted to carriage traffic and that part of it which is reserved for the safety of foot-passengers. It is their duty to do that, and that without

No. 27.

May 24, 1892.
Duffie v.
McCormick.

reference to any question of property or title. There is a street there; it is the duty of the magistrates—within their power and according to their duty—to see that the foot-passengers are protected by having a line of march for themselves, on to which vehicular traffic is not admitted. Now, if that be clear, the case comes to be without any public interest. The magistrates or the commissioners at a particular time may make the foot-passage too narrow; at another time they may make it too broad. The street has a certain breadth in point of fact from house to house, and it has to be divided between carriageway and foot-path, and it is for the magistrates to exercise their judgment from time to time as to how the division shall be made.

It had here occurred to them that the proper statute to proceed upon in order to maintain the footpath for the exclusive use of foot-passengers in the future, as it had been for the last from forty to sixty years, was to institute prosecutions under the Roads and Bridges Act.

Now, that came about in this way. The road leading through Rutherglen, and really forming the High Street of Rutherglen, was a turnpike road under the General Turnpike Act, and under the management of the Turnpike Road Trustees,—like many other public turnpike roads under the statute,—and managed by the Turnpike Road Trustees, which at different places passed through a burgh.

Now, no doubt, the police authority in the burgh have a duty to attend to the public safety within the burgh, but the Turnpike Road Trustees had also, in my opinion, a clear duty under clause 96 of the General Turnpike Act to see that any footpath on or alongside of a turnpike road was not endangered by carriage traffic being allowed to pass along it. By clause 96 anyone who endangers the public safety by driving a carriage upon a footpath alongside of a turnpike road, although not on it, is subject to a penalty. Now, who can enforce it? The Turnpike Road Trustees could have enforced it under the General Turnpike Act, in my opinion, even within burgh. That statute did not say,—and I cannot infer,—that the provision imposing a penalty for driving upon a footpath alongside of a turnpike road could not be enforced by the road trustees when the road happened to be within burgh. It is a turnpike road notwithstanding that it is within burgh—a turnpike road with a footpath alongside of it, and the penalty in clause 96 applies to anybody who endangers the public safety by driving vehicles upon that footpath.

Now, under section 47 of the Roads and Bridges Act, 1878, the Commissioners of Police of the burgh of Rutherglen have come in place of the Turnpike Road Trustees, and section 96 of the General Turnpike Act has been incorporated in section 123 of the Roads and Bridges Act. I am of opinion that the officer of the Police Commissioners may in the interests of the public safety prosecute under the Roads and Bridges Act for this offence, whereby the safety of foot-passengers is endangered, viz., by driving carts and carriages on the foot-paths set apart for foot-passengers. I assume for the reasons I have stated that this footpath, although of extraordinary breadth, was set apart in point of fact and maintained for the use of the foot-passengers, and that the magistrates are now only by this prosecution checking what they represent as a comparatively recent innovation, which in their judgment is detrimental to the safety of foot-passengers who use it. If they have acted indiscreetly in reserving so much to be protected against vehicular traffic for the safety of foot-passengers, they will correct that if they ascertain that such a course is according to the general feeling

of the inhabitants of the place where they are acting as magistrates and guardians of the public safety. I have no reason to know what the prevailing public opinion upon that question is, but in the meantime I see no grounds upon which I can interfere with the efforts of the magistrates to promote the interests of the public safety by instituting prosecutions such as this to stop the traffic of vehicles along what is in fact a footpath. I am therefore of opinion that this appeal ought to be dismissed, there being, in my judgment, no error in point of law on the part of the magistrates who pronounced the conviction.

LORD TRAYNER.—I concur in the result at which your Lordships have arrived.

THE COURT dismissed the appeal, and affirmed the determination of the inferior Judge.

JOHN RHIND, S.S.C.—J. & A. HASTIE, Solicitors—Agents.

JOHN M'HATTIE, Complainer.—*Ure—J. C. Watt.*
THOMAS WYNESS (Superintendent of Police for the City of Aberdeen)
AND ANOTHER, Respondents.—*C. J. Guthrie.*

No. 28.

May 27, 1892.
M'Hattie v.
Wyness.

Warrant to apprehend—Indorsation—Act 11 and 12 Vict. c. 42.—A warrant to arrest a man in Aberdeen upon a charge of conspiracy was granted by the Lord Mayor of the City of London upon sworn information under the Act 11 and 12 Vict. c. 42. Before the warrant reached Aberdeen, and was indorsed by the magistrate in Aberdeen in terms of section 14 of the Act,* the police in Aberdeen, acting upon a telegram from the police in London, had arrested the man and imprisoned him.

In a bill of suspension and liberation the complainer pleaded that his arrest and imprisonment were without warrant.

The Court *refused* the bill, in respect that while the complainer might have a civil action for illegal arrest he was now in custody upon a warrant.

ON 24th May 1892 a warrant was granted by the Lord Mayor (Evans) of the City of London, to apprehend and bring to the Mansion House John M'Hattie, residing in George Street, Aberdeen, upon a charge of having in December last unlawfully and wickedly conspired with Alexander Stephen and other persons falsely and fraudulently to obtain from the British and Foreign Marine Insurance Company, Limited, and divers other insurance companies and insurers, large sums of money, with intent to cheat and defraud.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Ruther-
furd Clark.
Lord Trayner.
Justiciary
Clerk.

The warrant, which was granted upon sworn information under the Act 11 and 12 Vict. c. 42, was despatched to Aberdeen in the hands of

* The Act 11 and 12 Vict. c. 42, sec. 14, enacts,—“If any person against whom a warrant shall be issued by any Justice of the Peace . . . within England . . . for any crime or offence against the laws . . . shall . . . reside or be . . . in . . . Scotland it shall be lawful for the Sheriff or Stewart-depute or substitute or any Justice of the Peace of the county or place where such person . . . shall be . . . to indorse (K) the said warrant . . . which warrant so indorsed shall be a sufficient authority to the person . . . bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all Sheriffs, officers . . . and other peace officers of the county or place where such warrant shall be so indorsed, to execute the same within the county or place where it shall have been so indorsed by apprehending the person against whom such warrant shall have been granted, and to convey him into the county or place in England . . . where the Justice or Justices who first issued the said warrant shall have jurisdiction in that behalf, and to carry him before such Justice or Justices . . . to be there dealt with according to law . . .”

No. 28.
 May 27, 1892.
 M'Hattie v.
 Wyness.

Detective Outram, and upon the 25th of May it was indorsed by John Crombie, magistrate and Justice of Peace for the city of Aberdeen, in terms of section 14 of the Act 11 and 12 Vict. c. 42.

Meantime, on the 24th, M'Hattie had been arrested and confined in the Police Court prison upon a telegram from the London police to the police in Aberdeen, intimating that they were sending an officer to bring M'Hattie to the Mansion House.

On 25th May M'Hattie presented a bill of suspension and liberation against the Chief Constable of Aberdeen, and Inspector Outram, averring, *inter alia*,—"The procedure in cases where an arrested person is sought to be delivered to an English Court upon an indorsed warrant is for the holder of the warrant to have it indorsed in Scotland, upon which indorsation the warrant becomes in ordinary circumstances effectual for arrest."

The complainer pleaded, *inter alia*;—"The complainer is entitled to suspension and liberation, in respect his arrest and imprisonment were without warrant, illegal, and oppressive."

On 25th May Lord Young granted warrant of service of the bill on the respondents: "Meantime orders that the complainer should not be removed beyond the jurisdiction of the Court of Justiciary."

On 26th May Lord Young ordered "Detective Inspector Outram, of the City of London Police, presently in Aberdeen, to appear in the High Court of Justiciary, Edinburgh, to-morrow, and bring with him the warrant complained of in this bill."

At the hearing on 27th May it was argued for the complainer that there was no legal authority for his arrest and incarceration. The Lord Mayor's warrant could not possibly be said to be the foundation of diligence against him. He was simply arrested upon a telegram from England.

LORD JUSTICE-CLERK.—It is said that the complainer was arrested on no warrant, and that he is therefore entitled to liberation. I cannot give effect to that contention. He is now apprehended and in custody upon a warrant. If there was anything illegal in his being taken and detained in Aberdeen without a warrant, he has his civil remedy against any person who has done that illegal act. But he is now in custody upon a warrant, and I am of opinion that we cannot interfere.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT refused the bill, and decerned.

DOVE & LOCKHART, S.S.C.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

No. 29.
 May 27, 1892.*
 Blains v.
 Rankin.

JAMES BLAIN AND ANOTHER, Complainer.—*Orr*.
 JOHN MARQUIS RANKIN (Procurator-Fiscal of Court at Stranraer),
 Respondent.—*C. N. Johnston*.

Form of complaint—Summary Procedure Act, 1864 (27 and 28 Vict. c. 53), form 2, Schedule A †—Defective statement of punishment craved.—In a com-

* Decided March 15, 1892.

† Schedule A prescribes first a form of complaint "for offence at common law." The conclusion of the prayer in that case is "to convict him of the said crime, and to adjudge him to suffer the pains of law."

The second form is for a statutory offence. It concludes "to convict him of the aforesaid contravention, and to adjudge him to suffer the penalties provided by the said Act (or Acts or any of them)."

under the Summary Procedure Acts, 1864 and 1881, and the Criminal Procedure Act, 1887, persons were charged with the statutory offence created by the Act 3 and 4 Vict. c. 74, sec. 1, of stealing oysters. The punishment provided by the statute is "imprisonment not exceeding the term of one year." The body of the complaint bore no reference to any punishment, but the prayer concluded "to convict" the persons named "of the crime charged, and to adjudge them to suffer the pains of the law." The Sheriff-substitute convicted the accused, and sentenced them to forty days' imprisonment.

No. 29.

May 27, 1892.

Blains v. Rankin.

Conviction *suspended* on the ground that the complaint was irregular (1), as the prayer thereof was not in the form prescribed by the Summary Procedure Act for the case of a statutory offence, and (2) as the prayer did not limit the amount of punishment asked to the duration of imprisonment sanctioned by the Summary Procedure Act, viz., sixty days.

Question whether it was essential to specify in the body of the complaint the amount of punishment sanctioned by the statute. *Opinion* (per Lord Justice-Clerk) that it was not.

JAMES AND JOHN BLAIN, fishermen, Stranraer, were charged in the Sheriff Court of Galloway under a complaint which bore to proceed on the Summary Jurisdiction Acts, 1864 and 1881, and the Criminal Procedure Act, 1887. The complaint set forth merely that the accused did, on a day labelled, and from an oyster fishing labelled, "steal 153 oysters and 296 oyster brood, contrary to the Act 3 and 4 Vict. cap. 74, sec. 1." This Act by its 1st section limits the punishment that may be inflicted to one year's imprisonment.

High Court.

Lord Justice-Clerk.

Lord Rutherford Clark.

Lord Trayner.

The prayer of the complaint, after craving the Sheriff to grant warrant to cite the accused, ran thus, viz., "and thereafter to convict them of the crime charged, and to adjudge them to suffer the pains of law."

The Sheriff-substitute (Watson) convicted the accused, and sentenced each of them to imprisonment for forty days.

The pursuers presented a bill of suspension, pleading;—(a) The said complaint is incompetent in respect it is not framed in terms of the Summary Procedure Act, 1864. (b) Said complaint is irrelevant in respect it does not set forth that the accused were liable for any statutory penalty, nor pray the Court to adjudge them to suffer any statutory penalty; and *separatim*, in respect it does not charge complainers with any offence known to the law. (c) In respect said conviction and sentence are not in the form prescribed by the Summary Procedure Act, 1864.

Argued for the suspenders;—The complaint must specify what penalties could competently follow conviction. If it did not the magistrate might be misled.¹ Even if the complaint were not open to objection on this ground, it was bad because its prayer asked for the infliction of the pains of law in the case of a statutory offence with a statutory punishment attached to it.² Further, the prayer of a complaint under the Summary Procedure Acts must restrict all punishments to the limits authorised by these Acts,³ viz., in the case of imprisonment to sixty days. The 20th section of the Criminal Procedure Act of 1887 was not applicable to such complaints as this.

Argued for the respondent;—A general reference to the penalties of the statute was sufficient where there was no alternative prescribed by the statute.⁴ Where the statute with its own statutory penalties was referred to as here in the body of the complaint, the phrase "pains of

¹ Thomson v. Wardlaw, Jan. 23, 1865, 5 Irvine, 45.

² Nicol v. McNeil, July 13, 1887, 14 R. 47, 1 White, 416; Bute v. More, Nov. 24, 1870, 9 Macph. 180, 1 Coup. 495.

³ Clark & Bendall v. Stuart, June 8, 1886, 13 R. (Just. Cases) 86, 1 White, 191; Chisholm v. Black & Morrison, June 12, 1871, 2 Coup. 49.

⁴ Galt v. Ritchie, July 16, 1873, 11 Macph. 971, 2 Couper, 470.

No. 29.
May 27, 1892.
Blains v.
Rankin.

law" in the prayer must be read with the same reference, and, as the complaint bore to be presented under the Summary Procedure Acts, must of necessity be read as restricted by the limitations of that Act.¹ If, in point of fact, the magistrate was not misled,—if the sentence imposed was within the Act,—then the proceedings were good.

LORD JUSTICE-CLERK.—The first objection taken here is to that part of the complaint which makes an accusation against the suspenders. It is said that it is not sufficient to aver that the thing done was done in contravention of the Act of Parliament, but that a statement of the penalty which has been incurred must be added.

As I am prepared to dispose of the case on another and a different ground, it is not necessary to decide that question, but I may say that the objection does not seem to me to be good. To sustain it would give this anomalous result, that a prosecutor proceeding under the Summary Procedure Act would be compelled to state the points against the accused at greater length than he is now required to do under an indictment.

But the second objection is much more formidable. The conclusion of such a complaint has always been a prayer craving the magistrate, after certain procedure, to inflict certain penalties. In the Statute of 1887 there is a clause (sec. 20) applicable to the corresponding part of an indictment, but it is not applicable to the prayer of a complaint under the Summary Procedure Acts.

The complaint is laid under the Summary Procedure Acts. The Act of 1864 is quite distinct in giving two forms of prayer, one applicable to an offence at common law, the other to a statutory offence. The former runs thus,—the magistrate is requested "to convict him of the said crime, and to adjudge him to suffer the pains of law." The form for a statutory offence is different. It is "to convict him of the aforesaid contravention, and to adjudge him to suffer the penalties provided by the said Act."

Here the prosecutor states his charge as a statutory charge, but in the prayer of the complaint he concludes in language applicable to an offence at common law. That is a distinct departure from statutory form. The question is whether the statutory requirement is a mere matter of form. I am satisfied that it is not a mere matter of form, but a matter of substance that the prosecutor should state that the accused should be adjudged to suffer the penalties provided by the Act.

It is plain that in this case the phrase "the pains of law" is ambiguous. What the person is liable to suffer under the statute is imprisonment for twelve months. The prosecutor who brings such a charge in the Summary Court is bound to certiorate the magistrate that he does not ask for the full penalty, which would be incompetent under the Summary Procedure Acts. That also is a matter of substance, and I think this conviction should be suspended.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I entirely agree with your Lordship on the points on which it is proposed to put our decision, but I reserve my opinion as to whether the charge here was rightly set forth.

THE COURT suspended the conviction.

P. PEARSON, S.S.C.—CROWN AGENT—Agents.

¹ Chisholm v. Black & Morrison, *ut supra*.

JOHN MACPHERSON, Appellant.—*A. J. Young—Dewar.*

No. 30.

ARCHIBALD CAMPBELL (Procurator-Fiscal for Burgh of Oban), Respondent.
—*Salvesen.*

May 27, 1892.*
Macpherson v.
Campbell.

Public-house—Licensed grocer—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), Form 3, Schedule A—“Give to be drunk or consumed on the premises.”—A customer called on a grocer in his licensed premises to settle an account, and to introduce a friend as a new customer. He asked that this friend should be supplied with half a glass of whisky. The grocer supplied the whisky as requested, and it was drunk by the person so introduced on the premises. The whisky was not paid for. *Held (dub. Lord Trayner)* that the grocer had committed a breach of his certificate.

A GROCER'S certificate under the Public-Houses Act of 1862 contains a condition that the holder “do not traffic in or give any spirits,” &c., “to be drunk or consumed on the” licensed premises. HIGH COURT.
Lord Justice-
Clerk.
Lord Ruther-
furd Clark.
Lord Trayner.

John Macpherson, licensed grocer in Oban, was convicted of a breach of this condition of his certificate in respect of the following facts, viz.: On 3d December 1891 Hugh M'Coll and Alexander M'Gregor, both farm-servants in the neighbourhood, went to Macpherson's premises. M'Gregor did so for the purpose of settling an account due by him to Macpherson, and of introducing M'Coll as a new customer. M'Gregor asked that M'Coll should be supplied with “a half,” stating that he wished to become a customer of Macpherson. By Macpherson's direction, Peter Mitchell, his shopman, thereupon supplied to M'Coll one-half glass of whisky of the value of twopence, which was drunk by M'Coll while standing at the counter. It was further proved that the liquor was not paid for, and that it was customary for Macpherson to treat customers, as had been done in this instance.

Macpherson obtained a case, in which the above facts were stated. The question of law was “whether the appellant, having without receiving payment therefor, given one half glass of whisky to be drunk on his licensed premises to a person who had resorted thereto for the purpose of doing business, did so give exciseable liquor to be drunk or consumed on the premises in the sense contemplated by the statute and the certificate, and did thereby commit a breach thereof.”

The appellant cited the cases of *Kay v. Gemmell*¹ and *M'Petric v. Cadenhead*.² This case, like those, he argued, was a case of giving by way of hospitality, or if not was a case of giving by way of sample, a thing not struck at by the Act.

Argued for the respondent;—This was not, like the cases cited, a giving to a friend as an act of hospitality. The grocer had evidently given the whisky in the exercise of his trade as a grocer. It was plain that the Act would very soon become a dead letter if a glass of whisky was given away with every pound of tea.

At advising,—

LORD JUSTICE-CLERK.—The case before us is one arising out of an alleged breach of certificate by a licensed grocer, in respect he did, within his licensed premises, traffic in or give exciseable liquor to a person named to be drunk on the premises.

The facts as stated bring out very clearly that the accused did give (I do not at present use that word in any technical sense) one half glass of whisky to be consumed on the premises, and that it was so consumed.

* Decided March 19, 1892.

¹ Nov. 13, 1884, 12 R. (Just. Cases) 14, 5 Coup. 535.

² March 19, 1885, 12 R. (Just. Cases) 35, 5 Coup. 661.

No. 30.

May 27, 1892.
Macpherson v.
Campbell.

I should have had no doubt that that fact constituted a breach of the certificate, unless there were some other facts set out disclosing some circumstance that would take the case out of the statute, *e.g.*, that the whisky had been given to a person who had been brought into the shop in a fainting condition.

But certain cases have been decided which place the whole matter in a somewhat difficult position, and establish that the Act does not apply to the case of a grocer who gives whisky to be consumed on the premises in the exercise of hospitality.

These decisions do not commend themselves to my mind, but I am bound by them, and in any case in which whisky is so given as a piece of hospitality we must hold that there is no breach of the certificate. But do the facts here amount to anything of that kind? I think not.

Alexander M'Gregor brought Hugh M'Coll, who was likely to become a customer to the shop, and asked the appellant to supply M'Coll with half a glass of whisky. By Macpherson's direction, Peter Mitchell, his shopman, thereupon supplied to M'Coll one half glass of whisky of the value of two-pence, which was drunk by M'Coll while standing at the counter.

I see nothing in that statement which brings this case within the rule of the decided cases. I think that this is just a case in which a grocer, in breach of his certificate, has supplied whisky to be drunk on the premises. It was suggested in argument that this was a case in which whisky was given to an intending purchaser that he might taste it. I read it as a simple case of treating. It has been decided, and rightly and properly decided, that if a customer receives a small quantity of whisky to taste its flavour, that is not a contravention of the statute.

I am satisfied that this case does not fall under any of the decisions quoted to us.

LORD RUTHERFURD CLARK.—I agree. I think that it has not been shewn that the drink here was given as a matter of hospitality; on the contrary, I think it has been shewn that it was not so given.

LORD TRAYNER.—If this question had arisen in this case for the first time, I should have had no difficulty in holding that there had been a breach of certificate. My difficulty now arises from the previous decisions, and from the principle which was laid down in those cases. I am, however, not disposed to carry the principle of those cases any further, and if your Lordships are able to distinguish the present case from them, I do not dissent.

THE COURT answered the question in the affirmative.

JAMES PURVES, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

No. 31.

July 14, 1892.
Eastburn v.
Wood.

ABRAHAM STATES EASTBURN AND ANOTHER, Appellants.—*Rhind*.
GEORGE MURE WOOD (Procurator-Fiscal of Justice of Peace Court
of Edinburgh), Respondent.—*Gillespie*.

Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 57.—County Council—Bye-law for suppression of nuisance.—Terms of a bye-law which was held to be beyond the powers given to County Councils by section 57 of the Local Government (Scotland) Act, 1889, to suppress by means of a bye-law nuisances not already punishable in a summary manner by virtue of any Act in force throughout a county.

ABRAHAM STATES EASTBURN, medical specialist, Glasgow, and Thomas Jones, billposter, Glasgow, were charged in the Justice of the Peace Court of Edinburgh, at the instance of the procurator-fiscal, upon a complaint which set forth that they had contravened section 1 of the bye-laws made by the County Council of Midlothian in virtue of the Local Government (Scotland) Act, 1889, section 57,* by affixing bills to certain wooden hoardings alongside a public road without consent of the owner or occupier in the county of Edinburgh. No. 31.

July 14, 1892.
Eastburn v.
Wood.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Trayner.
Justiciary
Clerk.

The accused objected to the competency of the complaint, on the ground that the provisions of the section of the bye-laws founded on were illegal, in respect that they were beyond the powers conferred by the 57th section of the Local Government Act upon the County Council.

The Justices repelled the objection, and after a proof convicted the accused, and adjudged each of them to pay £1 of penalty, and in default to be imprisoned for seven days.

Eastburn and Jones craved a case, in which the following question, *inter alia*, was submitted for the opinion of the High Court:—"Whether the County Council were empowered by section 57 of the Local Government (Scotland) Act, 1889, to make bye-law 1?"

Argued for the appellants;—The bye-law was *ultra vires* of the County Council. The 57th section of the Act of 1889 gave them power to make bye-laws for the suppression of "nuisances." A nuisance was something offensive, and there was no proof that the bills in question were offensive.

Argued for the respondent;—The powers given to the County Council by the section were very wide, and they had not exceeded them in framing the bye-laws. Anything that annoyed was a nuisance, and the disfigurement of buildings by bill-sticking was an annoyance amounting to nuisance.

At advising,—

LORD YOUNG.—The question which is before us in this case is whether the County Council of Midlothian had power to make the bye-law No. 1, against

* The Local Government (Scotland) Act, 1889 (52 and 53 cap. 50), sec. 57, enacts,—“The council of a county may from time to time make such bye-laws as to them seem meet for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county, and may thereby appoint such penalties not exceeding in any case £5 as they deem necessary for the punishment of offences against the same.”

“Bye-Laws for the Suppression of Nuisances and Vagrancy, under the ‘Local Government (Scotland) Act, 1889,’ section 57.

“1. Every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice; and

“2. Every person who causes any hand-bill, waste or soiled paper, rags, or other similar material, to be strewn, laid down, or to fall upon any street, road, or other thoroughfare, or adjoining fences; and

“5. Every person found begging, or placing themselves or otherwise acting so as to induce, or for the purpose of inducing, the giving of alms, and all persons conducting themselves as vagrants, having no fixed place of residence, and no lawful means of gaining their livelihood within the county, shall be guilty of an offence under the ‘Local Government (Scotland) Act, 1889,’ sec. 57, and shall be liable on summary conviction to a penalty not exceeding forty shillings in each case.”

No. 31.

July 14, 1892.
Eastburn v.
Wood.

which the appellants have been held to have offended. It is an interesting case, because it is the first instance of the making of local legislation which has come before us. Under the 57th section of the Local Government Act the County Council is entitled to make bye-laws, in fact, to legislate in regard to certain matters within the county of Midlothian, viz., the prevention of vagrancy, and the prevention and suppression of nuisances within the county. They have made this piece of legislation upon which these two appellants were convicted, and we are asked to say whether it is in the power of the Council to pass such a bye-law. The first question is, whether we have power to determine that question? I am of opinion that we have the power. The question has been frequently raised and decided in the English Courts, and always in the view that the Courts have the power to consider whether the right to make any particular bye-law is within the jurisdiction of the County Council.

We are therefore asked if it was in the power of the County Council to make this bye-law. Their power depends upon the words of the 57th section of the Local Government Act. That section provides that the County Council may make "such bye-laws as to them seem meet for the administration of the affairs of the county for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county." This is a limited power of general legislation granted to the County Council for the suppression of vagrancy and nuisances which are not otherwise punishable summarily by statute. Now, the County Council, in the first of the bye-laws framed by them to this end, enacted that—"Every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice," should be liable in a penalty.

Now, there are three enactments contained in this clause. The first has nothing to do with the question whether authority is given or not, or whether the consent of the owner and occupier is given, which elements are only applicable to the second and third enactments in the clause. Under the first, if anyone is so wicked as to write upon or mark walls with chalk, he is to be punished at once. Now, one would not say that that was a very happy specimen of legislation, and really penal legislation requires more consideration and more skill than has here been resorted to to express it.

But the particular enactment in clause 1 with which we are now concerned is the third, "or without the consent of the owner or occupier, affixes or causes to be affixed to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice." So that any person putting up any notice on a tree or dyke within the county of Midlothian, without the consent of the owner and occupier, is to be subject to a penalty of 40s.

Is it within the power of the County Council to make such an enactment? There is nothing said here about nuisance. I quite appreciate the desirability of putting a stop to what is popularly called the bill-sticking nuisance, and I do not think it would require any very great skill to frame an enactment to suppress it, but to say that anybody who puts up a bill upon any fence at the side of the road within the county of Midlothian is to be liable to a penalty

of 40s., and in default of imprisonment, is extravagant as a piece of serious legislation. No. 31.

Nuisance may be brought into any case of bill-sticking by the character or size of the bill, the place selected for putting it up, or other reasons, but to say that every bill stuck upon a fence by the roadside is a nuisance is to say what cannot be maintained as a legal proposition. A notice put up on a fence by the roadside that a charity sermon is to be preached in the parish church for behoof of the destitute sick would be a bill put up in the county of Midlothian, and probably the owner and occupier of the lands enclosed within the fence might not have been convened to give their consent to the putting up of the notice, so that that would be an offence under this section. I may observe that the announcement of such a sermon would of itself be an offence under another of these bye-laws, viz., the 5th. That section provides that "Every person found begging," (it is not said where except within the county of Midlothian), "or placing themselves, or otherwise acting so as to induce, or for the purpose of inducing, the giving of alms," is to be liable to summary conviction, and a penalty of 40s. The purpose of a charity sermon is to induce the giving of alms, and the notice might make the person who put it up liable for the penalty. July 14, 1892.
Eastburn v.
Wood.

Now, I think the provisions of the 5th section are just as clearly beyond the powers of the County Council as those of the first, although it is not necessary for the Court to decide that point. The practical conclusion I arrive at is, that if the County Council are going to penally legislate upon bill-sticking, which may be a nuisance, they must really resort to someone with intelligence enough to frame the enactment. Bill-sticking may subject those transgressing to a penalty and imprisonment, and may be put down by a bye-law applicable to the case. The 5th bye-law, however, is not limited to any case. It refers to the county of Midlothian, and if the Convener of the county were to ask in his library for charity in support of any object, he would be liable in a penalty under the law as so expressed.

There is another enactment—the second—to which I should like to call attention (although it is not within the case), which has regard to what may be called the paper nuisance. It is a very serious one, especially in the streets of Edinburgh, where whole newspapers seem to be thrown down and allowed to blow about, and its suppression is worthy of attention. The second enactment runs thus—"Every person who causes any hand-bill, waste or soiled paper, rags, or other similar material to be strewn, laid down, or to fall upon any street, road, or other thoroughfare or adjoining fences," is to be liable in a penalty.

One of the first cases which occurs to one is that of a paper chase. Any boy laying down paper as scent at the part of a fence leading into a field and adjoining a thoroughfare could, under the enactment, be punished by fine or imprisonment although there was no nuisance whatever. That is altogether unreasonable, and the enactment might be quite easily expressed so as to repress the paper nuisance without using language which would comprehend such a case as that.

Therefore, upon the case before us, my opinion is that this local bye-law was beyond the powers given by the Act of 1889 to the County Council to suppress nuisances by means of a bye-law. That is sufficient to dispose of the case, and to set aside the conviction.

No. 31. LORD TRAYNER.—I am of opinion that this bye-law is beyond the powers of the County Council.

July 14, 1892.
Eastburn v.
Wood.

LORD JUSTICE-CLERK concurred.

THE COURT quashed the conviction,

JOHN VEITCH, Solicitor—GEORGE M. WOOD, S.S.C.—Agents.

No. 32.

GEORGE ADAM MILLER, Appellant.—*A. J. Young—Cook.*

July 18, 1892.
Miller v.
White.

JOHN WHITE (Procurator-Fiscal of Burgh of Dalkeith), Respondent.—*M'Neill.*

Public-house—Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), sec. 5—Prosecution for selling spirits without a certificate against an innkeeper holding temporary licence from Commissioners of Inland Revenue—Oppression.—An innkeeper, whose licence expired on 15th May 1892, but whose occupancy of the inn, in virtue of the Removal Terms (Burghs) Act, 1886 (49 and 50 Vict. c. 50), sec. 4, did not expire till the 28th, presented an application to the Commissioners of Inland Revenue, with concurrence of two local Justices of the Peace, craving authority to sell exciseable liquors from the 15th till the 28th. The application was granted upon his paying a quarter's licence duty. On receiving notice from the chief constable that he was not entitled to sell without a certificate, he ceased to do so after the 17th. On the 20th he was charged and subsequently convicted by a magistrate, who was one of the Justices of the Peace who had concurred in the application to the Commissioners, for the offence of selling liquor on the 17th without a certificate. The Court *sustained* an appeal by him, holding that the prosecution was, in the circumstances, oppressive.

HIGH COURT.
Lord Young.
Lord M'Laren.
Ld. Wellwood.
Jnsticiary
Clerk.

GEORGE ADAM MILLER was tenant of Annfield Inn, Eskbank, Dalkeith, for nine years preceding Whitsunday 1892. His licence expired on 15th May 1892, but as the removal term from houses let on lease was by 49 and 50 Vict. c. 50, sec. 4, postponed to the 28th May, his occupancy of the inn did not expire until that date. As he had a considerable stock in trade on the premises, he on 13th May presented a petition to her Majesty's Commissioners of Inland Revenue (Excise), Somerset House, London, craving leave to carry on his usual public-house business from the 16th to the 28th May inclusive, so as to give him an opportunity of disposing of his stock upon the premises. The application had the following concurrence appended to it:—"We, William Watson, provost of Dalkeith, and Thomas Alison, Rose Hill, Dalkeith, two of Her Majesty's Justices of the Peace for the county of Edinburgh, respectfully concur in the above petition, and pray that it may be granted. WILLIAM WATSON, J.P., THOMAS ALISON, J.P."

The petition and concurrence were duly lodged with the Commissioners. They intimated upon 14th May to Miller that the petition had been granted upon his paying a quarter's licence duty, and he accordingly paid it. He immediately intimated to the chief constable that he had done so, and that he intended to carry on his business until 28th May. On 16th May the chief constable wrote in reply, intimating "that notwithstanding Miller has paid a quarter's duty to the Inland Revenue, he has no certificate from the Justices, and, if he continues to sell, steps will be taken with the view to a prosecution. He has been warned accordingly."

Miller did not continue his business after the 17th May.

On 20th May Miller was served with a complaint at the instance of the Procurator-fiscal of the burgh of Dalkeith, charging him with selling exciseable liquors without a certificate.

The complaint was heard on the 30th before Provost Watson, and the accused was found guilty of selling drink upon the 17th without a certificate, and fined. No. 32.

July 18, 1892.
Miller v.
White.

Miller appealed to the High Court of Justiciary. The appellant set forth the facts and proceedings above narrated, and stated, "that the police had been informed of each step taken, and that the appellant, on being apprised that they might object, did not open the inn after the 17th May 1892. Evidence was led on behalf of the present appellant, which shewed that it has been customary, not only in Edinburgh, but throughout Scotland, to carry on a retail business with an excise licence, for temporary purposes, without objection by the police. This is the first known case of a prosecution against the holder of an excise licence granted to him for a special purpose, and a limited time. The Commissioners of Inland Revenue give such a licence only if the application for it is indorsed or concurred in by two Justices of the Peace. The said Provost Watson, who along with another Justice concurred in the appellant's petition to the Commissioners and thus obtained the grant, sat in judgment upon the appellant for doing what the prayer in the petition asked that he should be empowered to do. Yet the said Provost Watson found the appellant guilty of an offence, and fined him 35s. and £2, 19s. expenses, and failing payment to suffer fourteen days' imprisonment. The defender considers himself aggrieved by said judgment, and now complains thereof, and seeks relief against the same on the ground of malice and oppression on the part of the magistrate, or of such deviation from the statutory enactment as prevented substantial justice being done, and for other reasons to be stated at the hearing hereof."

In his answers the respondent stated,—“It is not true, as stated, that there was evidence led which shewed that it has been customary, not only in Edinburgh, but throughout Scotland, to carry on a retail business with an excise licence for temporary purposes without objection by the police. The letter of the chief constable of 17th May 1892, referred to by the appellant, shews that such a custom does not prevail in the county of Midlothian. The licence alleged by the appellant to have been granted to him by the Commissioners of Inland Revenue is null and void.”

The respondent maintained that the licence granted by the Inland Revenue was null and void under sec. 5 of the Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35).*

LORD YOUNG.—This is an unusual case. The removal term was recently in Scotland postponed from the 15th to the 28th May, and the 15th, the old term of removal, was that upon which licences expired, so that a tenant of an inn who has to remove at Whitsunday is left in a position of some hardship, because during that fortnight he cannot carry on his business. His stock in trade is there, and he cannot sell it, for his certificate and licence have expired. In this state of matters, the Commissioners of Inland Revenue seem to have thought it fitting to interpose for the protection of tenants in that position, by considering

* The Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), sec. 5,—“No licence for the sale of spirits, wine, porter, ale, beer, cyder, perry, or other exciseable liquors by retail, whether to be drunk or consumed on the premises of the person licensed or not, shall be granted by the Commissioners of Inland Revenue, or by any officer of Inland Revenue, to any person in Scotland who shall not produce to the said Commissioners or officer a certificate, granted in terms of this Act, enabling the party to obtain such licence, and every licence which shall be granted contrary to the terms of this Act shall be null and void to all intents and purposes.”

No. 32. an application by such persons, provided it is backed by two local magistrates, to continue the licence between the 15th and 28th, with a view to remove that hardship.

July 18, 1892.
Miller v.
White.

Now the appellant being in this position asked the provost and a local Justice to certify his application to the Board of Inland Revenue as a fitting one to be granted, with reference to his house and to him individually, and they certified accordingly, and the application was granted by the Inland Revenue, he paying a certain sum for it. He proceeded to act upon the permission, and immediately the procurator-fiscal proceeded to prosecute him as acting illegally—selling spirits unlawfully without a certificate. I think that if I had been the provost who signed as concurring in the petition humbly praying that the application should be granted, I should have thought such a prosecution unbecoming in the highest degree and oppressive, and should have declined to entertain it. But the provost seems to have been overcome by the technical idea that however oppressive and unbecoming he might think the prosecution, he was bound to convict if it was only proved that the formal statutory certificate by the Justices at a meeting had not been granted.

Now, I think, as I have said, that the prosecution was oppressive, and on that ground we have jurisdiction, and, in my opinion, a duty to set aside the conviction. I am then for sustaining the appeal.

LORD McLAREN and LORD WELLWOOD concurred.

THE COURT sustained the appeal, and recalled the judgment.

GORDON PETER & SHAND, S.S.C.—J. W. CHESLER, Solicitor—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1891-92.

WINTER SESSION.

THOMAS JACK, Pursuer (Respondent).—*Comrie Thomson—McLennan.*
WILLIAM FLEMING AND OTHERS, Defenders (Reclaimers).—*Ure—*
A. S. D. Thomson.

No. 1.

Oct. 15, 1891.
Jack v. Flem-

Issue—Reparation—Slander—Concurrence in and adoption of the slander of another.—In an action of damages for slander against A and B, the pursuer alleged that on the occasion of his election to the eldership in a parish church, the defenders had deliberately and maliciously resolved to use means to prevent his ordination; that they had prepared, or caused to be prepared, and published a petition to the minister to be signed by members of the congregation, representing that the pursuer's appointment as an elder would be injurious to the interests of the church; that the defenders, acting in concert and in pursuance of their malicious design, proceeded to canvass certain members of the church for signatures to the petition; that the defenders called upon S to obtain his signature to the petition, and that A, in his presence, made certain false and calumnious and injurious statements regarding the pursuer; that B was then present and heard what A said, and concurred with him in said slanderous statement uttered in pursuance of their said malicious design.

The pursuer proposed the issues:—(1) Whether A made the false and calumnious statement in presence of S and B? and (2) whether B falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by A?

Held that the second issue could not be allowed and that there should be one issue, viz., Whether the defenders, or either of them, and which of them, in presence and hearing of S, falsely and calumniously stated, &c.?

Held by Lord Stormonth Darling (Ordinary), and acquiesced in, that the pursuer was not bound to put in issue malice and want of probable cause, as the defenders were not privileged in canvassing for signatures to the petition.

Held by Lord Stormonth Darling, and acquiesced in, that in issues relating to statements by the defenders to the kirk-session want of probable cause must be put in the issue as well as malice.

THOMAS JACK, Houston, Renfrewshire, raised an action of damages against William Fleming, John Gourlay Harvey, and others for an alleged slander.

1st DIVISION.
Ld. Stormonth
Darling.

The pursuer averred that he had for years been a member of the Houston Parish Church, of which the defenders were also members; that the defenders had conceived malice and ill-will towards him in connection with certain proceedings taken in 1890 by the congregation regarding the election of a minister to the church; that in 1891 they seized upon the

No. 1.

Oct. 15, 1891.
Jack v. Fleming.

occasion of the pursuer's election to the eldership of the church as a convenient opportunity of injuring his character and gratifying their feelings of malice against him, and resolved to use every means in their power to prevent his ordination as an elder; that they accordingly falsely, calumniously, maliciously, and without probable cause, prepared and published throughout the parish a petition or representation to the minister against his ordination as an elder; and that the defenders, acting in concert and in pursuance of their malicious design, proceeded to canvas the whole members of the congregation known to them for signatures to the said petition.

In cond. 6 the pursuer averred;—"In particular, the defenders William Fleming and John Gourlay Harvey, in their malicious endeavours to obtain signatures to the said petition, called upon Alexander Scott, gardener, Houston, at his house in Milliken Street there, on or about the 8th day of January 1891, for the purpose of securing his signature and the signature of his wife to the said petition. While there the said defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott, and of Mrs Elizabeth Burt or Scott, his wife, falsely, calumniously, maliciously, and without probable cause, stated of and concerning the pursuer that pursuer had behaved most shamefully and disgracefully to" a girl named, "or did use words of like import, meaning thereby that the pursuer had been guilty of improper or immoral conduct towards" the girl named. "The said charge was absolutely and entirely groundless. Further, the said defender William Fleming was then and there present, heard what the said defender John Gourlay Harvey said, and concurred with the latter in said slanderous statement regarding the pursuer, uttered in pursuance of their said malicious design."

The pursuer further averred that in objections to the pursuer's appointment as an elder, lodged with the kirk-session, the defenders had falsely, maliciously, and without probable cause made injurious statements regarding him.

The defenders contended that in all the pursuer's issues malice and want of probable cause must be put in issue.

On 26th June 1891, the Lord Ordinary (Stormonth Darling) appointed the following issues, *inter alia*, for the trial of the cause:—" (1) Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defender John Gourlay Harvey, in presence and hearing of the said Alexander Scott, of Mrs Elizabeth Burt or Scott, his wife, and of the defender William Fleming, or one or more of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards" a girl named "had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards" the girl named, "or did use words of like import of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500. (2) Whether at the time and place above libelled, the defender William Fleming falsely and calumniously concurred in and adopted the statement falsely and calumniously made by the defender John Gourlay Harvey of and concerning the pursuer, in presence and hearing of the parties named in the first issue, or one or more of them, to the loss, injury, and damage of the pursuer? Damages laid at £100."*

* "OPINION.—The first question is whether, as regard issues 1 to 8 inclusive the pleadings disclose a case of privilege, so as to require the insertion of the word 'maliciously.' I am of opinion that they do not. The defenders, if the honestly believed that the pursuer's character was such as to unfit him for the

The issues relating to statements made by the defenders to the kirk-session contained the words "maliciously" and "without probable cause." No. 1.
 The defenders reclaimed, and argued;—The second issue must be dis- Oct. 15, 1891.
 allowed. It was quite unprecedented in form. It did not necessarily ing. Jack v. Flem-

imply that the defender Fleming had been a party to the slander uttered by Harvey. The defenders did not again raise the question as to the insertion of the words "maliciously" and "without probable cause."

The pursuer argued that the issue sufficiently put before the jury the question which he desired to raise against Fleming.

LORD ADAM.—I think it is altogether out of the question to allow the issue in these terms, viz., whether the defender Fleming was guilty of slandering the pursuer merely by "concurring and adopting" a statement made by another of the defenders.

I agree with what was said by your Lordship during the discussion, that the issue must charge the defender with uttering the slander complained of in some way, though not necessarily with having uttered it in so many words.

I therefore think that the issue as it stands must be disallowed, and that the point raised thereby may be included in the first issue by making it run thus: "Whether on or about the 8th day of January 1891, and at or near, &c. . . . the defenders, John Gourlay Harvey and William Fleming, or either of them, and which, did falsely and calumniously state of and concerning the pursuer," &c. If there is a statement that the defenders Harvey and Fleming were acting in concert, I do not think it necessary to put in the issue that the one made use of the words complained of in presence of the other.

I think with that alteration the first issue will try the question which the pursuer desires to raise in the second issue.

LORD M'LAREN.—I am of the same opinion. In regard to the issue I think we ought not to sanction what would be an innovation in the law of slander.

What is proposed here to be put in issue is whether the defender Fleming was "art and part" with another of the defenders in uttering the slander complained of. Both defenders ought to be charged with the uttering of the slander, and the jury will say whether the circumstances proved in regard to the second defender's conduct amount to an utterance of the slander by him.

LORD KINNEAR concurred.

THE COURT approved of, *inter alia*, the following issue for the trial of

eldership, were within the protection of privilege in stating their objections to the kirk-session, but I do not think that they were under any protection in canvassing among the parishioners for signatures to a petition. The question whether the pursuer should be made an elder lay with the kirk-session, and not with the parishioners.

"With regard to issues 9, 10, 11, and 12, which relate to statements made to the kirk-session, it is admitted by the pursuer that they must contain the word 'maliciously,' but the defenders maintain that they should also contain the words 'and without probable cause.' The common case in which these words require to be inserted is where information is given to the criminal authorities. But that is not the only case; and the test seems to be whether the defenders were acting in the discharge of a public duty (see *Croucher v. Inglis*, 16 R. 774). Now, I think it may fairly be said that when a kirk-session, one of the recognised judicatories of the country, publicly invites objections to the ordination of certain persons as elders, it is a public duty on the part of any parishioner, who honestly entertains objections to their ordination, to state his objections in the proper quarter. I therefore think that these words must go in."

No. 1.

Oct. 15, 1891.
Jack v. Fleming.

the cause :—" Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defenders, John Gourlay Harvey and William Fleming, or either and which of them, in presence and hearing of the said Alexander Scott, and of Mrs Elizabeth Burt or Scott, his wife, or one of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards" a girl named "had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards . . . or did use words of like import of and concerning the pursuer, to his loss, injury, and damage? Damages against the defender John Gourlay Harvey laid at £500. Damages against the defender William Fleming laid at £100."

CUMMING & DUFF, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 2.

Oct. 17, 1891.
Dunsmore's
Trustee v.
Stewart.

ALEXANDER GORDON (Peter Dunsmore's Trustee), Appellant.—*Clyde*.
JAMES STEWART, Respondent.

Process—Caution for expenses—Bankruptcy—Undischarged bankrupt.—An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to the Sheriff. Held that the claimant could not be allowed to proceed without finding caution for expenses.

1st Division.
Sheriff of
Lanarkshire.

JAMES STEWART, who was an undischarged bankrupt, lodged a claim in the sequestration of Peter Dunsmore, spirit-dealer there, for the sum of £301, 5s. 2d., being the amount of two bills for £100 and £200. The trustee in the sequestration having rejected the claim, Stewart lodged an appeal to the Sheriff.

On 22d May 1891 the Sheriff-substitute (Birnie) appointed parties to lodge minutes prepared in terms of the statute.

The revised minute for Stewart was in these terms,—“The appellant submits and avers that the bills on which his claim is founded were granted for value, and that therefore he is entitled to succeed in this appeal.”

The trustee's revised minute was to the effect that the claimant had acted as factor for the bankrupt and collected rents and other moneys belonging to him, and had all along failed to account to his trustee for his intromissions; that the bills on which the claim was made were given by the bankrupt to cover advances to be made by the claimant on behalf of the bankrupt in the management of his affairs, and not for cash advanced at their dates; that the claimant had made no advances and had all along failed to satisfy the trustee that the bankrupt was indebted to him in anything at the date of the bills or the sequestration; that on the contrary, on an accounting there was a large balance due by the claimant to the trustee, and the trustee had therefore rejected the claim.

On 29th June the Sheriff-substitute refused a motion by the trustee that Stewart be ordained to find caution for expenses.*

Dunsmore's trustee appealed, and in addition to the statements made in his minute, he stated that Stewart's trustee had been discharged, but that prior to his discharge he had considered the propriety of making the present claim and had decided not to do so.

* “NOTE.—The appellant's claim is founded on bills, and he is virtually a defender. No doubt he has failed to convince the trustee—who has no interest except to do justice—that the bills were granted for advances at their dates, but having in view the more recent decisions this is not to my mind sufficient to compel the appellant to find caution.”

Argued for the trustee;—Even assuming, as did the Sheriff-substitute, that Stewart must be considered as a defender, he ought, in the circumstances, to be ordained to find caution.¹ But that was not truly Stewart's position. He was claiming a sum of money, and was in the position of a pursuer suing a petitory action met by the two defences of compensation and no value given. The ordinary rule must then be applied, and he should be ordained to find caution.

There was no appearance for Stewart.

LORD PRESIDENT.—This claim by James Stewart is for the amount of certain bills granted to him by the bankrupt. The claimant is at present an undischarged bankrupt. It is true that there is no trustee at present acting in his sequestration, but it has been stated to us that the trustee when in office had this claim before him and resolved not to take action upon it.

The trustee is now discharged, but the beneficial right to the sum which the bankrupt now claims is in his creditors; the money, if recovered, would fall to be administered in some form for the benefit of his creditors, and this might be done by reviving the sequestration.

Now, in this state of matters, the question arises whether, if he desires to prosecute this claim the claimant must not find caution, and whether the claim can be treated otherwise than as a suit to recover money at the instance of an undischarged bankrupt. It is true the claim is made in a sequestration, but it is not the less a proceeding by an undischarged bankrupt to recover money. I think that the ordinary rule applies, viz., that the claimant must find caution, and I cannot see anything stated on record to take the present case out of that rule. The origin and substance of the claim are not very fully divulged by the claimant. He was very pointedly challenged on this subject, and under the interlocutor of 22d May 1891, which appointed the minutes of the parties to be exchanged and revised, he had very full opportunity of explaining the origin of the bills, but he has confined his statement on the subject to a bald statement that the bills were granted for value.

I think, therefore, that he must be ordained to find caution before he can proceed.

LORD ADAM concurred.

LORD McLAREN.—I am unwilling to disturb the finding of the Sheriff in regard to a matter so purely discretionary as is the question whether caution should be found by an undischarged bankrupt. The policy of our bankruptcy law, however, seems to give an almost unlimited right of appeal from the Sheriff, and as the case is competently brought before us, we are bound to exercise our jurisdiction to the best of our judgment. I see no reason in the circumstances of this case for deviating from the ordinary rule as to finding security for expenses, and I agree that Stewart must be ordained to find caution.

LORD KIRKNEAR concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute dated 29th June 1891: Remit to the Sheriff-substitute to ordain the respondent, James Stewart, to find caution for expenses in common form."

JAMES AYTON, Solicitor, Agent.

¹ *Stevenson v. Lee*, June 4, 1886, 13 R. 913.

No. 3. THOMAS LEES (Inspector of Poor, North Berwick), Pursuer (Appellant).

—*D.-F. Balfour—Graham Stewart.*

Oct. 17, 1891.

Lees v. Kemp.

T. W. KEMP (Inspector of Poor, Haddington), Defender (Respondent).—*Comrie Thomson—C. J. Guthrie.*

Poor—Derivative settlement—Forisfamiliation—Imbecile.—A young man, twenty-two years of age, who had all his life been so weak in mind as to be unable for any work, except of the most simple kind, and that under supervision, and who had never earned anything for his own support, was, on the application of his father, a farm-servant, removed by the inspector of poor to the district asylum. At the date of his removal he was suffering from an acute attack of mania. He continued to live in the asylum, and the relieving parish raised an action to fix liability for his support on the parish of his own birth. *Held* (following the case of *Fraser v. Robertson*, 5 Macph. 819) that at the date of his removal he had not been forisfamiliated, and that he was still a member of his father's family, and therefore chargeable to his father's residential settlement.

2D DIVISION.
Sheriff of
Haddington.

MICHAEL BUCHAN was born on 26th August 1867, and was a son of Peter Buchan, a farm-labourer. Michael went with his father to reside at Balgone Barns, in the parish of North Berwick, at Whitsunday 1887, and on 18th June 1889 application was made by the father to the inspector of poor of the parish of North Berwick for parochial relief for Michael, and for his admission to the Haddington District Lunatic Asylum, on account of his being in a state of mental derangement, and after the usual procedure Michael was admitted as an inmate of the said asylum.

The inspector of North Berwick, having thus relieved the pauper, raised an action in the Sheriff Court at Haddington against the inspector of Haddington, Michael's birth parish, for reimbursement of the sums disbursed on Michael's account, or that should in the future be disbursed. At the date of the action Michael was still in the asylum.

The defender pleaded;—(1) The said Michael Buchan, being incapable of acquiring a settlement, follows the settlement of his father. (2) In the circumstances stated, the defender should be assoilzied, with expenses.

It was admitted that Michael had never earned wages and had lived with his father from his birth to June 1889, except from November 1885 to February 1886, when he was in the asylum on account of an acute attack of mania; that neither Michael nor his father had a residential settlement in Haddingtonshire; and that on the occasion of his admission to the asylum in 1889 he was again suffering from mania.

A proof was led as to the mental condition of the pauper. He could read and write a little, and tell the time on a clock, could count with a few slips up to a hundred, and could tell one coin from another. As was admitted, he had never earned any money by his work, but had gone messages for his parents to shops, and done light field work, such as carrying manure in a basket. He could not use a wheelbarrow, as he always wheeled it to one side, nor could he learn to dig. The most favourable evidence as to the pauper's state adduced by the pursuer was that of Dr Ireland, for ten years superintendent of the Asylum for Idiots at Larbert. He said,—“There is no doubt these imbecile lads are often lazy and indolent, but if they are looked after they can often earn their living on a farm. I think, from what I heard, that Michael Buchan was capable of working sufficiently on a farm for his keep.” Dr Ireland added, however,—“I do not think he is able to maintain himself without supervision, and that applies to his whole life.”

The Sheriff-substitute (Shirreff), on 26th June 1891, pronounced this interlocutor:—“Finds in point of fact (first) that Michael Buchan, de-

signed in the petition, has been during his whole life an idiot or imbecile; (second) that he has never been able to earn anything for his own support; (third) that the said Michael Buchan has been during his whole life, prior to his removal to the Haddington District Asylum, where he now is, maintained by his father as a member of his family, except during the period of three months, from 25th November 1885, when he was maintained by the Parochial Board of Dunbar in the Haddington Asylum: Finds in point of law that, in these circumstances, the parish of his father's settlement is the parish bound to relieve the pursuer of the maintenance of Michael Buchan: Therefore sustains the defences, assoilzies the defender, and decerns," &c.*

No. 3.

Oct. 17, 1891.
Lees v. Kemp.

The pursuer appealed, and argued;—The pauper was in fact forisfamiated. He was still living with his father, but that did not prevent forisfamiation. Many men, *e.g.*, sons of great peers or rich men, continued to live in their fathers' houses till they became old men, and were supported by their fathers. Could it be said that such people were not independent members of society, *i.e.*, forisfamiated? All that *Fraser's* case¹ decided was that forisfamiation did not come with majority. That must be conceded. There must be ability to earn a livelihood, or, to put it conversely, a child would not be forisfamiated if he lived with his father because he could not live anywhere else. As a matter of fact this boy could have earned enough to support himself; Dr Ireland said so. If he was forisfamiated he was capable of having a settlement in his own right,² *i.e.*, in this case the parish of birth.

Argued for the defender;—Even if forisfamiated, the pauper here could not have a settlement in his own right; he was, from lack of mind, a perpetual pupil. But, looking to the cases of *Nixon* and *Cassels* quoted on the other side, in which the circumstances of the pauper must be admitted to be very similar to those of the present case, more reliance was placed on the proposition that the pauper here never was in fact forisfamiated. Mere attainment of the age of majority would not effect forisfamiation, and it was hard to see what other element tending in that direction was presented by the case here. It was idle to say that a lad who could neither dig nor trundle a wheelbarrow could earn his living at country labour; and what farmer would employ a servant who would require another to supervise his work?

LORD JUSTICE-CLERK.—The Sheriff-substitute has decided this case on the ground that the pauper has never been able to earn enough to support himself, and that, I think, is the import of the evidence.

* "NOTE.— . . . Although he had attained the age of twenty-two years when he became chargeable to the parish of North Berwick, his father was still bound to support him. After he attained majority he did nothing to break the ties that 'united him to the family circle.' He was therefore 'still a child of the house in the ordinary sense of that expression, a member of the family of which his father was the head, and consequently his settlement still depended on that of his father.'—(*Fraser v. Robertson*, 6th June 1867, 5 Macph., p. 819, Lord Justice-Clerk, p. 823, 39 Scot. Jur. 455.)

"The only ground on which, in this action, the parish of Haddington is sought to be made liable for the maintenance of the lunatic is, that Haddington is his own parish of birth. As the Sheriff-substitute is humbly of opinion that the parish bound to support the lunatic is the parish of his father's settlement, the defender, as representing the parish of Haddington, is assoilzied."

¹ See Sheriff-substitute's note, *supra*.

² *Nixon v. Rowand*, Dec. 20, 1887, 15 R. 191; *Cassels v. Somerville and Scott*, June 24, 1885, 12 R. 1155.

No. 3. The case was heard on the 11th of the month of March. He has been in the service of the Sheriff-substitute during the whole of his youth, except when he was in the service of the Sheriff-substitute during the year 1888.

The case was heard on the 11th of the month of March. There is a copy of a similar petition which was presented to the Sheriff-substitute, and which was a petition for the recovery of the children of the petitioner. The petition of the petitioner was a petition for the recovery of the children of the petitioner. The petition of the petitioner was a petition for the recovery of the children of the petitioner.

Lord Broughmuir.—The petition of the petitioner was not impugned, and we must pronounce a decree in favour of the petitioner as expressed. I think with great confidence that the present case is ruled by the case of *Foster*.

Lord Macdonald.

Lord Macdonald.

The Court pronounced the interdict—“Find in fact in terms of the findings in fact in the interdict of the Sheriff-substitute against the respondents. There be leave to appeal.”

Lord Macdonald.—*Edinburgh & Leith Children's Aid and Refuge Association.*

No. 4.

Case No. 1888.
Interdict v.
Interdict v.
Interdict v.
Interdict v.
Interdict v.
Interdict v.
Interdict v.
Interdict v.

Arthur Delaney, Petitioner.—*James Stirling, Respondent.*
James Stirling and Others, Respondents of Edinburgh and Leith Children's Aid and Refuge Association.—*J. C. L. v. J. C. L.*

Parent and Child—Custody of Children—Interdict—Responsibility of parents.—In a petition by a father against S., the original founder of the Association for destitute children, and certain directors appointed by her, to have them ordained to restore his three children who had been taken by S. to Nova Scotia, the Court, on 7th June 1889, ordained the defenders to deliver the children to their father on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order. The directors (who alone appeared in the petition), thereupon instituted proceedings in the Supreme Court of Nova Scotia against S., from which she was ultimately discharged, it being held that she had taken all the steps which could be expected of her to find the children without success. A detective officer, who was afterwards employed by the directors, having reported that his search for the children had been fruitless, and that he saw no practical way of following it up, the respondents, on 20th October 1891, moved that, in respect that they had done everything in their power to recover the children, the interlocutor of 7th June 1889 ought to be recalled.

The Court held that the respondents had done everything which could in the circumstances be expected of them to recover the children, but *sicet* procedure in the petition *hoc statu* in order that either party might move further in it in the event of fresh information being obtained in regard to the children.

1st Division. (Sequence of case reported 16 R. 753.)

In June 1888 Arthur Delaney, painter, presented a petition against Miss Stirling, the original founder of the Edinburgh and Leith Children's Aid and Refuge, and the directors of the Refuge, praying that they should be ordained to deliver to him his three children, whom he alleged that they had removed to Nova Scotia. The directors of the Association alone appeared in the petition.

On 7th June 1889 the Court pronounced an interlocutor ordaining the whole parties called as respondents to deliver the children to the peti-

tioner, and that on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order. No. 4.

In July 1889 the directors appeared, and stated that they had sent their secretary out to Nova Scotia to search for the children, but the search had been unavailing. In a minute they stated that they proposed to take legal proceedings for delivery of the children against Miss Stirling, who had gone to Nova Scotia. Oct. 20, 1891.
Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge.

On 14th July 1891 the petitioner lodged a note, in which he stated that these proceedings * had not resulted in the recovery of the children, and craved the Court to ordain the respondents to enable the petitioner and his law-agent to proceed to America and to search for the children over a reasonable time, or otherwise to ordain the respondents individually to proceed to America. The Court allowed the directors till 17th July to consider what they would do further in compliance with the order of June 1889, and upon 17th July 1891 they lodged a minute proposing to employ detectives in further search.

On 17th July the Court interponed authority to this minute, "the respondents to report to the Court by the first sederunt-day in October."

A Canadian detective officer, Mr Mellish, was accordingly employed, and on 9th September he issued his report. After a full narration of the efforts unsuccessfully made by him to trace the children, from which it appeared that he had found different persons with whom the children had at different times lived, he stated,—“I am convinced that the several changes effected in their respective residences of late were made with the deliberate intention of avoiding location in case of inquiry, and I know of nothing further I can do except grope somewhat aimlessly without anything to work upon.”

The report having been boxed to the Court in terms of the interlocutor of 17th July, counsel for the respondents moved that in respect they had done everything in their power to recover the children, the interlocutor of 7th June 1889 should be recalled.

This motion was opposed by counsel for the petitioner, who moved that the respondents be ordained to bring the judgment of the Supreme Court of Nova Scotia (which was not unanimous) under the review of the Judicial Committee of the Privy Council.

The petitioner contended that having failed to carry out a general order to deliver up the children, it was incumbent upon the directors to suggest some further procedure to have the order carried out.¹

LORD ADAM.—This petition is before us upon a report by a detective officer who was sent out by the respondents to search for the children under an order of the Court.

I cannot say that the report is satisfactory, but so far as I can gather from its terms the detective officer has done all he could, and he tells us that he does not see any other means of following up his search.

* The proceedings referred to were raised in the form of an application to the Supreme Court of Nova Scotia at Halifax, dated 23d July 1889. After sundry procedure judgment was pronounced against Miss Stirling on 21st February 1891, and a writ of attachment for contempt of Court was issued against her. She was liberated on bail, and after an opportunity had been given to her of answering interrogatories, the Court, upon 8th July 1891, by a majority of two Judges to one, found her answers satisfactory; that she had purged the contempt declared against her, and accordingly discharged her.

¹ The Queen v. Barnardo, 1889, L. R., 23 Q. B. D. 305, and 1890, L. R., 24 Q. B. D. 283.

No. 4.

Oct. 21, 1891.
*James v.
 Directors of
 the Nova Scotia
 Prison Board.*
See also page 10.

As far, then, as that report goes, I cannot see any practical course which can be adopted to make further search successful.

It has been suggested to us by counsel for the petitioner that in view of the fact that the judgment of the Supreme Court in Nova Scotia was not unanimous we ought to order the respondents to appeal it to the Judicial Committee of the Privy Council.

The judgment of the Court of Nova Scotia has, however, by a majority of two Judges to one, declared that Miss Stirling has satisfactorily answered the interrogatories put to her by the Court, and has purged herself of the contempt of which she was formerly found guilty. I do not then see how we could take any further proceedings as regards the judgment which would be effectual.

It is not suggested from the bar that any other effectual course could be taken.

For my own part, I should be very willing to give the fullest assistance to the father in his search for these children. It seems very remarkable that this lady, who may be actuated by benevolent motives, should take the children outwink the jurisdiction of the Court, and should then allow them to disappear in the wilds of Nova Scotia without also being able to say where they are to be found.

I think, however, that the directors have *bona fide* done all that they can be expected to do.

In my opinion this petition ought not to be sent out of Court, for it may be that further information will come to the father or the directors which may make it competent and proper for them to make another motion in the petition.

We ought then, I think, to pronounce no further order in the meantime.

THE LORD PRESIDENT, LORD McLAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the case, together with the report, sist procedure under the petition *loc statim*."

E. D. YOUNG, W.S.—R. C. GRAY, S.S.C.—Agents.

No. 5.

Oct. 21, 1891.
*Taylor v.
 Maclellans.*

H. & E. TAYLOR, Pursuers (Appellants).—*Asher—Ure.*
P. & W. MACLELLAN, Defenders (Respondents).—*Jameson—Dickson.*
Et c contra.

Contract—Delivery—Unforeseen accidents preventing delivery.—Where a person has contracted to deliver goods, which are not part of his own stock in trade, and are known not to be, and has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circumstances, such as strikes, or sickness among workmen.

A firm of iron-merchants in Glasgow contracted to supply the iron work of certain buildings, at prices which were such as to shew to persons in the trade that the iron was to be got abroad. No time was fixed for delivery, but it was part of the contract that the prices specified should include charges for "delivery at the job at such times as may be required by the masons." The iron-merchants made due arrangements with a well-known firm of ironmasters in Belgium for supply of the goods required. The ordinary and reasonable time required for the production of the iron, after specifications had been received, was six weeks. The iron not having been delivered for several weeks after that date the parties who had contracted with the iron-merchants raised an action of damages against them for loss incurred in consequence of this delay. In defence it was pleaded that the delays were due to strikes, and to the heat of

the weather, which had been so great as to produce sickness among the workmen in Belgium. These facts being shewn to have caused the delay complained of, held that the goods had been duly and timeously delivered in terms of the contract.

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

In March 1888 P. & W. Maclellan, iron-merchants, Glasgow, raised an action in the Sheriff Court at Glasgow for payment of a sum of £244, 16s. 9d. against H. & E. Taylor, spirit-merchants in Glasgow, being the price of certain iron-work beams and girders supplied to them for use in building three houses in Glasgow.

2D DIVISION.
Sheriff of
Lanarkshire.

The only defence to this action was a plea of compensation in respect of a sum of damages which the defenders said was due to them for loss sustained by them owing to delay in the completion of the buildings caused by the failure of Maclellans to deliver the iron in time.

To constitute this claim Taylors raised an action in December 1888 for £700 of damages for the loss alleged to have been thus suffered by them. They stated that there had been delay in the delivery of the iron, for which the Maclellans were responsible, and pleaded;—(1) The sum sued for being the balance of the loss which the pursuers have sustained through the defenders' breach of contract in failing timeously to deliver the goods contracted for, decree should be granted, with interest and expenses, as craved.

The defenders admitted that there had been some delay, but stated that the ordinary period allowed for delivery, viz., six or eight weeks, "was not a reasonable time in the circumstances. Explained that what is a reasonable time in a contract of the kind in ordinary circumstances is by custom (which custom the pursuers know or ought to have known), subject to an extension, if strikes, weather, or other similar causes beyond the control of persons in the position of defenders hinder the work. The following circumstances which occurred in this case, in accordance with said custom, excused the defenders from giving delivery sooner than they did. The girders, &c., were to be made and brought from Belgium, and were liable to the ordinary delays and risks of the trade there, including strikes. The pursuers and their architect were aware of this at the time of entering into the contract. Considerable delay occurred in the manufacture of the girders, &c., in consequence of strikes occurring among the men employed by the manufacturers of such work in Belgium, and also of the excessive heat prevailing at the time the goods were being manufactured, causing the work to be interrupted. But for these and other similar causes the goods would have been delivered within the usual time allowed by custom of trade in the ordinary case, which is within six or eight weeks of the date of final order."

They pleaded;—(3) The defenders having given delivery within a reasonable time, having reference to the circumstances, they should be absolved, with expenses.

The actions were conjoined and a proof was allowed.

The contract, which was constituted by a letter of offer and a letter of acceptance, contained no direct obligation to deliver within any specified time. The letter of offer began with a schedule of estimates, and then contained this sentence,—“The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams, and lay the same.” The object of this clause was admitted in evidence to be not that the Taylors should have a right to demand delivery the moment the masons were ready, but simply to regulate the mode of delivery after the Maclellans were prepared to deliver, so that their work might not be blocked by the whole iron being delivered at once. In the usual course

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

goods would be delivered in six or eight weeks after specification. The prices stipulated were such as to shew any architect of experience that he was not buying goods lying in stock in Glasgow, which could be delivered at any time, but goods which had to be ordered from, manufactured in, and imported from, Belgium. The iron girders and other material required were specified for about 15th June, but were not delivered till the end of September, being thus about six weeks longer in being delivered than was usual. The defenders proved their averments as to the causes of delay.

The Sheriff-substitute (Erskine Murray), after findings in fact to the effect already stated, found in law “. . . (5) that the parties Maclellan have proved a custom of trade that the buyer in such cases takes the risk of delay from strikes and other unforeseen causes beyond the seller's control; (6) that the parties Maclellan have proved that in the present case the delay arose from such causes; therefore in the action Maclellans v. Taylors decerns as craved, and in the counter action assolizies the defenders.”

Taylors appealed. They argued that no custom of trade had been as a matter of fact proved, and that the delay had not been shewn to be due to the strikes and great heat to which the defenders ascribed it. On the law they argued that, as Maclellans had undertaken to deliver in a reasonable time, they must do so. If Belgium was suffering from strikes and excessive heat, then they should have gone elsewhere. It might be usual to get such goods in Belgium, but that was not the only market. If it had been intended that they should not take such risks, they should have inserted the recognised stipulations to that effect which were quite familiar.

Argued for the Maclellans;—The contract implied delivery in “reasonable” time. The question was, is that reasonable in ordinary circumstances, or reasonable in the circumstances which had come into existence at the date when the contract should have been performed? Authority said the latter was the sound meaning.¹

LORD YOUNG.—The question upon the whole matter is whether Messrs Maclellan can be held to be guilty of breach of contract in respect of the delay which occurred here. They, in the ordinary way, resorted to quite proper people in the place to which resort is commonly and familiarly had under similar circumstances, and the delay occurred there in the manner which has been explained.

Can we affirm in point of fact that they were guilty of undue delay or chargeable with undue delay in the execution of the contract, so that they were in breach of contract and were liable in damages? I am of opinion that upon the evidence we cannot affirm that. I do not quite like the expression “usage of trade” as applied in the present case. The particular language is not of first-class importance, if we know what it means, but I would rather avoid the use of the expression “usage or custom of trade,” as applicable to the circumstances of this case. When such goods as these have to be got, or are commonly got, from abroad, the causes of delay which are incident to their being procured are *prima facie* to be taken into account, and not unreasonably, upon the question whether the party, who is acting in the usual manner, is to have undue delay imputed to him or not. I would rather deal with the question as a question whether these causes of delay, which are proved to have occurred here not in an

¹ Hick v. Rodocanachi, Sons, & Co., L. R. [1891], 2 Q. B. 626.

exceptional manner at all, may be taken into account in considering whether the party is chargeable with breach of contract. I think that they ought to be taken into account. It is said that he might have gone elsewhere. So he might, and the usual or at least not unfamiliar causes of delay might have occurred in any quarter. Had he, instead of going to Belgium, gone to some other country, there might have been no strike in Belgium, and no heat there such as to prevent men from working, and these calamities might have occurred in the place to which he resorted. I think there is no specialty in his having gone to Belgium. The same thing might have happened if he had given his order in Glasgow.

No. 5.

Oct. 21, 1891.

Taylors v.
Maclellans.

The question is whether the fact of the quite intelligible and by no means unfamiliar causes of delay occurring in Belgium at the works to which he in ordinary course resorted makes any difference, and I think it makes none. He was acting in the execution of the contract in the usual manner, with all the energy in his power, and this delay, not very great in itself, and for which no one till now has claimed damages, occurred.

I arrive then at the same conclusion as the learned Sheriff-substitute, preferring, however, to find in point of fact that the Messrs Maclellan were not guilty of undue delay, or in other words, that the undue delay imputed to them has not been established, and that they were not in undue delay in supplying and delivering the articles contracted for, and were not in breach of contract in that respect. If that is found in point of fact, then the ground of action here is negatived without any finding upon usage or custom of trade at all.

I think that such a finding ought to be pronounced, with the result that the Messrs Maclellan shall have decree for the amount sued for by them in their action, and that they shall be assoilzied from the conclusions of the action of damages against them.

LORD TRAYNER.—I have come to the same conclusion. The claim made by Messrs Maclellan being admitted, the question now to be determined is, whether the counter claim made by the Messrs Taylor for damages in respect of the failure of the Messrs Maclellan to fulfil their contract has been established. The failure alleged against them is that there was undue delay in delivering the goods which they had contracted to deliver. In considering that question the first thing to look at is the contract itself, because, if the Messrs Maclellan have there undertaken to deliver the iron furnishings in question within a specified time, they are bound to deliver within that time or answer for the consequences. In my opinion, Messrs Maclellan did not bind themselves by the contract between them and the Messrs Taylor to deliver the iron furnishings within or before any particular date.

There is no time for delivery specified. If that is a correct view of the contract, then the only obligation incumbent on the Messrs Maclellan was to deliver the goods within a reasonable time. It appears that the Messrs Maclellan took from four to eight weeks longer in the delivery of the goods than would have been the case, or would have been reasonable, in ordinary circumstances. This delay was occasioned by strikes prevailing in Belgium, where the furnishings in question were being made. Now, I concur in the opinion expressed in the case of *Hick v. Rodocanachi* that where a party is bound to fulfil a contract not within a specified but within a reasonable time, the reasonableness of the time taken is to be considered in connection with the circum-

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

goods would be delivered in six or eight weeks after specification. The prices stipulated were such as to shew any architect of experience that he was not buying goods lying in stock in Glasgow, which could be delivered at any time, but goods which had to be ordered from, manufactured in, and imported from, Belgium. The iron girders and other material required were specified for about 15th June, but were not delivered till the end of September, being thus about six weeks longer in being delivered than was usual. The defenders proved their averments as to the causes of delay.

The Sheriff-substitute (Erskine Murray), after findings in fact to the effect already stated, found in law “. . . (5) that the parties Maclellan have proved a custom of trade that the buyer in such cases takes the risk of delay from strikes and other unforeseen causes beyond the seller's control; (6) that the parties Maclellan have proved that in the present case the delay arose from such causes; therefore in the action Maclellans v. Taylors decerns as craved, and in the counter action assolis the defenders.”

Taylors appealed. They argued that no custom of trade had been as a matter of fact proved, and that the delay had not been shewn to be due to the strikes and great heat to which the defenders ascribed it. On the law they argued that, as Maclellans had undertaken to deliver in a reasonable time, they must do so. If Belgium was suffering from strikes and excessive heat, then they should have gone elsewhere. It might be usual to get such goods in Belgium, but that was not the only market. If it had been intended that they should not take such risks, they should have inserted the recognised stipulations to that effect which were quite familiar.

Argued for the Maclellans;—The contract implied delivery in “reasonable” time. The question was, is that reasonable in ordinary circumstances, or reasonable in the circumstances which had come into existence at the date when the contract should have been performed? Authority said the latter was the sound meaning.¹

LORD YOUNG.—The question upon the whole matter is whether Messrs Maclellan can be held to be guilty of breach of contract in respect of the delay which occurred here. They, in the ordinary way, resorted to quite proper people in the place to which resort is commonly and familiarly had under similar circumstances, and the delay occurred there in the manner which has been explained.

Can we affirm in point of fact that they were guilty of undue delay or chargeable with undue delay in the execution of the contract, so that they were in breach of contract and were liable in damages? I am of opinion that upon the evidence we cannot affirm that. I do not quite like the expression “usage of trade” as applied in the present case. The particular language is not of first-class importance, if we know what it means, but I would rather avoid the use of the expression “usage or custom of trade,” as applicable to the circumstances of this case. When such goods as these have to be got, or are commonly got, from abroad, the causes of delay which are incident to their being procured are *prima facie* to be taken into account, and not unreasonably, upon the question whether the party, who is acting in the usual manner, is to have undue delay imputed to him or not. I would rather deal with the question as a question whether these causes of delay, which are proved to have occurred here not in an

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exceptional manner at all, may be taken into account in considering whether the party is chargeable with breach of contract. I think that they ought to be taken into account. It is said that he might have gone elsewhere. So he might, and the usual or at least not unfamiliar causes of delay might have occurred in any quarter. Had he, instead of going to Belgium, gone to some other country, there might have been no strike in Belgium, and no heat there such as to prevent men from working, and these calamities might have occurred in the place to which he resorted. I think there is no specialty in his having gone to Belgium. The same thing might have happened if he had given his order in Glasgow.

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

The question is whether the fact of the quite intelligible and by no means unfamiliar causes of delay occurring in Belgium at the works to which he in ordinary course resorted makes any difference, and I think it makes none. He was acting in the execution of the contract in the usual manner, with all the energy in his power, and this delay, not very great in itself, and for which no one till now has claimed damages, occurred.

I arrive then at the same conclusion as the learned Sheriff-substitute, preferring, however, to find in point of fact that the Messrs Maclellan were not guilty of undue delay, or in other words, that the undue delay imputed to them has not been established, and that they were not in undue delay in supplying and delivering the articles contracted for, and were not in breach of contract in that respect. If that is found in point of fact, then the ground of action here is negated without any finding upon usage or custom of trade at all.

I think that such a finding ought to be pronounced, with the result that the Messrs Maclellan shall have decree for the amount sued for by them in their action, and that they shall be assoilzied from the conclusions of the action of damages against them.

LORD TRAYNER.—I have come to the same conclusion. The claim made by Messrs Maclellan being admitted, the question now to be determined is, whether the counter claim made by the Messrs Taylor for damages in respect of the failure of the Messrs Maclellan to fulfil their contract has been established. The failure alleged against them is that there was undue delay in delivering the goods which they had contracted to deliver. In considering that question the first thing to look at is the contract itself, because, if the Messrs Maclellan have there undertaken to deliver the iron furnishings in question within a specified time, they are bound to deliver within that time or answer for the consequences. In my opinion, Messrs Maclellan did not bind themselves by the contract between them and the Messrs Taylor to deliver the iron furnishings within or before any particular date.

There is no time for delivery specified. If that is a correct view of the contract, then the only obligation incumbent on the Messrs Maclellan was to deliver the goods within a reasonable time. It appears that the Messrs Maclellan took from four to eight weeks longer in the delivery of the goods than would have been the case, or would have been reasonable, in ordinary circumstances. This delay was occasioned by strikes prevailing in Belgium, where the furnishings in question were being made. Now, I concur in the opinion expressed in the case of *Hick v. Rodocanachi* that where a party is bound to fulfil a contract not within a specified but within a reasonable time, the reasonableness of the time taken is to be considered in connection with the circum-

No. 1.

Oct. 15, 1891.
Jack v. Flem-
ing.

the cause :—" Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defenders, John Gourlay Harvey and William Fleming, or either and which of them, in presence and hearing of the said Alexander Scott, and of Mrs Elizabeth Burt or Scott, his wife, or one of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards " a girl named " had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards . . . or did use words of like import of and concerning the pursuer, to his loss, injury, and damage? Damages against the defender John Gourlay Harvey laid at £500. Damages against the defender William Fleming laid at £100."

CUMMING & DUFF, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 2.

Oct. 17, 1891.
Dunsmore's
Trustee v.
Stewart.

ALEXANDER GORDON (Peter Dunsmore's Trustee), Appellant.—*Clyde*.
JAMES STEWART, Respondent.

Process—Caution for expenses—Bankruptcy—Undischarged bankrupt.—An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to the Sheriff. *Held* that the claimant could not be allowed to proceed without finding caution for expenses.

1st DIVISION.
Sheriff of
Lanarkshire.

JAMES STEWART, who was an undischarged bankrupt, lodged a claim in the sequestration of Peter Dunsmore, spirit-dealer there, for the sum of £301, 5s. 2d., being the amount of two bills for £100 and £200. The trustee in the sequestration having rejected the claim, Stewart lodged an appeal to the Sheriff.

On 22d May 1891 the Sheriff-substitute (Birnie) appointed parties to lodge minutes prepared in terms of the statute.

The revised minute for Stewart was in these terms,—“ The appellant submits and avers that the bills on which his claim is founded were granted for value, and that therefore he is entitled to succeed in this appeal.”

The trustee's revised minute was to the effect that the claimant had acted as factor for the bankrupt and collected rents and other moneys belonging to him, and had all along failed to account to his trustee for his intromissions; that the bills on which the claim was made were given by the bankrupt to cover advances to be made by the claimant on behalf of the bankrupt in the management of his affairs, and not for cash advanced at their dates; that the claimant had made no advances and had all along failed to satisfy the trustee that the bankrupt was indebted to him in anything at the date of the bills or the sequestration; that on the contrary, on an accounting there was a large balance due by the claimant to the trustee, and the trustee had therefore rejected the claim.

On 29th June the Sheriff-substitute refused a motion by the trustee that Stewart be ordained to find caution for expenses.*

Dunsmore's trustee appealed, and in addition to the statements made in his minute, he stated that Stewart's trustee had been discharged, but that prior to his discharge he had considered the propriety of making the present claim and had decided not to do so.

* “ NOTE.—The appellant's claim is founded on bills, and he is virtually a defender. No doubt he has failed to convince the trustee—who has no interest except to do justice—that the bills were granted for advances at their dates, but having in view the more recent decisions this is not to my mind sufficient to compel the appellant to find caution.”

Argued for the trustee;—Even assuming, as did the Sheriff-substitute, **No. 2.**
that Stewart must be considered as a defender, he ought, in the circum-
stances, to be ordained to find caution.¹ But that was not truly Stewart's **Oct. 17, 1891.**
position. He was claiming a sum of money, and was in the position of **Dunsmore's**
a pursuer suing a petitory action met by the two defences of compensa- **Trustee v. Stewart.**
tion and no value given. The ordinary rule must then be applied, and
he should be ordained to find caution.

There was no appearance for Stewart.

LORD PRESIDENT.—This claim by James Stewart is for the amount of certain bills granted to him by the bankrupt. The claimant is at present an undischarged bankrupt. It is true that there is no trustee at present acting in his sequestration, but it has been stated to us that the trustee when in office had this claim before him and resolved not to take action upon it.

The trustee is now discharged, but the beneficial right to the sum which the bankrupt now claims is in his creditors; the money, if recovered, would fall to be administered in some form for the benefit of his creditors, and this might be done by reviving the sequestration.

Now, in this state of matters, the question arises whether, if he desires to prosecute this claim the claimant must not find caution, and whether the claim can be treated otherwise than as a suit to recover money at the instance of an undischarged bankrupt. It is true the claim is made in a sequestration, but it is not the less a proceeding by an undischarged bankrupt to recover money. I think that the ordinary rule applies, viz., that the claimant must find caution, and I cannot see anything stated on record to take the present case out of that rule. The origin and substance of the claim are not very fully divulged by the claimant. He was very pointedly challenged on this subject, and under the interlocutor of 22d May 1891, which appointed the minutes of the parties to be exchanged and revised, he had very full opportunity of explaining the origin of the bills, but he has confined his statement on the subject to a bald statement that the bills were granted for value.

I think, therefore, that he must be ordained to find caution before he can proceed.

LORD ADAM concurred.

LORD M'LAREN.—I am unwilling to disturb the finding of the Sheriff in regard to a matter so purely discretionary as is the question whether caution should be found by an undischarged bankrupt. The policy of our bankruptcy law, however, seems to give an almost unlimited right of appeal from the Sheriff, and as the case is competently brought before us, we are bound to exercise our jurisdiction to the best of our judgment. I see no reason in the circumstances of this case for deviating from the ordinary rule as to finding security for expenses, and I agree that Stewart must be ordained to find caution.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute dated 29th June 1891: Remit to the Sheriff-substitute to ordain the respondent, James Stewart, to find caution for expenses in common form."

JAMES AYTON, Solicitor, Agent.

¹ *Stevenson v. Lee*, June 4, 1886, 13 R. 913.

No. 3. THOMAS LEES (Inspector of Poor, North Berwick), Pursuer (Appellant).

—*D. F. Balfour—Graham Stewart.*

Oct. 17, 1891. T. W. KEMP (Inspector of Poor, Haddington), Defender (Respondent).—
Lees v. Kemp. Comrie Thomson—C. J. Guthrie.

Poor—Derivative settlement—Forisfamiliation—Imbecile.—A young man, twenty-two years of age, who had all his life been so weak in mind as to be unable for any work, except of the most simple kind, and that under supervision, and who had never earned anything for his own support, was, on the application of his father, a farm-servant, removed by the inspector of poor to the district asylum. At the date of his removal he was suffering from an acute attack of mania. He continued to live in the asylum, and the relieving parish raised an action to fix liability for his support on the parish of his own birth. *Held* (following the case of *Fraser v. Robertson*, 5 Macph. 819) that at the date of his removal he had not been forisfamiliated, and that he was still a member of his father's family, and therefore chargeable to his father's residential settlement.

2d Division.
 Sheriff of
 Haddington.

MICHAEL BUCHAN was born on 26th August 1867, and was a son of Peter Buchan, a farm-labourer. Michael went with his father to reside at Balgone Barns, in the parish of North Berwick, at Whitsunday 1887, and on 18th June 1889 application was made by the father to the inspector of poor of the parish of North Berwick for parochial relief for Michael, and for his admission to the Haddington District Lunatic Asylum, on account of his being in a state of mental derangement, and after the usual procedure Michael was admitted as an inmate of the said asylum.

The inspector of North Berwick, having thus relieved the pauper, raised an action in the Sheriff Court at Haddington against the inspector of Haddington, Michael's birth parish, for reimbursement of the sums disbursed on Michael's account, or that should in the future be disbursed. At the date of the action Michael was still in the asylum.

The defender pleaded ;—(1) The said Michael Buchan, being incapable of acquiring a settlement, follows the settlement of his father. (2) In the circumstances stated, the defender should be assoilzied, with expenses.

It was admitted that Michael had never earned wages and had lived with his father from his birth to June 1889, except from November 1885 to February 1886, when he was in the asylum on account of an acute attack of mania ; that neither Michael nor his father had a residential settlement in Haddingtonshire ; and that on the occasion of his admission to the asylum in 1889 he was again suffering from mania.

A proof was led as to the mental condition of the pauper. He could read and write a little, and tell the time on a clock, could count with a few slips up to a hundred, and could tell one coin from another. As was admitted, he had never earned any money by his work, but had gone messages for his parents to shops, and done light field work, such as carrying manure in a basket. He could not use a wheelbarrow, as he always wheeled it to one side, nor could he learn to dig. The most favourable evidence as to the pauper's state adduced by the pursuer was that of Dr Ireland, for ten years superintendent of the Asylum for Idiots at Larbert. He said,—“There is no doubt these imbecile lads are often lazy and indolent, but if they are looked after they can often earn their living on a farm. I think, from what I heard, that Michael Buchan was capable of working sufficiently on a farm for his keep.” Dr Ireland added however,—“I do not think he is able to maintain himself without supervision, and that applies to his whole life.”

The Sheriff-substitute (Shirreff), on 26th June 1891, pronounced the interlocutor :—“Finds in point of fact (first) that Michael Buchan, de

tioner, and that on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order.

In July 1889 the directors appeared, and stated that they had sent their secretary out to Nova Scotia to search for the children, but the search had been unavailing. In a minute they stated that they proposed to take legal proceedings for delivery of the children against Miss Stirling, who had gone to Nova Scotia.

No. 4.
Oct. 20, 1891.
Delaney v.
Directors of
Edinburgh
and Leith
Children's Aid
and Refuge.

On 14th July 1891 the petitioner lodged a note, in which he stated that these proceedings* had not resulted in the recovery of the children, and craved the Court to ordain the respondents to enable the petitioner and his law-agent to proceed to America and to search for the children over a reasonable time, or otherwise to ordain the respondents individually to proceed to America. The Court allowed the directors till 17th July to consider what they would do further in compliance with the order of June 1889, and upon 17th July 1891 they lodged a minute proposing to employ detectives in further search.

On 17th July the Court interponed authority to this minute, "the respondents to report to the Court by the first sederunt-day in October."

A Canadian detective officer, Mr Mellish, was accordingly employed, and on 9th September he issued his report. After a full narration of the efforts unsuccessfully made by him to trace the children, from which it appeared that he had found different persons with whom the children had at different times lived, he stated,—“I am convinced that the several changes effected in their respective residences of late were made with the deliberate intention of avoiding location in case of inquiry, and I know of nothing further I can do except grope somewhat aimlessly without anything to work upon.”

The report having been boxed to the Court in terms of the interlocutor of 17th July, counsel for the respondents moved that in respect they had done everything in their power to recover the children, the interlocutor of 7th June 1889 should be recalled.

This motion was opposed by counsel for the petitioner, who moved that the respondents be ordained to bring the judgment of the Supreme Court of Nova Scotia (which was not unanimous) under the review of the Judicial Committee of the Privy Council.

The petitioner contended that having failed to carry out a general order to deliver up the children, it was incumbent upon the directors to suggest some further procedure to have the order carried out.¹

LORD ADAM.—This petition is before us upon a report by a detective officer who was sent out by the respondents to search for the children under an order of the Court.

I cannot say that the report is satisfactory, but so far as I can gather from its terms the detective officer has done all he could, and he tells us that he does not see any other means of following up his search.

* The proceedings referred to were raised in the form of an application to the Supreme Court of Nova Scotia at Halifax, dated 23d July 1889. After sundry procedure judgment was pronounced against Miss Stirling on 21st February 1891, and a writ of attachment for contempt of Court was issued against her. She was liberated on bail, and after an opportunity had been given to her of answering interrogatories, the Court, upon 8th July 1891, by a majority of two Judges to one, found her answers satisfactory; that she had purged the contempt declared against her, and accordingly discharged her.

¹ The Queen v. Barnardo, 1889, L. R., 23 Q. B. D. 305, and 1890, L. R., 24 Q. B. D. 283.

No. 4.

Oct. 20, 1891.

Delaney v.
Directors of
Edinburgh
and Leith
Children's Aid
and Refuge.

As far, then, as that report goes, I cannot see any practical course which can be adopted to make further search successful.

It has been suggested to us by counsel for the petitioner that in view of the fact that the judgment of the Supreme Court in Nova Scotia was not unanimous we ought to order the respondents to appeal it to the Judicial Committee of the Privy Council.

The judgment of the Court of Nova Scotia has, however, by a majority of two Judges to one, declared that Miss Stirling has satisfactorily answered the interrogatories put to her by the Court, and has purged herself of the contempt of which she was formerly found guilty. I do not then see how we could take any further proceedings as regards the judgment which would be effectual.

It is not suggested from the bar that any other effectual course could be taken.

For my own part, I should be very willing to give the fullest assistance to the father in his search for these children. It seems very remarkable that this lady, who may be actuated by benevolent motives, should take the children outwith the jurisdiction of the Court, and should then allow them to disappear in the wilds of Nova Scotia without also being able to say where they are to be found.

I think, however, that the directors have *bona fide* done all that they can be expected to do.

In my opinion this petition ought not to be sent out of Court, for it may be that further information will come to the father or the directors which may make it competent and proper for them to make another motion in the petition.

We ought then, I think, to pronounce no further order in the meantime.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the case, together with the report, sist procedure under the petition *hoc statu*."

E. D. YOUNG, W.S.—R. C. GRAY, S.S.C.—Agents.

No. 5.

Oct. 21, 1891.

Taylors v.
Maclellans.

H. & E. TAYLOR, Pursuers (Appellants).—*Asher—Ure*.
P. & W. MACLELLAN, Defenders (Respondents).—*Jamcson—Dickson*.
Et c contra.

Contract—Delivery—Unforeseen accidents preventing delivery.—Where a person has contracted to deliver goods, which are not part of his own stock in trade, and are known not to be, and has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circumstances, such as strikes, or sickness among workmen.

A firm of iron-merchants in Glasgow contracted to supply the iron work of certain buildings, at prices which were such as to shew to persons in the trade that the iron was to be got abroad. No time was fixed for delivery, but it was part of the contract that the prices specified should include charges for "delivery at the job at such times as may be required by the masons." The iron-merchants made due arrangements with a well-known firm of ironmasters in Belgium for supply of the goods required. The ordinary and reasonable time required for the production of the iron, after specifications had been received, was six weeks. The iron not having been delivered for several weeks after that date, the parties who had contracted with the iron-merchants raised an action of damages against them for loss incurred in consequence of this delay. In defence it was pleaded that the delays were due to strikes, and to the heat of

the weather, which had been so great as to produce sickness among the workmen in Belgium. These facts being shewn to have caused the delay complained of, held that the goods had been duly and timeously delivered in terms of the contract.

No. 5.

Oct. 21, 1891.

Taylors v.
Maclellans.

In March 1888 P. & W. Maclellan, iron-merchants, Glasgow, raised an action in the Sheriff Court at Glasgow for payment of a sum of £244, 16s. 9d. against H. & E. Taylor, spirit-merchants in Glasgow, being the price of certain iron-work beams and girders supplied to them for use in building three houses in Glasgow.

2D DIVISION.
Sheriff of
Lanarkshire.

The only defence to this action was a plea of compensation in respect of a sum of damages which the defenders said was due to them for loss sustained by them owing to delay in the completion of the buildings caused by the failure of Maclellans to deliver the iron in time.

To constitute this claim Taylors raised an action in December 1888 for £700 of damages for the loss alleged to have been thus suffered by them. They stated that there had been delay in the delivery of the iron, for which the Maclellans were responsible, and pleaded;—(1) The sum sued for being the balance of the loss which the pursuers have sustained through the defenders' breach of contract in failing timeously to deliver the goods contracted for, decree should be granted, with interest and expenses, as craved.

The defenders admitted that there had been some delay, but stated that the ordinary period allowed for delivery, viz., six or eight weeks, "was not a reasonable time in the circumstances. Explained that what is a reasonable time in a contract of the kind in ordinary circumstances is by custom (which custom the pursuers know or ought to have known), subject to an extension, if strikes, weather, or other similar causes beyond the control of persons in the position of defenders hinder the work. The following circumstances which occurred in this case, in accordance with said custom, excused the defenders from giving delivery sooner than they did. The girders, &c., were to be made and brought from Belgium, and were liable to the ordinary delays and risks of the trade there, including strikes. The pursuers and their architect were aware of this at the time of entering into the contract. Considerable delay occurred in the manufacture of the girders, &c., in consequence of strikes occurring among the men employed by the manufacturers of such work in Belgium, and also of the excessive heat prevailing at the time the goods were being manufactured, causing the work to be interrupted. But for these and other similar causes the goods would have been delivered within the usual time allowed by custom of trade in the ordinary case, which is within six or eight weeks of the date of final order."

They pleaded;—(3) The defenders having given delivery within a reasonable time, having reference to the circumstances, they should be assoilzied, with expenses.

The actions were conjoined and a proof was allowed.

The contract, which was constituted by a letter of offer and a letter of acceptance, contained no direct obligation to deliver within any specified time. The letter of offer began with a schedule of estimates, and then contained this sentence,—“The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams, and lay the same.” The object of this clause was admitted in evidence to be not that the Taylors should have a right to demand delivery the moment the masons were ready, but simply to regulate the mode of delivery after the Maclellans were prepared to deliver, so that their work might not be blocked by the whole iron being delivered at once. In the usual course

No. 4.

Oct. 20, 1891.
Delaney v.
Directors of
Edinburgh
and Leith
Children's Aid
and Refuge.

As far, then, as that report goes, I cannot see any practical course which can be adopted to make further search successful.

It has been suggested to us by counsel for the petitioner that in view of the fact that the judgment of the Supreme Court in Nova Scotia was not unanimous we ought to order the respondents to appeal it to the Judicial Committee of the Privy Council.

The judgment of the Court of Nova Scotia has, however, by a majority of two Judges to one, declared that Miss Stirling has satisfactorily answered the interrogatories put to her by the Court, and has purged herself of the contempt of which she was formerly found guilty. I do not then see how we could take any further proceedings as regards the judgment which would be effectual.

It is not suggested from the bar that any other effectual course could be taken.

For my own part, I should be very willing to give the fullest assistance to the father in his search for these children. It seems very remarkable that this lady, who may be actuated by benevolent motives, should take the children outwith the jurisdiction of the Court, and should then allow them to disappear in the wilds of Nova Scotia without also being able to say where they are to be found.

I think, however, that the directors have *bona fide* done all that they can be expected to do.

In my opinion this petition ought not to be sent out of Court, for it may be that further information will come to the father or the directors which may make it competent and proper for them to make another motion in the petition.

We ought then, I think, to pronounce no further order in the meantime.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the case, together with the report, sist procedure under the petition *hoc statu*."

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No. 5.

Oct. 21, 1891.
Taylors v.
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A firm of iron-merchants in Glasgow contracted to supply the iron work of certain buildings, at prices which were such as to shew to persons in the trade that the iron was to be got abroad. No time was fixed for delivery, but it was part of the contract that the prices specified should include charges for "delivery at the job at such times as may be required by the masons." The iron-merchants made due arrangements with a well-known firm of ironmasters in Belgium for supply of the goods required. The ordinary and reasonable time required for the production of the iron, after specifications had been received, was six weeks. The iron not having been delivered for several weeks after that date, the parties who had contracted with the iron-merchants raised an action of damages against them for loss incurred in consequence of this delay. In defence it was pleaded that the delays were due to strikes, and to the heat of

exceptional manner at all, may be taken into account in considering whether the party is chargeable with breach of contract. I think that they ought to be taken into account. It is said that he might have gone elsewhere. So he might, and the usual or at least not unfamiliar causes of delay might have occurred in any quarter. Had he, instead of going to Belgium, gone to some other country, there might have been no strike in Belgium, and no heat there such as to prevent men from working, and these calamities might have occurred in the place to which he resorted. I think there is no specialty in his having gone to Belgium. The same thing might have happened if he had given his order in Glasgow.

No. 5.

Oct. 21, 1891.

Taylors v.
Maclellans.

The question is whether the fact of the quite intelligible and by no means unfamiliar causes of delay occurring in Belgium at the works to which he in ordinary course resorted makes any difference, and I think it makes none. He was acting in the execution of the contract in the usual manner, with all the energy in his power, and this delay, not very great in itself, and for which no one till now has claimed damages, occurred.

I arrive then at the same conclusion as the learned Sheriff-substitute, preferring, however, to find in point of fact that the Messrs Maclellan were not guilty of undue delay, or in other words, that the undue delay imputed to them has not been established, and that they were not in undue delay in supplying and delivering the articles contracted for, and were not in breach of contract in that respect. If that is found in point of fact, then the ground of action here is negatived without any finding upon usage or custom of trade at all.

I think that such a finding ought to be pronounced, with the result that the Messrs Maclellan shall have decree for the amount sued for by them in their action, and that they shall be assoilzied from the conclusions of the action of damages against them.

LORD TRAYNER.—I have come to the same conclusion. The claim made by Messrs Maclellan being admitted, the question now to be determined is, whether the counter claim made by the Messrs Taylor for damages in respect of the failure of the Messrs Maclellan to fulfil their contract has been established. The failure alleged against them is that there was undue delay in delivering the goods which they had contracted to deliver. In considering that question the first thing to look at is the contract itself, because, if the Messrs Maclellan have there undertaken to deliver the iron furnishings in question within a specified time, they are bound to deliver within that time or answer for the consequences. In my opinion, Messrs Maclellan did not bind themselves by the contract between them and the Messrs Taylor to deliver the iron furnishings within or before any particular date.

There is no time for delivery specified. If that is a correct view of the contract, then the only obligation incumbent on the Messrs Maclellan was to deliver the goods within a reasonable time. It appears that the Messrs Maclellan took from four to eight weeks longer in the delivery of the goods than would have been the case, or would have been reasonable, in ordinary circumstances. This delay was occasioned by strikes prevailing in Belgium, where the furnishings in question were being made. Now, I concur in the opinion expressed in the case of *Hick v. Rodocanachi* that where a party is bound to fulfil a contract not within a specified but within a reasonable time, the reasonableness of the time taken is to be considered in connection with the circum-

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

goods would be delivered in six or eight weeks after specification. The prices stipulated were such as to shew any architect of experience that he was not buying goods lying in stock in Glasgow, which could be delivered at any time, but goods which had to be ordered from, manufactured in, and imported from, Belgium. The iron girders and other material required were specified for about 15th June, but were not delivered till the end of September, being thus about six weeks longer in being delivered than was usual. The defenders proved their averments as to the causes of delay.

The Sheriff-substitute (Erskine Murray), after findings in fact to the effect already stated, found in law “. . . (5) that the parties Maclellan have proved a custom of trade that the buyer in such cases takes the risk of delay from strikes and other unforeseen causes beyond the seller's control; (6) that the parties Maclellan have proved that in the present case the delay arose from such causes; therefore in the action Maclellans v. Taylors decerns as craved, and in the counter action assolis the defenders.”

Taylors appealed. They argued that no custom of trade had been as a matter of fact proved, and that the delay had not been shewn to be due to the strikes and great heat to which the defenders ascribed it. On the law they argued that, as Maclellans had undertaken to deliver in a reasonable time, they must do so. If Belgium was suffering from strikes and excessive heat, then they should have gone elsewhere. It might be usual to get such goods in Belgium, but that was not the only market. If it had been intended that they should not take such risks, they should have inserted the recognised stipulations to that effect which were quite familiar.

Argued for the Maclellans;—The contract implied delivery in “reasonable” time. The question was, is that reasonable in ordinary circumstances, or reasonable in the circumstances which had come into existence at the date when the contract should have been performed? Authority said the latter was the sound meaning.¹

LORD YOUNG.—The question upon the whole matter is whether Messrs Maclellan can be held to be guilty of breach of contract in respect of the delay which occurred here. They, in the ordinary way, resorted to quite proper people in the place to which resort is commonly and familiarly had under similar circumstances, and the delay occurred there in the manner which has been explained.

Can we affirm in point of fact that they were guilty of undue delay or chargeable with undue delay in the execution of the contract, so that they were in breach of contract and were liable in damages? I am of opinion that upon the evidence we cannot affirm that. I do not quite like the expression “usage of trade” as applied in the present case. The particular language is not of first-class importance, if we know what it means, but I would rather avoid the use of the expression “usage or custom of trade,” as applicable to the circumstances of this case. When such goods as these have to be got, or are commonly got, from abroad, the causes of delay which are incident to their being procured are *prima facie* to be taken into account, and not unreasonably, upon the question whether the party, who is acting in the usual manner, is to have undue delay imputed to him or not. I would rather deal with the question as a question whether these causes of delay, which are proved to have occurred here not in an

¹ Hick v. Rodocanachi, Sons, & Co., L. R. [1891], 2 Q. B. 626.

ALLAN'S TRUSTEE, Pursuer (Reclaimer).—*Ure*.
 THOMAS ALLAN & SONS, Defenders (Respondents).—*W. C. Smith*.

No. 6.

Oct. 23, 1891.
 Allan's Trust-
 tee v. Allan
 & Sons.

Process—Reclaiming Note—Failure to send copies of reclaiming note—6 Geo. IV. c. 120 (*Judicature Act*, 1825), sec. 18.—The 18th section of the *Judicature Act*, 1825, enacts that a party shall be entitled to reclaim “provided that such party shall, within twenty-one days from the date of the interlocutor” against which he reclaims, print and box the reclaiming note, &c., “and shall at the same time give notice of his application for review by delivery of six copies of the note” to the agent of his opponent.

A reclaiming note was printed, boxed, enrolled on the Single Bills of the Second Division, and sent to the roll. The six copies of the reclaiming note were not sent to the respondents' agents till four days after the case had been sent to the roll. The respondents' agents had no intimation of the reclaiming note, and no knowledge of its having been presented, till the same period had elapsed. *Held*, on the authority of *Campbell v. Campbell*, March 7, 1868, 6 Macph. 563 (*dub.* Lord Justice-Clerk), that the provisions of the statute were directory merely and not imperative, and that it was in the power of the Court, if no prejudice were suffered by the respondent, to relieve the reclaimer of the consequences of his neglect. Motion by the respondent to dismiss reclaiming note refused.

Process—Expenses—Separate discussion on expenses.—*Per* Lord Young,—“I think that the most expedient course is that we should consider and decide the question of expenses when we are forming and expressing our opinion on the merits.”

In an action by Allan's trustee against Thomas Allan & Sons a judgment disposing of the whole merits of the case was pronounced by the Lord Ordinary (Wellwood) on 8th September 1891. A reclaiming note against his Lordship's judgment was printed and boxed by the trustee in the ordinary course; it appeared in the Single Bills of the Second Division on the first sederunt-day of the Winter Session, the 15th October, and was sent to the roll. On the 19th, the respondents' agents desiring to make up their account of expenses, applied to the clerk of the process in the Outer-House for the process, and then for the first time learned that a reclaiming note had been presented. So soon as the attention of the reclaimer's agents was called to the matter, they sent six copies of the reclaiming note to the opposite agents, and explained that it was purely through inadvertence that they had not done so sooner.

The respondents presented a note to the Lord Justice-Clerk craving him to move the Court to dismiss the note as incompetent. They referred to the distinct terms of the statute,¹ and argued that this point had been determined by decisions² against the competency of a reclaiming note in such circumstances. *Campbell's case*³ was in the other direction, but it was justified on the ground that the “application for review” was held to be enrolment on the Single Bills, and if the copies were delivered by that time the statute was satisfied. [LORD YOUNG referred to Mackay, i. 553, and particularly to the statement that “the recent decisions and the strong inclination of the Court is against sustaining objections of this nature.”] That statement had no warrant; the case of *Muir*,⁴ in which a

¹ 6 Geo. IV. c. 120, sec. 18.

² *Bell v. Warden*, July 2, 1830, 8 S. 1007, 2 Scot. Jur. 516; *Pollock v. Harkness*, July 7, 1835, 13 S. 1072, 7 Scot. Jur. 493; *Fraser v. Steven's Trustees*, June 6, 1839, 1 D. 886, 11 Scot. Jur. 487; *Taylor v. Macdonald*, Feb. 10, 1844, 6 D. 637, 16 Scot. Jur. 306.

³ *Campbell v. Campbell*, 1868, 6 Macph. 563, 40 Scot. Jur. 290.

⁴ *Muir v. Muir*, Oct. 17, 1874, 2 R. 26.

No. 1.

Oct. 15, 1891.
Jack v. Fleming.

the cause :—" Whether, on or about the 8th day of January 1891, and at or near the house in Milliken Street, Houston, occupied by Alexander Scott, gardener there, the defenders, John Gourlay Harvey and William Fleming, or either and which of them, in presence and hearing of the said Alexander Scott, and of Mrs Elizabeth Burt or Scott, his wife, or one of them, falsely and calumniously stated of and concerning the pursuer that the pursuer's conduct towards " a girl named " had been shameful, meaning thereby that the pursuer had committed or connived at immoral conduct towards . . . or did use words of like import of and concerning the pursuer, to his loss, injury, and damage ? Damages against the defender John Gourlay Harvey laid at £500. Damages against the defender William Fleming laid at £100."

CUMMING & DUFF, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 2.

Oct. 17, 1891.
Dunsmore's
Trustee v.
Stewart.

ALEXANDER GORDON (Peter Dunsmore's Trustee), Appellant.—*Clyde*.
JAMES STEWART, Respondent.

Process—Caution for expenses—Bankruptcy—Undischarged bankrupt.—An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to the Sheriff. Held that the claimant could not be allowed to proceed without finding caution for expenses.

1st DIVISION.
Sheriff of
Lanarkshire.

JAMES STEWART, who was an undischarged bankrupt, lodged a claim in the sequestration of Peter Dunsmore, spirit-dealer there, for the sum of £301, 5s. 2d., being the amount of two bills for £100 and £200. The trustee in the sequestration having rejected the claim, Stewart lodged an appeal to the Sheriff.

On 22d May 1891 the Sheriff-substitute (Birnie) appointed parties to lodge minutes prepared in terms of the statute.

The revised minute for Stewart was in these terms,—“ The appellant submits and avers that the bills on which his claim is founded were granted for value, and that therefore he is entitled to succeed in this appeal.”

The trustee's revised minute was to the effect that the claimant had acted as factor for the bankrupt and collected rents and other moneys belonging to him, and had all along failed to account to his trustee for his intromissions ; that the bills on which the claim was made were given by the bankrupt to cover advances to be made by the claimant on behalf of the bankrupt in the management of his affairs, and not for cash advanced at their dates ; that the claimant had made no advances and had all along failed to satisfy the trustee that the bankrupt was indebted to him in anything at the date of the bills or the sequestration ; that on the contrary, on an accounting there was a large balance due by the claimant to the trustee, and the trustee had therefore rejected the claim.

On 29th June the Sheriff-substitute refused a motion by the trustee that Stewart be ordained to find caution for expenses.*

Dunsmore's trustee appealed, and in addition to the statements made in his minute, he stated that Stewart's trustee had been discharged, but that prior to his discharge he had considered the propriety of making the present claim and had decided not to do so.

* “ NOTE.—The appellant's claim is founded on bills, and he is *virtually* a defender. No doubt he has failed to convince the trustee—who has no interest except to do justice—that the bills were granted for advances at their dates, but having in view the more recent decisions this is not to my mind sufficient to compel the appellant to find caution.”

Argued for the trustee ;—Even assuming, as did the Sheriff-substitute, **No. 2.**
 that Stewart must be considered as a defender, he ought, in the circum-
 stances, to be ordained to find caution.¹ But that was not truly Stewart's **Oct. 17, 1891.**
 position. He was claiming a sum of money, and was in the position of **Dunsmore's**
 a pursuer suing a petitory action met by the two defences of compensa- **Trustee v. Stewart.**
 tion and no value given. The ordinary rule must then be applied, and
 he should be ordained to find caution.

There was no appearance for Stewart.

LORD PRESIDENT.—This claim by James Stewart is for the amount of certain bills granted to him by the bankrupt. The claimant is at present an undischarged bankrupt. It is true that there is no trustee at present acting in his sequestration, but it has been stated to us that the trustee when in office had this claim before him and resolved not to take action upon it.

The trustee is now discharged, but the beneficial right to the sum which the bankrupt now claims is in his creditors ; the money, if recovered, would fall to be administered in some form for the benefit of his creditors, and this might be done by reviving the sequestration.

Now, in this state of matters, the question arises whether, if he desires to prosecute this claim the claimant must not find caution, and whether the claim can be treated otherwise than as a suit to recover money at the instance of an undischarged bankrupt. It is true the claim is made in a sequestration, but it is not the less a proceeding by an undischarged bankrupt to recover money. I think that the ordinary rule applies, viz., that the claimant must find caution, and I cannot see anything stated on record to take the present case out of that rule. The origin and substance of the claim are not very fully divulged by the claimant. He was very pointedly challenged on this subject, and under the interlocutor of 22d May 1891, which appointed the minutes of the parties to be exchanged and revised, he had very full opportunity of explaining the origin of the bills, but he has confined his statement on the subject to a bald statement that the bills were granted for value.

I think, therefore, that he must be ordained to find caution before he can proceed.

LORD ADAM concurred.

LORD M'LAREN.—I am unwilling to disturb the finding of the Sheriff in regard to a matter so purely discretionary as is the question whether caution should be found by an undischarged bankrupt. The policy of our bankruptcy law, however, seems to give an almost unlimited right of appeal from the Sheriff, and as the case is competently brought before us, we are bound to exercise our jurisdiction to the best of our judgment. I see no reason in the circumstances of this case for deviating from the ordinary rule as to finding security for expenses, and I agree that Stewart must be ordained to find caution.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor :—" Recall the interlocutor of the Sheriff-substitute dated 29th June 1891 : Remit to the Sheriff-substitute to ordain the respondent, James Stewart, to find caution for expenses in common form."

JAMES AYTON, Solicitor, Agent.

¹ *Stevenson v. Lee*, June 4, 1886, 13 R. 913.

No. 7.

Oct. 24, 1891.
 Stocker v.
 Liquidators of
 the Coustons-
 holm Paper
 Mills Co.,
 Limited.

The liquidators reclaimed, and argued;—Opportunity had been given to the petitioner to have matters set right when the list was settled, and when decree for the amount of his call was pronounced. These interlocutors were final, and he must therefore remain on the list and pay his call. [LORD TRAYNER.—But a reclaiming note against either of these interlocutors would not, if he had been successful, have removed him from the register.] He might even yet have a remedy by suspension. [LORD TRAYNER.—But there again he could not get the register amended.] Surely a person who had allowed a decree for money to go out against him was barred from reviewing the grounds of that decree except by suspension. Even the remedy under the 35th section of the Act of 1862 must be asked within a reasonable time, or it might be lost.¹

Argued for the petitioner;—Section 35 of the Act of 1862 was still in force. Under the old procedure that remedy might be asked at any time, or certainly after a considerable time (in *Hart's* case² two years), and after decree for calls had been made.

LORD JUSTICE-CLERK.—By this Statute of 1886 it became lawful for the Court to remit to one of the Lord Ordinaries to take the same procedure as under the Statute of 1862 was taken by the Court itself. It was provided by section 6 that all orders or judgments by the Lord Ordinary should be subject to review by reclaiming note within fourteen days.

That was all that was done by that section. The proceedings in the liquidation were transferred to the Outer-House, and what was done there by the Lord Ordinary was subjected to review by reclaiming note. But nothing more was done; and in particular that section did not deprive a party from taking the benefit of any clause of the Act of 1862 exactly as he might have done if the Act of 1886 had not been passed.

If a person would not have been barred by anything that might have happened in the Inner-House under the Act of 1862 from presenting such a petition as this, it cannot make any difference to that that the liquidation has been transferred by the later statute to the Outer-House, and a remedy given by reclaiming note against any orders or judgments of the Lord Ordinary.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT adhered.

ALEX. MORISON, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

No. 8.

Oct. 27, 1891.
 Milligan v.
 Muir & Co.

THOMAS MILLIGAN, Pursuer (Appellant).—*Ralston*.
 ROBERT MUIR & Co., Defenders (Respondents).—*Jameson*.—*Fleming*.

Reparation—Master and Servant—Risk known to servant—Unfenced machinery—Knowledge of foreman.—A lad of sixteen was employed to drive a copper-cutting machine by turning a handle which worked the fly-wheel and so set the gearing of the machine in motion. The ordinary way of driving the wheel was that this lad and another stood one on each side of the handle and turned it. While he was engaged in this work the lad's hand was crushed in the cogged or pinion wheels attached to the fly-wheel, and he raised an action against his employers at common law, and, alternatively, under the Employers Liability Act for damages.

He averred that the machine was situated close to the wall, the point of the

¹ Buckley, p. 111 (6th edn.).

² Hart's case, 1868, L. R., 6 Eq. 512.

handle being only eighteen inches from it; that at the time of the accident there was a "considerable quantity of sheets of copper laid against the wall . . . on the side of the handle on which" he should have stood, that in consequence he "could not use the handle, but had to help to turn the fly-wheel by catching the rim. He worked in this manner in sight and with the knowledge of the foreman all day, and was not forbidden to do so. He had been previously working it in the same way, which was the only possible method open to pursuer, and that with foreman's knowledge." His hand slipped off the fly-wheel, as he alleged, was caught between the pinion or cogged wheels and the spur wheel, and was crushed. He further averred that there was a duty on the defenders to have the machinery fenced, and that if it had been fenced the accident would not have happened.

No. 8.

Oct. 27, 1891.
 Milligan v.
 Muir & Co.

Held (1) that he had not stated a relevant case of fault against his employers in his averments as to the presence of the sheets of copper; (2) that the averment of the foreman's knowledge of his actings was not relevant to support a case under the Employers Liability Act; and (3) that, as the machine was driven by hand, and as there was no danger in the use of it, there was no obligation to fence it.

THOMAS MILLIGAN, a lad of sixteen years of age, was employed in the workshop of Robert Muir & Company, brassfounders in Glasgow. His work was at a copper-cutting machine, which he and another lad, Dunlop, drove by turning a handle attached to a fly-wheel; this fly-wheel was geared to the other wheels of the machine which brought certain circular cutters into play. There was no mechanical power used to drive the wheel. On 16th April Milligan's hand was caught between the fly-wheel and some of the other wheels of the machine and hurt.

2D DIVISION.
 Sheriff of
 Lanarkshire.

To recover damages he raised an action in the Sheriff Court against his employers. He averred that "the copper-cutting machine is situated quite close to the wall. The point of the handle, which is on the rim of the wheel, is only eighteen inches from the wall. On the date in question there was a considerable quantity of sheets of copper laid against the wall opposite the machine and the handle of the machine, and also on the side of the handle on which pursuer would have stood. The boy Dunlop, who was considerably taller than pursuer, was working the handle on one side, and pursuer was placed on the other side of the handle facing him. Owing to the presence of masses of copper pursuer could not use the handle, but had to help to turn the fly-wheel by catching the rim. He worked in this manner in sight and with the knowledge of the foreman all day, and was not forbidden to do so. He had been previously working it in the same way, which was the only possible method open to pursuer, and that with foreman's knowledge." He further averred;—"The occurrence of this, or any similar accident, could have been easily prevented and rendered impossible by having the machine properly fenced and protected." . . . "It was the duty of, and incumbent on, the defenders, in terms of the Factory and Workshops Act, to have had the machinery fenced or protected, which could easily have been done at a trifling expense, and without interfering with the usefulness and working of the machinery. Had this reasonable precaution been adopted, the work would have been perfectly safe, and injury rendered impossible. Further, it is usual and customary for such machines to be so fenced."

He pleaded;—(1) Pursuer having been injured as before narrated through the fault or negligence at common law of the defenders, or those for whom they are responsible, he is entitled to decree in terms of the first of the alternative conclusions of the petition, with expenses. (2) Pursuer having been injured through the fault of the defenders, or those for whom they are responsible, under the Employers Liability Act,

No. 3.

Oct. 17, 1891.
Lees v. Kemp.

The history of the pauper may be stated very shortly. He has been in the state described by the Sheriff-substitute during the whole of his youth, except for the two periods during which he suffered from acute mania.

The case of *Fraser* cited by the Sheriff-substitute rules this case. There a person in a similar condition was held never to have been forisfamiliaried, and therefore to be still a member of the family of which the father was the head. The parish of the father's settlement was accordingly held to be the parish liable for the maintenance of the pauper. I think the Sheriff-substitute's judgment here is sound.

LORD RUTHERFURD CLARK.—The authority of *Fraser's* case was not impugned, and we must pronounce a decision in accordance with the views there expressed. I think with your Lordship that the present case is ruled by the case of *Fraser*.

LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-substitute appealed against: Therefore dismiss the appeal," &c.

LYLE & WALLACE, Solicitors—H. & H. TOD, W.S.—Agents.

No. 4.

Oct. 20, 1891.
Delaney v.
Directors of
Edinburgh
and Leith
Children's Aid
and Refuge.

ARTHUR DELANEY, Petitioner.—*Ross Stewart.*

JAMES COLSTON AND OTHERS (Directors of Edinburgh and Leith Children's Aid and Refuge), Respondents.—*J. C. Lorimer.*

Parent and Child—Custody of children—Charitable institution—Responsibility of directors.—In a petition by a father against S., the original founder of a home for destitute children, and certain directors appointed by her, to have them ordained to restore his three children who had been taken by S. to Nova Scotia, the Court, on 7th June 1889, ordained the defenders to deliver the children to their father on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order. The directors (who alone appeared in the petition) thereupon instituted proceedings in the Supreme Court of Nova Scotia against S., from which she was ultimately discharged, it being held that she had taken all the steps which could be expected of her to find the children without success. A detective officer, who was afterwards employed by the directors, having reported that his search for the children had been fruitless, and that he saw no practical way of following it up, the respondents, on 20th October 1891, moved that, in respect that they had done everything in their power to recover the children, the interlocutor of 7th June 1889 ought to be recalled.

The Court held that the respondents had done everything which could in the circumstances be expected of them to recover the children, but *sisted* procedure in the petition *hoc statu* in order that either party might move further in it in the event of fresh information being obtained in regard to the children.

1st DIVISION.

(SEQUEL of case reported 16 R. 753.)

In June 1888 Arthur Delaney, painter, presented a petition against Miss Stirling, the original founder of the Edinburgh and Leith Children's Aid and Refuge, and the directors of the Refuge, praying that they should be ordained to deliver to him his three children, whom he alleged that they had removed to Nova Scotia. The directors of the Association alone appeared in the petition.

On 7th June 1889 the Court pronounced an interlocutor ordaining the whole parties called as respondents to deliver the children to the peti

off shafting and running dangerously, so that people passing or working at or near it run risk of being hurt. It is not alleged that, if it was worked by hand in the ordinary way, there would be any danger, and there could not well be, for in ordinary working the boys must both be outside the large fly-wheel, and clear of the cogged wheels. **No. 8.**
Oct. 27, 1891.
Milligan v. Muir & Co.

Then it is said that he was doing what he did with the foreman's knowledge. But it is not said that the foreman had ordered him to act as he did. The mere fact that a foreman sees a workman doing a piece of work in an unusual way, and does not interfere, is scarcely a ground for holding the foreman's master liable for the consequences of what the workman does, if it results in injury to him. Such a case is plainly not covered by the Employers Liability Act.

I am therefore of opinion that the pursuer has stated no relevant case, and that the action should be dismissed.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT found that the pursuer had not set forth facts relevant to support the conclusions of the petition, and dismissed the action.

W. A. HYSLOP, W.S.—DRUMMOND & REID, W.S.—Agents.

ROBERT GREER, Pursuer (Appellant).—*Jameson—Deas.*
 ALEXANDER TURNBULL & COMPANY, Defenders (Respondents).—
C. J. Guthrie—Younger.

No. 9.

Oct. 27, 1891.
Greer v. Turn-
bull & Co.

Reparation—Master and Servant—Injury not connected with the fault alleged as ground of accident.—A workman in the employment of a firm of engineers was working a crane in their moulding-shop. In this shop was a moulding-pit about twelve feet deep. While working at the crane the workman had his thumb caught in the pinion-wheel of the crane and injured. To recover damages for this injury he raised an action against his employers, in which he averred that between the moulding-pit and the crane "at the nearest point there is only some nineteen inches or so of space"; that "in turning round the crane it became necessary for pursuer to pass along the edge of the moulding-pit, which was uncovered, and as the room left to pass was so small that the crane handle overhanging the pit, he stumbled on the edge of the pit, and, in an endeavour to regain his balance, his left hand was caught in the wheels of the crane and the thumb torn off." He also averred that the pit should have been covered and was not.

Held that the pursuer had disclosed no relevant case, the accident being, according to his own statement, due to his stumble, and that stumble not being alleged to be due to the narrowness of the space between the crane and the pit, or to the fact of the pit being uncovered.

ROBERT GREER, an ironmoulder in the employment of Alexander Turn-
 bull & Company, engineers and valve masters at Bishopbriggs, raised an action of damages in the Sheriff Court against them for injuries received in their employment on 14th February 1891. He was engaged in working a crane in their moulding-shop at the time of the accident, lifting by means of the crane some moulding-boxes from one part of the shop to another. **2D DIVISION.**
Sheriff of
 Lanarkshire.

Of this crane he averred,—“It is placed in line with two columns supporting the roof of the moulding-shed, and within about 19 inches of one of these columns. In the same moulding-shed there is a circular moulding-pit about 12 feet deep and about 8 feet in diameter, and between this pit and the crane at the nearest point there is only some 19 inches or so of

No. 4.

Oct. 20, 1891.
 Delaney v.
 Directors of
 Edinburgh
 and Leith
 Children's Aid
 and Refuge.

As far, then, as that report goes, I cannot see any practical course which can be adopted to make further search successful.

It has been suggested to us by counsel for the petitioner that in view of the fact that the judgment of the Supreme Court in Nova Scotia was not unanimous we ought to order the respondents to appeal it to the Judicial Committee of the Privy Council.

The judgment of the Court of Nova Scotia has, however, by a majority of two Judges to one, declared that Miss Stirling has satisfactorily answered the interrogatories put to her by the Court, and has purged herself of the contempt of which she was formerly found guilty. I do not then see how we could take any further proceedings as regards the judgment which would be effectual.

It is not suggested from the bar that any other effectual course could be taken.

For my own part, I should be very willing to give the fullest assistance to the father in his search for these children. It seems very remarkable that this lady, who may be actuated by benevolent motives, should take the children outwith the jurisdiction of the Court, and should then allow them to disappear in the wilds of Nova Scotia without also being able to say where they are to be found.

I think, however, that the directors have *bona fide* done all that they can be expected to do.

In my opinion this petition ought not to be sent out of Court, for it may be that further information will come to the father or the directors which may make it competent and proper for them to make another motion in the petition.

We ought then, I think, to pronounce no further order in the meantime.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the case, together with the report, sist procedure under the petition *hoc statu*."

E. D. YOUNG, W.S.—R. C. GRAY, S.S.C.—Agents.

No. 5.

Oct. 21, 1891.
 Taylors v.
 Maclellans.

H. & E. TAYLOR, Pursuers (Appellants).—*Asher—Ure*.
 P. & W. MACLELLAN, Defenders (Respondents).—*Jamson—Dickson*.
Et c contra.

Contract—Delivery—Unforeseen accidents preventing delivery.—Where a person has contracted to deliver goods, which are not part of his own stock in trade, and are known not to be, and has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circumstances, such as strikes, or sickness among workmen.

A firm of iron-merchants in Glasgow contracted to supply the iron work of certain buildings, at prices which were such as to shew to persons in the trade that the iron was to be got abroad. No time was fixed for delivery, but it was part of the contract that the prices specified should include charges for "delivery at the job at such times as may be required by the masons." The iron-merchants made due arrangements with a well-known firm of ironmasters in Belgium for supply of the goods required. The ordinary and reasonable time required for the production of the iron, after specifications had been received, was six weeks. The iron not having been delivered for several weeks after that date, the parties who had contracted with the iron-merchants raised an action of damages against them for loss incurred in consequence of this delay. In defence it was pleaded that the delays were due to strikes, and to the heat of

It is not said that the stumbling of the pursuer was occasioned by anything for which the defenders are responsible. The passage on which the pursuer stumbled was (so far as the pursuer's averments go) exactly as it had been all the time he had been in the defenders' employment. It was not insufficient for the purpose for which it was used; it was not encumbered or obstructed by anything which should not have been there. The pursuer's stumbling must therefore have arisen from pure accident or from negligence on his part. There is no averment that the passage was at all unusual or different, either as regards its width or position, from similar passages in other and similar works. There is no averment that the pursuer or anyone else had complained of the passage in any way or at any time. The first part of the defenders' alleged fault seems to me, in these circumstances, to disclose no ground of action against the defenders.

No. 9.

Oct. 27, 1891.
Greer v. Turnbull & Co.

The second ground alleged is that the moulding-pit was not covered. But the want of covering did not lead to the injury sustained by the pursuer. Had he fallen into the pit and broken his arm or his leg, or otherwise sustained injury through such a fall, the want of covering would plainly have been important. But it does not appear that if the pit had been covered the result would have been different. Having stumbled, the pursuer would naturally grasp at the nearest thing to enable him to regain his balance and prevent his falling; and this is what he did, with the unfortunate result that he lost his thumb.

It was suggested that if the pit had been covered he would not have grasped at the crane for support, but would have allowed himself to fall on the covering of the pit. But this is mere speculation, and is not averment. Had it been averred it would not have altered my opinion as to the relevancy of the pursuer's averments. I think the record discloses that the pursuer's injuries of which he complains were the result of his having stumbled on the narrow passage, and that neither the condition of the passage nor of the adjoining moulding-pit had anything to do with such injuries, and, at all events, did not cause them.

In the view I take of the case it is not necessary to consider the effect of the averment that frequent complaints had been made about the pit being uncovered. If the uncovered condition of the pit did not cause the injuries or lead to them, and I think it did not, then, although the defenders were held to be in fault in not having the pit covered, there would still be no ground of action against them, as the fault alleged did not produce or lead to the injury complained of. But it may be noticed farther that the pursuer's averment that the pit should have been covered is qualified by the words, "when not in use." The pursuer does not aver that the pit was not in use at the time he fell. I do not, however, put any weight on this criticism of the record, as it could have been amended if such an amendment would have made the pursuer's averments relevant. I am of opinion, however, that the pursuer's averments do not set forth any relevant case against the defenders.

LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT found that the pursuer had not set forth facts relevant to support the conclusions of the action, and dismissed the same.

SIMPSON & MARWICK, W.S.—J. & J. ROSS, W.S.—Agents.

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

goods would be delivered in six or eight weeks after specification. The prices stipulated were such as to shew any architect of experience that he was not buying goods lying in stock in Glasgow, which could be delivered at any time, but goods which had to be ordered from, manufactured in, and imported from, Belgium. The iron girders and other material required were specified for about 15th June, but were not delivered till the end of September, being thus about six weeks longer in being delivered than was usual. The defenders proved their averments as to the causes of delay.

The Sheriff-substitute (Erskine Murray), after findings in fact to the effect already stated, found in law “. . . (5) that the parties Maclellan have proved a custom of trade that the buyer in such cases takes the risk of delay from strikes and other unforeseen causes beyond the seller's control; (6) that the parties Maclellan have proved that in the present case the delay arose from such causes; therefore in the action *Maclellans v. Taylors* decerns as craved, and in the counter action assolis the defenders.”

Taylors appealed. They argued that no custom of trade had been as a matter of fact proved, and that the delay had not been shewn to be due to the strikes and great heat to which the defenders ascribed it. On the law they argued that, as Maclellans had undertaken to deliver in a reasonable time, they must do so. If Belgium was suffering from strikes and excessive heat, then they should have gone elsewhere. It might be usual to get such goods in Belgium, but that was not the only market. If it had been intended that they should not take such risks, they should have inserted the recognised stipulations to that effect which were quite familiar.

Argued for the Maclellans;—The contract implied delivery in “reasonable” time. The question was, is that reasonable in ordinary circumstances, or reasonable in the circumstances which had come into existence at the date when the contract should have been performed? Authority said the latter was the sound meaning.¹

LORD YOUNG.—The question upon the whole matter is whether Messrs Maclellan can be held to be guilty of breach of contract in respect of the delay which occurred here. They, in the ordinary way, resorted to quite proper people in the place to which resort is commonly and familiarly had under similar circumstances, and the delay occurred there in the manner which has been explained.

Can we affirm in point of fact that they were guilty of undue delay or chargeable with undue delay in the execution of the contract, so that they were in breach of contract and were liable in damages? I am of opinion that upon the evidence we cannot affirm that. I do not quite like the expression “usage of trade” as applied in the present case. The particular language is not of first-class importance, if we know what it means, but I would rather avoid the use of the expression “usage or custom of trade,” as applicable to the circumstances of this case. When such goods as these have to be got, or are commonly got, from abroad, the causes of delay which are incident to their being procured are *prima facie* to be taken into account, and not unreasonably, upon the question whether the party, who is acting in the usual manner, is to have undue delay imputed to him or not. I would rather deal with the question as a question whether these causes of delay, which are proved to have occurred here not in an

¹ *Hick v. Rodocanachi, Sons, & Co.*, L. R. [1891], 2 Q. B. 626.

LORD ADAM.—As I understand, the order of service has been intimated No. 10.
and served. There is no doubt that in the ordinary case such an order when
served stops all further procedure in the Court of Session, and removes the case Oct. 27, 1891.
to the House of Lords. The question of the competency of the appeal appears Edinburgh
to me to be a matter for the Judicial Committee of the House of Lords, and I Northern
cannot assume that this appeal is so utterly and entirely incompetent that we are Tramways Co.
entitled to disregard the order of service. I am therefore of opinion that there v. Mann.
can be no further procedure in the Court of Session, and that Lord Low should
not pronounce any further order.

LORD M'LAREN.—I have always understood that an order for service of an
appeal stops all further procedure in the Court below, the theory of our com-
mon law being that a cause cannot be in two places at the same time. It may
be possible under a statute to proceed with a case in two Courts at the same
date, but there is no statutory provision of that kind applicable to the case
before us, and therefore I think that meantime there can be no procedure in
the case in the Court of Session. The question of the competency of the
appeal is a matter for the Appeal Committee of the House of Lords.

LORD KINNEAR concurred.

THEREAFTER Lord Low pronounced this interlocutor:—"The Lord
Ordinary having reported the case to their Lordships of the First
Division, on the motion for an order on the defenders to lodge the
account referred to in the interlocutor of 30th June 1891, and as
advised by their Lordships, refuses the pursuers' said motion, in
respect of the appeal by the defenders to the House of Lords and
order for service thereon."

GRAHAM, JOHNSTON, & FLEMING, W.S.—A. & G. V. MANN, S.S.C.—Agents.

ANDREW GRAY, Pursuer (Respondent).—*P. Blair.*

JAMES WEIR, Defender (Appellant).—*C. J. Guthrie—Crabb Watt.*

No. 11.

Oct. 28, 1891.
Gray v. Weir.

*Reparation—Wrongous use of Diligence—Sequestration in security of rent—
Warrant to carry back furniture removed by tenant.*—The tenant of a house,
without having paid the rent of £5 for the current half year, and before the
termination of his tenancy, removed part of his furniture to a farm five miles
distant, of which he had taken a lease. The removal was carried out in an open
manner, and the landlord, who lived in the same tenement, had been previously
informed that the tenant intended to remove before the term, though not of the
precise day on which he would do so. As soon as the landlord heard that the
tenant had removed he wrote to him threatening proceedings, unless the rent
were paid by a certain date, but this letter failed to reach the tenant until after
that date owing to the negligence of the person to whom the landlord had given it
to post. On the day mentioned the landlord, believing that his letter had
reached the tenant in due course, raised a summons of sequestration against him,
averring that he had removed his effects "without finding security for the rent,
and without intimation to the pursuer." The landlord also lodged a minute
craving warrant, in respect the tenant "had removed the subjects of hypothec,"
to carry the same back to his house. The Sheriff thereupon granted warrant as
craved, and on the next day a sheriff-officer proceeded to the tenant's new abode,
and was in the act of bringing the furniture back to the landlord's house when
the proceedings were stopped by the tenant paying the rent and expenses.

In an action at the instance of the tenant, the Court held that the warrant
had been executed without cause, and therefore that its execution was illegal,
and that the landlord was liable in damages.

No. 5.

Oct. 21, 1891.
Taylors v.
Maclellans.

stances existing at the time of fulfilment rather than the circumstances existing when the contract is made. Taking into account the circumstances which are proved to have existed here, I think the Messrs Taylor have failed to shew that there was any undue delay in the fulfilment of the contract in question, and that their claim for damages on account of undue delay cannot be sustained.

I will only add that in my opinion the custom of trade on which the Messrs Maclellan relied to some extent is not proved.

LORD JUSTICE-CLERK.—I agree with both your Lordships in the opinion expressed that this is not a case to be treated at all as one regarding established custom of trade. This is the case of a contract made to deliver certain goods without any time being specified, and that leads to the conclusion that the time taken for delivery must be a reasonable time. If reasonable time is exceeded, then damages for breach of contract will be due. Now, it is essential that one who makes such a contract, as in this case, to deliver within a reasonable time, shall exercise due care in making arrangements for fulfilling the contract. If he does anything which is unreasonable, if he acts in such a way as to cause likely and serious risk that the contract may not be fulfilled within a reasonable time, then he shall be responsible for that failure to act duly in carrying out the contract. But I am of opinion that there was perfectly reasonable care taken here. The orders were given to a well-known manufacturer, and the person giving the orders had at that time no reasonable ground for holding that any serious or exceptional delay would occur. Then comes the question, if one is satisfied that reasonable care was taken in placing the contract, whether the time occupied was reasonable in the sense of being reasonable in the circumstances. It is, of course, quite plain that in the ordinary case usage would bring about in such contracts a general term which would be held sufficient. In this case the general term would be something like six weeks or two months. But, then, extraordinary circumstances may arise, such as a strike or a fire, or some very serious accident to machinery, or an epidemic among workmen engaged in a large factory, which might fairly be a reasonable excuse for exceeding the ordinary time; and the question here, I think, is just this, whether we have sufficient evidence to satisfy us that there were such extraordinary circumstances occurring, and whether these extraordinary circumstances occurring were sufficient to prevent Messrs Maclellan from being in fault, and beyond reasonable time in delivering at the time they did, so much beyond what would have been the ordinary time. I am satisfied upon the evidence that there is no ground for holding that they were in breach of contract in delivering so late as they did. The late delivery was due to extraordinary circumstances which they were not bound to anticipate. Therefore I agree with your Lordships that the judgment should be as proposed by Lord Young.

LORD RUTHERFURD CLARK was absent.

THE COURT pronounced this interlocutor:—"Find (1) that by the offer, No. 7/1 of process, and the acceptance, No. 26 of process, P. & W. Maclellan agreed to supply, and H. & E. Taylor to buy, the iron therein referred to; (2) that the said iron was duly and timeously delivered in terms of the contract; therefore of new in the action P. & W. Maclellan v. H. & E. Taylor, decern as craved, and in the counter action, H. & E. Taylor v. P. & W. Maclellan, assoilzie the defenders from the conclusions of the action."

SIMPSON & MARWICK, W.S.—J. & J. Ross, W.S.—Agents.

they were illegal, and the defender is liable in damages; assesses the damages at the sum of £6, 5s.,” &c. No. 11.

The defender appealed, and argued;—The pursuer here had removed the subjects of the defender's hypothec without having paid or found security for his rent, and without having given the defender notice of the date of his removal. The proceedings taken were therefore within the defender's legal right, and he was justified in using them, and was not liable in damages.¹ Oct. 28, 1891.
Gray v. Weir.

The pursuer argued;—The defender had been made aware that the pursuer was going to remove before the term, and the removal was carried out in a perfectly open manner. The defender was in these circumstances bound to have given the pursuer notice before taking these extreme proceedings against him.² The defender could have got his rent by asking for it, and the execution of the warrant was unnecessary and wrongful. Damages were therefore due.

At advising,—

LORD PRESIDENT.—At the date of the occurrence on which the action is founded the pursuer was the tenant of a small house belonging to the defender in the town of Aberdeen. The tenancy was for half a year, expiring at the ensuing Whitsunday, and at that Whitsunday the amount due as rent would have been £5. The pursuer, during the currency of the term, concluded a bargain for taking a farm in the immediate neighbourhood, with entry before Whitsunday. Accordingly, some weeks before that term he took possession of the farm, and proceeded to remove his furniture there from the house in Aberdeen. It appears that the removal of the furniture was begun on Tuesday, 22d April, but was not completed in one day, part of the furniture being removed on the Tuesday, and the remainder on the following Saturday. While the defender was getting settled in his new farm he was interrupted by the arrival of a sheriff-officer, who, in his absence, but in the presence of his wife, produced a warrant, and proceeded to carry back the furniture to Aberdeen. It appears that, while on his way thither, the officer met the pursuer, and that the rent was then and there paid.

This action is brought on account of the wrong that is said to have been done the pursuer by the removal of his furniture in these circumstances.

The warrant for removal obtained from the Sheriff followed on and was incidental to an application for sequestration of the pursuer's effects made to the Sheriff on 25th April. It was set out in the summons of sequestration “that the defender (*i.e.* the present pursuer) has removed his effects from said house without finding security for the rent, and without intimation to the pursuer.” In order to obtain a warrant to carry back the furniture it was necessary that a special statement should be made, and accordingly this minute was lodged by the present defender. “In respect the defender has removed the subjects of hypothec to Banchory Hillock, Banchory-Devenick, warrant is craved to carry same back,” &c., and upon that the Sheriff wrote,—“Grants warrant as craved.”

In order to consider rightly the question which has arisen in this action, it is necessary to note that the warrant obtained by the defender falls within the class of warrants which are not obtained as matters of course, and are not the

¹ Dove Wilson's Sheriff Court Practice (4th ed.) 488; Ersk. Inst. ii. 6, 58-60; Rankine on Leases, 344; Donald v. Leitch, March 17, 1886, 13 R. 790.

² Johnston v. Young, Oct. 27, 1890, 18 R. (Just. Cases) 6.

No. 11.
Oct. 28, 1891.
Gray v. Weir.

ordinary right of the creditor. He requires to support his application for such a warrant by a special statement of facts. The duty of the Judge to whom such an application is made is illustrated by the case of *Johnston v. Young*, and I mention that case merely as one throwing light on the proceedings which are necessary in order to obtain such a warrant.

That being the nature of the warrant and the conditions under which it is granted, it belongs to the class of cases in which the creditor acts at his own peril, and anyone seeking redress on account of such a warrant having been used against him need not allege malice and want of probable cause, but merely that the diligence was used wrongfully. That, then, is the issue which has been tried by the Sheriff, and we have to decide whether the Sheriff-principal is right in holding that the defender is liable. The ground of his judgment is tersely expressed in these terms:—"Finds in law that the said proceedings having been carried out without notice and without cause, they were illegal, and the defender is liable in damages." I prefer to split that finding into two, finding in fact that the proceedings were without notice, and that they were without cause. It is quite certain that they were without notice, but I desire, following the example of Lord Rutherford Clark in *Johnston v. Young*, to guard myself against laying down that in all cases it is necessary that notice should be given. One can picture cases of clandestine removings in which to give notice would be to defeat the legitimate purpose of the application, and therefore Lord Rutherford Clark says that the question whether notice is required is one of circumstances, and that it can only be dispensed with safely in exceptional cases.

The absence of notice to the tenant accordingly is a salient feature in the case, though it is not conclusive against the defender, but the main question is whether the proceedings were "without cause." I am clearly of opinion that they were. In this case the pursuer and defender lived close together, occupying houses which were part of the same building, on the opposite sides of a passage; they were acquainted and on sufficiently friendly terms. The defender was aware that the pursuer was going to leave before the term, that having been made matter of conversation between them. It had indeed been suggested in conversation, and the suggestion had been encouraged by the defender, that the outgoing tenant of Banchory Hillock might take the premises vacated by the pursuer, and remain as tenant in his place after the term. It is therefore demonstrated that the defender possessed the knowledge that the pursuer was going to move before the term. It is quite true that he did not know the precise day on which the removal was to take place, but no importance attached to the precise day. The sufficient fact is that the removal which had been spoken of, and looked forward to, was a removal during the tenancy.

These are the circumstances of the removal. There was nothing in it of a clandestine character. It was deliberately carried out. On Tuesday 22d April one lorry conveyed part of the furniture to Banchory Hillock, and of this the defender's household were cognisant, and were spectators. The remainder of the furniture followed on the next Saturday. Where was it removed to? It was only removed to a distance of five miles. The circumstances of the pursuer rendered him perfectly able, and he was apparently perfectly willing, to pay the rent, and it is obvious that if the defender had adopted the common sense plan of asking him for the money, or for security, he would have got it.

The case does not seem to me to be one of peculiar delicacy at all. The

defender's proceedings were, in my opinion, adopted altogether without cause, and accordingly a legal wrong was done to the pursuer. I think indeed that the defender may congratulate himself on the moderate amount of damages fixed by the Sheriff, because a more unfortunate introduction to his new farm than he gave the pursuer can hardly be imagined. As, however, the question of the amount of the damages has not been canvassed, I propose that we should affirm the findings in fact of the Sheriff-substitute down to and including the 11th, but should add an additional finding to the effect that the warrant was executed without cause. I therefore propose substantially that we should adhere to the judgment of the Sheriff.

No. 11.

Oct. 28, 1891.
Gray v. Weir.

LORD ADAM.—This seems to me to be an unfortunate case, both because the sum in dispute is small,—only £5 of damages having been awarded by the Sheriff,—and also because I think that if the letter from the defender to the pursuer had been delivered, instead of being kept in the messenger's pocket, the rent would have been paid, and so there would have been no summons of sequestration, no carrying away of the pursuer's furniture, and no subsequent action.

In dealing with the case my opinion is entirely in accord with that of your Lordship. I do not doubt that the defender, as landlord, had the right, in the first place, to sequester the pursuer's furniture, and, in the second place, if it was removed to have it brought back, unless good cause were shewn why his right should not be enforced. No objection can be taken to his acting in respect of his having applied for a warrant to have the goods brought back, but then, when a landlord applies for such a warrant without notice to the tenant, he is bound to state the special circumstances in which it is craved, and I think no such circumstances were set forth in this case, and if he had set forth a true account of the circumstances in which the tenant had removed his furniture, a warrant would not have been granted. I concur in thinking that it cannot be said that in all cases it is necessary for a landlord to give his tenant notice that he intends to apply for a warrant to have his goods brought back. Where a tenant made a midnight flitting, or carried off his goods in some other clandestine manner, the Sheriff would, I think, be bound to grant a warrant though no notice of the application had been made to the tenant, and there may be other cases where notice might not be necessary. But if special circumstances are not set forth, such a warrant ought not to be granted without notice to the tenant having been made. I quite agree with what was said in the case of *Johnston v. Young*, as to the duty of the person applying for a warrant, and the duty of the Judge granting it.

In the present case no statement was made of special circumstances. It is quite true, as was pointed out by Mr Guthrie, that on the face of the application for sequestration it was set out that the tenant had removed his effects without giving intimation to the landlord, or finding security for the rent. Even if these facts had been set out in the minute, I should not have thought them sufficient to justify the granting of the warrant without notice to the tenant. There was nothing in these facts to shew that there had been any attempt to defeat the landlord's hypothec. If, after receiving notice, the tenant had not been prepared to pay the rent, the Sheriff-substitute would have been entitled to grant the warrant, but no opportunity was given to the tenant to pay his rent, his effects were just seized. I do not think that if the circumstances had been disclosed to the Sheriff he would have granted the warrant for their seizure, and

No. 11. therefore I agree that their seizure was wrongful, and that the pursuer is entitled to have redress.

Oct. 28, 1891.
Gray v. Weir.

LORD M'LAREN.—The question which we have to consider is not quite the same as that which was considered in the case of *Johnston v. Young*, because in that case the Court of Justiciary had to consider whether the Sheriff was entitled to grant a warrant for the removal of effects on the statements made before him. We are considering whether the statement made before the Sheriff was one which the defender can justify; but the observations of the Judges, and especially those in which the Court all agreed, are of great value in elucidating the present case.

I think the first matter for inquiry to be, what is the ordinary right of a real creditor using the diligence of sequestration? His right in the ordinary case is to have the goods of his debtor inventoried and sequestrated, and thereby he converts the general security given him by the law into a special security applicable to the goods named in the inventory. Until sequestration is applied for the tenant is entitled to remove particular effects and replace them by others of equal value. There is no objection to his changing one article for another, provided he does not impair the value of the landlord's security.

The landlord's other remedy is rather distinct from his ordinary right, and arises only when there is danger of his right of hypothec being defeated. It is not doubtful that a landlord may apply for interdict against a contemplated removal of his goods by the tenant, and may also obtain a warrant to bring them back if they have been removed.

In all cases where an application to a Judge or Magistrate is necessary for the purpose of asserting the right of a creditor, the law holds the creditor responsible for the statements on which a warrant is obtained. In this case the parties accept the findings in fact in the Sheriff-substitute's interlocutor as sufficient for the decision of the case, and I should like to call attention to the 3d, 5th, and 7th findings. The third finding is to the effect that the defender knew that the pursuer intended to remove before the term, but did not know the particular day on which the removing was to take place. The fifth finding bears that the pursuer effected his removal in an open manner, and the seventh is to the effect that a letter from the defender to the pursuer, intimating that he proposed to apply for a warrant to remove the pursuer's furniture in default of payment, did not reach the pursuer till after the warrant had been put in force. Now, if these facts had been disclosed to the Sheriff-substitute when he was asked for the warrant, would it have been granted? I think not. I may answer that question by saying that it would have been impossible to grant it consistently with the decision in the case of *Johnston v. Young*, because that case is to the effect that the remedy of bringing back a tenant's furniture is only to be granted on proper cause shewn, and when it is necessary to secure the creditor's rights. Proper cause was not shewn in this case, the only statement made being that the tenant had removed his effects without finding security for the rent and without intimation to the landlord. The Sheriff held, and was probably entitled to hold, that the removal had been clandestine, and that the tenant had refused to find security for the rent, the fact being that the landlord never asked the tenant to do so.

It appears to me that the proceedings complained of would never have taken place if the letter from the defender, which unfortunately miscarried, had reached

the pursuer in time. While that letter shews that the defender entered on these proceedings in good faith, and would probably be conclusive in his favour, if it was necessary for the pursuer to aver that he was actuated by malice, yet the state of the law applicable to cases of this kind appears not to relieve the landlord from responsibility for the fact that no intimation of the intended proceedings was made to the tenant. No. 11.
Oct. 28, 1891.
Gray v. Weir.

I agree with your Lordship that this is a clear case of the improper use of diligence entitling the debtor to damages, and I also agree that the Sheriff has fixed on a very small sum of damages, so that I find it difficult to understand what was the defender's motive in bringing the case here.

THE COURT recalled the interlocutor of the Sheriff of 9th June 1891: Found in fact in terms of the first eleven findings in fact contained in the interlocutor of the Sheriff-substitute of 30th April 1891: *Quoad ultra* recalled said interlocutor: Found in fact that the warrant for removal was executed without cause: Found in law that the execution of said warrant was illegal, and that the defender was liable in damages: Assessed the damages in accordance with the judgment of the Sheriff at £6, 5s., and decerned.

HAGART & BURN MURDOCH, W.S.—WISHART & MACNAUGHTON, W.S.—Agents.

MRS ELIZABETH S. WILLIAMS OR ROSS AND SPOUSE, Pursuers (Reclaimers). No. 12.

—*Salvesen*—*Wilson*.

HIS HIGHNESS SIR BHAGVAT SINHJEE, THAKOR SAHIB OF GONDAL,
Defender (Respondent).—*D.-F. Balfour*—*Dickson*.

Oct. 29, 1891.
Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

Foreign—*Obligation ex delicto*—*Law of the obligation, not lex fori, will govern*
—*Parent and Child*—*Aliment*.—A person suing for damages *ex delicto* in respect of an act committed abroad has no action unless that act is by the law of the place where it is committed a wrong inferring a legal remedy.

An Englishwoman raised an action in Scotland against a domiciled Indian concluding for damages for alleged seduction and for aliment for a child alleged to be the fruit of the seduction. The seduction was alleged to have taken place in England. By the law of England a woman has no action for damages on the ground of seduction, and the only means by which she can recover aliment is by an application to a Justice of the Peace, if she be a single woman, under the Bastardy Act (35 and 36 Vict. cap. 65). In this case the woman made no such application, and married before the child was born, more than two years before raising her action in Scotland. *Held* that she could not maintain an action on either head in Scotland.

MRS ELIZABETH SARAH WILLIAMS OR ROSS, AND GEORGE ROSS, her husband, with whom she resided in London, raised an action on 23d September 1890 against His Highness Sir Bhagvat Sinhjee, the Thakor Sahib of Gondal, in the Province of Gujarat and Presidency of Bombay, K.C.S.I., LL.D., concluding for (first) a sum of £10, 10s.; (second) £50 per annum; and (third) £2000. 2D DIVISION.
Ld. Stormonth
Darling.

The defender, who was a sovereign prince, had come to Scotland in 1886, and attended the medical classes in the University of Edinburgh. In 1887 he went to London to attend the celebration of the jubilee of Her Majesty the Queen, and lived in a furnished house there from the beginning of May till the end of July 1887. He then went back to his own dominions, and returned subsequently to Scotland, where he was living when the action was raised.

When he took his house in London, the prince took into his service some of the servants of the owner of the house, and among them the pur-

No. 12.

Oct. 29, 1891.

Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

suer, who was a housemaid. In her action she averred that on 21st May 1887 the defender, "partly by physical force and partly by reason of the ascendancy which his rank and station in life and his power and position as her master had given him over her, overcame her scruples, and succeeded in seducing her. By the use of threats, and by blandishments and promises, he induced her to renew the act of connection at intervals during his residence in London." At the time of the seduction she averred that she was engaged to her husband. She alleged that, as the result of the seduction, she became pregnant. On 8th September she married her husband, who was, till his marriage, a private in the Artillery, and on 13th February 1888, she was delivered of a child of which she averred that the defender was the father.

The sums concluded for were claimed, the first as inlying expenses, the second for the aliment and education of the child, and the third as damages for seduction. She pleaded the seduction as entitling her to decree.

The defender denied the pursuers' material averments, and stated;—"By the law of England neither of the pursuers has any right or title to sue for damages in respect of seduction of the female pursuer, and any person who has seduced the female pursuer is not liable in damages to the pursuers, either jointly or separately. By the said law the defender is not liable either for inlying expenses to the pursuer or for aliment for an illegitimate child."

He pleaded;—(2) The questions between the parties fall to be determined by the law of England; and in respect of the said law, which excludes the pursuers' claims, the defender should be assoilzied. (3) No title to sue.

The Lord Ordinary (Stormonth Darling) allowed the defender a proof as to his statement of English law.

Mr H. H. Asquith, Q.C., was called to depone to the English law, and said:—" (Q.) According to the English law, where a woman has been seduced and given birth to a bastard child, what legal relation, if any, subsists between her and the man who seduced her, with regard to inlying expenses? (A.) None whatever; there is no obligation of any kind on the man to pay inlying expenses. (Q.) In the same circumstances, is there according to English law any obligation—apart from express contract—for maintenance and education of the bastard? (A.) None whatever. (Q.) Is there any action for seduction of a woman in England? (A.) Not at the suit of the woman. The only action for seduction known to the English law is an action at the suit of the parent or employer of the person seduced, the foundation of the action being the supposed loss of the woman's services to her parent or employer. (Q.) And the consequent damage thereby suffered by the parent or employer? (A.) That is so. The woman as such has no right of action. (Q.) Is it essential for the maintenance of such an action to shew that the woman seduced was in the service of the plaintiff? (A.) It is essential to shew that she was in the service of the plaintiff, both at the time of the seduction and at the time of her subsequent confinement. . . . Cross.—(Q.) Is seduction recognised as a wrong by the law of England: is it a tort for which an action may lie? (A.) It is not recognised as a wrong to the woman who is seduced, but, if followed by certain consequences, it is recognised as a wrong to the parent or employer. (Q.) Do you suggest that the quality of the act depends upon the existence of the person to whom the remedy is given? (A.) I suggest that the wrongfulness of the act does depend upon the person who is complaining of it. (Q.) Is it your view that according to the English law, if a single woman happens to be an

orphan, not in the employment of any person, the seduction of such a woman is not a wrong? (A.) Certainly, that is perfectly clear. (Q.) Is it not the more correct way to put it, that it is not a wrong for which the law of England gives a remedy? (A.) The law of England gives a remedy for every wrong. By the Court.—(Q.) For every legal wrong? (A.) Yes, or to put it in other words, nothing is a wrong according to the law of England for which that law provides no remedy. . . . (Q.) Is that principle consistently applied—the action being, as you say, one for loss of services—is the measure of the damage awarded by the Courts at all connected with the extent of the loss sustained by the loss of services? (A.) Very remotely, and I think as a rule not at all. (Q.) Is it relevant to lead evidence that the father has been disgraced by his daughter's shame in aggravation of the damages? (A.) It is. (Q.) And are the facts of the seduction as regards the arts employed and the methods used by the seducer relevant on the question of damages? (A.) They are. (Q.) Quite irrespective of whether there has been actual loss of services, provided the necessary relationship exists? (A.) As I have already explained, there must be either actual or constructive loss of services, otherwise no evidence at all is relevant. . . . There is a proceeding, created by what we call in England the Bastardy Acts, whereby a single woman who has been seduced may apply to Justices of Petty Sessions for a summons against the person she alleges to be the father, and the Justices may thereupon after hearing evidence, if they think fit and in the exercise of their discretion, make an order upon the person who appears to them to be the father of the child to pay a certain sum not exceeding 5s. or something like that per week, for its maintenance up to a certain time. These provisions are embodied in the Acts 35 and 36 Vict. cap. 65, and 36 Vict. cap. 9. I refer to these statutes as containing the law upon the subject.”

Mr Brodie-Innes, a barrister in England and a member of the Scottish bar, was held as concurring *in omnibus* with Mr Asquith.

The Lord Ordinary, on 4th July 1891, pronounced this interlocutor:—“Finds that the acts complained of took place in England, and that it is proved that the law of England recognises no claim at the instance of the pursuers, or either of them, in respect of inlying expenses, aliment, or damages for seduction; finds that there are no other relevant allegations on record entitling the pursuers to damages; therefore dismisses the action, and decerns.”*

* “OPINION.—The pursuers of this action are a married couple domiciled in England, and the defender is an Indian Prince, temporarily resident in Scotland. The pursuers' allegations are that the defender, while residing in London during the summer of 1887, seduced the female pursuer, who was then a servant in his house, and that in consequence, on 13th February 1888, she gave birth to a child of which the defender is the father. The conclusions of the summons are for inlying expenses and aliment, and a sum of £2000 in name of damages.

“The claim is made in somewhat remarkable circumstances, for the pursuers' story is that Mrs Ross yielded to the advances of the defender at a time when she was engaged to her present husband, that they married while she was pregnant, that they at first registered the child as the husband's, though they afterwards had this entry cancelled and registered it as illegitimate, and that Mrs Ross wrote letters to the defender in which she not only concealed the fact of her marriage, but represented that her affianced husband had given her up in consequence of the birth of the child. These circumstances are by no means favourable to the pursuers' claim, but they do not, except indirectly, affect the questions which I have now to decide, viz.—(1) Whether the rights of parties

No. 12.
Oct. 29, 1891.
Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

No. 12.

Oct. 29, 1891.

Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

The pursuer reclaimed;—Mr Asquith's evidence, when fairly read, meant that seduction was a wrongful act in England, "not justifiable,"

fall to be determined by the law of England, and (2) what that law is with regard to them.

"It will be convenient that I should take the second question first.

"It is established by the uncontradicted evidence of Mr Asquith, Q.C., and Mr Brodie-Innes that, by the law of England, a woman who has been seduced has no right of action against her seducer, and that the only action for seduction known to the English law is an action at the suit of the parent or employer of the person seduced, the foundation of the action being the loss of the woman's services to her parent or employer. It follows from this that the plaintiff must be able to shew that the woman was in his service, actual or constructive, at the time of the seduction, and also at the time of her confinement; and this of course excludes the notion of any right of action at the instance of a husband who has married the woman after her seduction. Further, it appears that by the common law of England the mother of a bastard child has no claim against the father for inlying expenses or aliment, and that the only statutory right to such payments is that conferred by the Acts 35 and 36 Vict. c. 65, and 36 Vict. c. 9—a right which is strictly limited to the case of a single woman. Neither the male nor the female pursuer would thus have a right of action in England against the defender (assuming the truth of all they say) in respect of inlying expenses, aliment, or seduction. That being so, one can quite understand the desire of the pursuers, apart from the circumstances of the defender's temporary residence here, to bring their action in Scotland.

"But the question remains whether the rights of parties fall to be determined by the law of England. I am of opinion that they do.

"It is, I think, a principle of the law of Scotland, in accordance with the weight of opinion among writers on international law, that no action can be maintained in the Courts of this country on account of a wrongful act committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it was committed as well as by the law of this country. That is the principle of Lord Shand's judgment in the case of *Goodman v. The London and North-Western Railway Co.*, March 6, 1877, 14 S. L. R. 449, where the widow of a domiciled Scotsman who had been killed on the line of an English railway founded jurisdiction against the company and brought an action of damages three years after the accident. Lord Shand held that, the grounds of action having arisen entirely in England, the rights and liabilities of parties must be regulated by English law, and that, as by that law the action was not now maintainable, it must be dismissed. The case is indeed a *fortiori* of the present, for the statute law of England, by Lord Campbell's Act (9 and 10 Vict. c. 93), did recognise a right of action at the instance of the pursuer, and only limited its exercise in point of time. In the present case there is not, and there never was, any right of action in England at the instance of the pursuers against the defender.

"Lord Shand's judgment was not reclaimed, for the case was compromised. But I am not aware of any decision in Scotland to the contrary. It was contended that the case of *M'Larty v. Steele*, 8 R. 435, is to an opposite effect. That was a case of slander uttered in Penang by one domiciled Scotsman against another, and the Court disallowed a counter issue, putting the question whether according to the law of Penang, no reparation for oral slander was due unless special damage was proved. But the judgment, as I read it, proceeded on the footing that slander was a wrong both by the law of Penang and the law of Scotland, and that the kind of damage necessary to be proved was a matter incidental to the remedy, which always falls to be determined by the *lex fori*.

"The same principle affords an explanation of the case of *Scott v. Seymour* 1862, 32 L. J. 61, which was an action brought by one British subject against another for an assault committed at Naples, and in which the law of Naples was unsuccessfully pleaded as excluding the action. Mr Justice Wightman expressed the opinion that damages might be recoverable in England, even

although the remedy for that wrong was given not to the woman but to her father or employer. The fact that the amount of damages might be affected by the woman's shame and the nature of the seductive arts shewed that the act done to her was a wrong. Now, the law was that to support a pursuer in an action under such circumstances the *lex fori* must give a right of action, and the question of remedy was for it; provided only that the act complained of was a wrong, i.e. "not justifiable" in the country in which it was committed. That was undoubted law,¹ and was sufficient for the purposes of this action, for this act was "not justifiable" by the law of England. Opinion had indeed gone further, and laid it down that the *lex fori* would rule both the question of the nature of the act and the form of the remedy.² *M' Larty v. Steele* bore out the argument now submitted.³ The Lord Justice-Clerk pointed out that although action might be refused unless special damage was proved, that did not establish that the thing complained of—verbal slander—was lawful. In that sense seduction was unlawful in England, although not actionable by the woman. In *Horn's case*⁴ too a claim for *solatium* was allowed by the Scots Court on an accident occurring in England, although the English law does not allow any claims in respect of *solatium*. The decision in *Goodman's case*⁵ was of little authority. It was a judgment by a single Judge; the defenders had had so little confidence in its soundness that they had paid £700 when a reclaiming note had been presented. As regarded the aliment, there was admitted by Mr Asquith to be an obligation in England, and the defender could not evade that by leaving the country.

No. 12.
Oct. 29, 1891.
Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

The defender argued;—The law knew no such thing as a wrong in the abstract.⁶ Therefore as the woman could not sue on this act it was, so far as she was concerned, no wrong. A wrong must be either the invasion of a *jus* or the withholding of a right, and the woman by the law of England could not say that of seduction. Lord Shand in *Goodman's case* had taken a sound view of the law, and that view was borne out by the English law both as laid down by Westlake in the passages referred to, and as laid down in collision cases.⁷ The doctrine that the *lex fori* governed was long since exploded.⁸ It would regulate the form and the *quantum*

though no damages were recoverable in Naples. But the other Judges rested their decision on the narrower, and, as I venture to think, the safer ground, that the plea failed to shew that damages might not be recoverable as incidental to the proceedings alleged to be pending in the Neapolitan Courts. That case cannot, therefore, be regarded as an authority for the proposition that the law of England will sustain an action of damages for an act which is not wrongful by the law of the country in which it was committed. If it were so regarded, it would be inconsistent with the later English case of *Phillips v. Eyre*, 1869, 4 L. R., Q. B. 225, and 1870, 6 L. R., Q. B. 1.

"I therefore hold, that in so far as the pursuers' claims relate to matters for which they would have no right of action in England, they cannot maintain an action here, and *quoad ultra*, that their averments are irrelevant."

¹ Westlake, secs. 166 and 199, and authorities.

² Mr Justice Wightman in *Scott v. Seymour*, cited by Lord Ordinary, and in 1 H. and C. 219; Lord Jeffrey in *Callendar v. Milligan*, June 20, 1849, 11 D. 1174, 21 Scot. Jur. 463; Savigny, sec. 374, Guthrie's edn., pp. 251 and 253-5; see also Story, secs. 556-7.

³ Jan. 22, 1881, 8 R. 435.

⁴ July 13, 1878, 5 R. 1055.

⁵ *Goodman v. London and North-Western Railway Co.*, March 6, 1877, 14 S. L. R. 449.

⁶ Addison on Torts, pp. 1 and 136.

⁷ The "*Maria Moxham*," 1876, L. R., 1 Prob. Div. 109.

⁸ Bar, pp. 272, 360, 429.

No. 12.

Oct. 29, 1891.

Rosses v.
H. H. Sir
Bhagvat
Sinhjee.

of the remedy and all the *litis ordinatória*, but the *litis decisoria* must be ruled by the law of the delict, *i.e.* the *lex loci actus*. *Horn's case*¹ adopted the English rule that the act must be a wrong, both where it was committed and where the remedy was sought, so did *M'Larty's case*,² the former holding that the items to be taken into account in estimating the *quantum* of the remedy must be determined by the *lex fori*, the latter claiming for the *forum* the right to control the proof of the wrong, *i.e.* to say what was good evidence.

LORD JUSTICE-CLERK.—This a somewhat peculiar case, and it is desirable, before expressing an opinion on the law, that the facts should be exactly specified and laid down.

The defender is an Indian Prince, who was for some time resident in London. He had taken a furnished house there, and took over the staff of servants who were in the house at the time. The pursuer was a female servant in the house, and her case alleges that by his acts he succeeded in seducing her from virtue, and that in consequence she became the mother of a child of which he is the father. She states that at the time of the seduction she was engaged to be married, and she was married when she was five months advanced in pregnancy. The Indian Prince having come back from India, where he had gone for a short time, and having come to live in Edinburgh, she sues him for inlying expenses, for aliment for the child, and for damages in respect of her seduction.

On that state of facts two questions arise, as stated by the Lord Ordinary, *viz.* :—“(1) Whether the rights of parties fall to be determined by the law of England, and (2) what that law is with regard to them.”

Evidence has been led as to the law of England, the evidence of Mr Asquith, Q.C., and of Mr Brodie-Innes, who is a member both of the English bar and of this bar. No evidence was led to contradict what these gentlemen said, and we must therefore take that as being the law of England on the subject.

Now, that law is that the pursuer has in England no right at all to sue for anything, except, under certain conditions and limitations, for aliment. Up to a recent date she would have had no rights at all. The only way in which any reparation for seduction can be recovered in England is by means of an action raised by the father or employer of the woman for loss of service, in consequence of the state into which she has been brought by her seducer having prevented her from giving service in her employment or in the family. Up to the Statute of 35 and 36 Vict. that was the only action that could be brought in respect of the consequences of seduction. By that statute a right was given to recover aliment in a particular way, but that right was only given to a single woman.

That being so, the defender having come to Scotland, has the pursuer any right to sue him here? She has no right under the statute, for she is no longer a single woman. As she has not that right, she has none at all, for that is the only right conferred upon a woman in her position.

The question is, does the case fall to be determined by the law of England or by the law of Scotland? I think by the law of England. The Lord Ordinary has gone over with care a number of decisions, which throw some light on the principles that must rule this case. In the opinion which he has expressed on these cases I entirely concur. The decision of the Court in the case of *Scott v. Seymour* is very much in favour of the view I have expressed. No doubt

Mr Justice Wightman, whose opinion is entitled to great respect, expressed an opinion that the law of England should be the law to determine whether damages could or could not be recovered; but the judgment in the case did not bear out that view, and one of his brethren expressly dissented from it.

No. 12.

Oct. 29, 1891.

Rosses v.

H. H. Sir

Bhagvat

Sinhjee.

There was one case in this Court cited which comes very near the present, viz, the case of *Goodman*. That was an important judgment, although it was by a single Judge, Lord Shand. The case was somewhat peculiar,—a woman sued for damages in respect of the death of her husband upon an English railway line. She was only entitled to do so in England if she raised her action within three years. Having allowed these three years to run out, she raised her action in Scotland. Lord Shand held “that the grounds of action having arisen entirely in England, the rights and liabilities of parties must be regulated by English law, and that, as by that law the action was not now maintainable, it must be dismissed.”

I take these words of Lord Shand, and, omitting the word “now,” they express exactly my view of the present case. This action is “not maintainable, and must be dismissed.”

LORD YOUNG.—By the law of England the pursuer had no action for damages for the illicit intercourse which is alleged to have taken place, even supposing it were seduction, taking that in the sense in which it is always taken in England, that he deprived her of her virtue. By the law of England he had done her no wrong. I am speaking only of the seduction. I lay aside, in the meantime, the claim for aliment.

Now, three years after the alleged illicit intercourse, two years after the birth of the baby, she brings an action of damages in Scotland. Nothing had occurred between them after the birth of the child until the action was brought. There was nothing therefore to give her a right of action, unless his coming to Scotland did so. If he left England without there being any ground of action against him, his coming to Scotland could never give rise to any such ground. That is the whole matter.

With respect to the aliment, she had no claim against him for that either. There is a statute in England by which, if she remained single, she might, by application to a Justice of the Peace, have got a moderate aliment. She made no such application, and the law of England gave her no other right. Then when she was five months gone with child she married a soldier. That raised an insuperable barrier to her getting any bastardy order, for she was then no longer a single woman. She has no claim then which she can make good by proceeding under the statute, and she has no other. The claim must be under the statute, or not at all, and it is excluded under the statute by the circumstances of the case.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I also concur. The ground on which I proceed is stated by the Lord Ordinary with as much clearness as I could possibly express it.

The leading conclusion is for a large sum of damages. The action therefore is an action for reparation for a wrong. I am satisfied, as I think all your Lordships are, both on principle and on authority, that an act, in order that it should give rise to action as being a wrong, must be recognised as a wrong giving rise to a legal remedy by the law of the place where it was committed. If the

No. 12.

Oct. 29, 1891.
 Rosses v.
 H. H. Sir
 Bhagvat
 Sinha.

be so, then this action is excluded, for the act which is alleged as the foundation of this action was committed in England, and is not recognised by the law of England as a wrong, in the sense or to the effect of giving rise to a remedy. If it is not a wrong in that sense by the law of England, it can never become a wrong from the fact that the doer of it has since come to Scotland.

The second point, the claim for aliment, is as clear. The only right given by the law of England to claim aliment for a bastard child is a right given by statute, but that right is limited to claims at the instance of a woman who is single. This pursuer is not a single woman, and therefore cannot claim the benefit of that statute.

THE COURT adhered.

THOMAS M'NAUGHT, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 13.

Oct. 29, 1891.
 Stephens,
 Mawson, &
 Goss v. Mac-
 leod & Co.

STEPHENS, MAWSON, & GOSS, Pursuers (Appellants).—*Asher—Dickson.*
 MACLEOD & COMPANY, Defenders (Respondents).—*D.-F. Balfour—Ure.*

The "Cassia."

Ship—Charter-party—Demurrage—Custom of port.—A charter-party stipulated that the steamship "Cassia" should proceed to "Portugalete, or any other usual ore loading place in the River Nervion, not above Luchana, as ordered by merchants' agents on arrival," and there load a cargo of iron ore, "after being berthed in turn." The vessel was ordered to go to Portugalete. The rules for regulating the turns of vessels loading there provided that their turn should be taken from the official list of arrivals. On 17th June the "Cassia" arrived at Portugalete, and was duly entered in the turn list. The shipmaster was ordered by the merchants to load the ship at a particular loading place to which a certain class of ore was brought by railway from a certain ore deposit named "Penuco." In consequence of other ships which had previously arrived being loaded from the same deposit, the "Cassia" had to wait her turn, and was not berthed for loading till 27th June. Another vessel which had arrived after the "Cassia" and had received a later number on the turn list had been berthed on 21st June at a different loading place to receive another class of ore from a different deposit, and finished loading on the 24th. In an action for demurrage by the owners of the "Cassia" against the charterers, *held (diss. Lord Young)* that according to the terms of the charter-party the "Cassia" should have been berthed on 21st June, and that the charterers were liable to the owners for demurrage.

2D DIVISION.
 Sheriff of
 Lanarkshire.

By charter-party, dated 7th June 1890, Messrs Stephens, Mawson, & Goss, owners of the steamship "Cassia," chartered that vessel to Messrs J. & A. Wylie, Troon.

The charter-party stipulated, *inter alia*, that the "Cassia" should "proceed to Portugalete, or any other usual ore loading place in the River Nervion, not above Luchana, as ordered by merchants' agents on arrival, or so near thereunto as she may safely get, and there load in the customary manner from the factors of the said merchants a full and complete cargo of iron ore, . . . and being so loaded shall therewith proceed to Glasgow. . . . Steamer to be loaded at the rate of not less than 400 tons per working day as customary (Sundays and holidays excepted), after being berthed in turn, . . . and ten days on demurrage over and above the said lay-days at 16s. 8d. per hour."

The vessel was ordered to Portugalete to load a cargo of iron ore for Macleod & Company, Glasgow.

Portugalete was the lowest reach on the River Nervion, about eight miles below the town of Bilbao. It formed part of the port of Bilbao, which extended from the mouth of the river to the town and beyond it. At Portugalete there were several places at which iron ore was deposited in readiness for vessels, and these different ore deposits were connected by rail

with their respective loading wharves. Various iron ores were brought down from different mines to different places of deposit and loading by the Bilbao River and Cantabrian Railway Company, Limited. Since 1872 the railway company had, with consent of the public authorities, published rules for regulating the turns of vessels loading at the wharves, *inter alia*,—" (1) The turn for loading vessels will be taken from the official list of arrivals, each vessel being entered on the company's turn list according to the number given as from the semaphore station at Galea Point. . . . (4) No vessel will be considered as being ready to load or available to take turn unless she has been duly advised to load by the shipper of the mineral, and that all necessary official and customs papers have been lodged at the office of the company's stationmaster at Sestao, also that there exists a sufficient quantity of mineral in the deposit to load a full and complete cargo, or such a quantity as may be asked for by the captain. (5) When two or more vessels are presented and in turn to load mineral from the same deposits, the company will use its discretion as to allowing more than one of such vessels to load at the same time."

No. 13.

Oct. 29, 1891.

Stephens,
Mawson, &
Goss v. Mac-
leod & Co.

The "Cassia."

By telegram, dated 11th June 1890, Macleod & Company advised F. L. Macleod, their agent at Bilbao, of the sailing of the "Cassia" for Portugalete. On 12th June the order to load the cargo was given by him to Victor de Chavarri, Bilbao, the owner of the mine from which the cargo was to be supplied, and was at once intimated by the latter to the Bilbao River and Cantabrian Railway Company, by whom the ore was to be carried from a deposit named "Penuco" to the loading wharf connected with it.

On 17th June 1890 the "Cassia" arrived in Bilbao Bay, and passed the government semaphore station at Galea Point. She received a number as the fourth steamer that had arrived by the first tide. On the same day the master of the ship intimated by letter to Messrs Macleod & Company's agent that the ship was now ready to receive cargo.

The Bilbao River and Cantabrian Railway Company received a note of the official list of arrivals in Bilbao Bay, and in accordance therewith made up their turn list of vessels. The "Cassia" was duly entered in the turn list in accordance with her number. The master was thereafter ordered by the agent for Macleod & Company to load his vessel at the wharf connected with the Penuco deposit. At this wharf there were already three steamers loading or waiting to be loaded with Penuco ore.

On 19th June the steamer "Ingoldsby" entered the harbour, and was advised to load at a deposit named "Rubio." She was berthed for loading on 21st June, and finished loading on the 24th.

On 21st June the master of the "Cassia" wrote Macleod & Company's agent as follows:—"Finding that the s.s. 'Ingoldsby,' of Cardiff, who arrived @ this port on the 19th inst., a later date than my steamer 'Cassia,' who arrived on the 17th inst., is now under tips @ Portugalete and has commenced loading, I hereby give you notice that the s.s. 'Cassia' time will commence from noon on the 21/6/90, as per charter-party, at Glasgow, June 7th, and that I shall also protest and hold you responsible for all detention that may ensue."

On 22d June the steamer "Petunia," which had arrived at the harbour on the 20th, and had been advised to load from a deposit named "Severino," was berthed for loading. She finished loading on the 26th.

On 25th June the steamer "Navarra," which had arrived on the 19th, and had been advised to load from the deposit named "Martinez," was berthed for loading. She finished loading on the 26th.

On 25th June the master of the "Cassia" intimated to Mr Macleod that the "Cassia's" time would expire at noon to-morrow, 26/6/90, and

No. 13. that after that date he would claim demurrage according to terms of charter-party.

Oct. 29, 1891.

Stephens,

Mawson, &

Goss v. Mac-

leod & Co.

The "Cassia."

On 27th June, about 8 A.M., the "Cassia" was berthed for loading from the Penuco deposit. The loading was completed between 6 and 8 P.M. on the following day. The vessel's carrying capacity was 1500 tons.

Stephens, Mawson, & Goss raised in October 1890 an action in the Sheriff Court of Lanarkshire against Messrs Macleod & Company (who had undertaken liability for any demurrage that might be due) for £116, 13s. 4d. as demurrage. The pursuers averred;—(Cond. 5) "The vessel was ordered to load at Portugalete, and her time for loading in regular turn commenced at noon on 21st June, but she was not berthed until about 8 A.M. on 27th June, and accordingly she was detained for five days and twenty hours beyond the time when she should have been berthed in her regular turn. The loading was completed about 8 P.M. on 28th June, being about seven days eight hours after the arrival of her turn. Had the vessel been berthed in her turn, and been loaded at the rate of 400 tons each day, she would have been loaded not later than noon on 26th June, or about fifty-six hours sooner than she was actually completed. It is believed and averred, however, that had she been berthed in turn, the vessel would have been loaded within a period not greater than that actually occupied, and, accordingly, demurrage is due for the full period claimed."

The defenders pleaded;—The said vessel having been berthed in due turn according to the custom of the port, and having been loaded within the lay-days provided for by the charter-party, defenders are entitled to absolvitor, with expenses.

The proof disclosed the facts above narrated. The master of the "Cassia" admitted that he had previous experience of the practice of loading vessels at Bilbao.

It was explained that the railway trucks could not be filled at Penuco deposit with sufficient speed to load more than one vessel at a time.

On 5th May 1891 the Sheriff-substitute (Guthrie) pronounced the following interlocutor:—"Finds that the pursuers' ship 'Cassia' arrived at Bilbao River to fulfil the contract contained in the charter-party, No. 8/1 of process, on the 17th of June 1890, and completed loading a cargo of iron ore at Portugalete, as ordered, upon Saturday, 28th June, at 8 P.M.: Finds that, according to the custom of the port, she was in turn for being berthed, and was berthed at 8 A.M. on June 27th, and that she was thus loaded within the lay-days provided by the charter-party, her carrying capacity being 1500 tons; therefore assoilzies the defenders."*

* "NOTE.—This case appears to be a clear one. In the reading of clauses in charter-parties as to loading and discharging, the custom of the port is an implied term, even if not expressed, and the question for consideration is whether, by the practice of the port of Bilbao, or the loading places on the River Nervion, to which this vessel was chartered, and which it is assumed are included in that port, the turn of the 'Cassia' arrived on the 21st June, as alleged by the pursuers, or not until the 27th. It seems to me that the only ground on which the former contention can be supported involves the proposition that the defenders were bound to alter their loading orders, and supply a different kind of ore, or ore from a different 'deposit' or mine from that which they had provided for the 'Cassia' before her arrival, and for which she had been booked. For the evidence sufficiently instructs that the regular practice of the port is for vessels to take their turn at the particular 'deposit' or loading place to which they are ordered, and that, if several vessels are waiting for cargo from the same loading place, the last comer must just be served in its rotation. It is hardly suggested that the charterers should be deprived of their

The pursuers appealed, and argued;—The turn of the “Cassia” was fixed by the official number she received on passing Galea Point. The first rule of the Bilbao Company shewed this to be so even according to the custom of the port. The “Cassia’s” turn arrived when a berth became vacant on 21st June, and from that date the defenders were liable in demurrage. Even if the delay was held to be caused by the custom of the port, that custom was contrary to the express terms of the charter-party, and therefore did not apply.¹

No. 13.

Oct. 29, 1891.

Stephens,
Mawson, &
Goss v. Mac-
leod & Co.

The “Cassia.”

Argued for the respondents;—In order to get a berth for the ship when she arrived arrangements had to be made beforehand in regard to the particular deposit at which she was to be loaded. The fourth and fifth rules of the Bilbao Company shewed that it was in their power to send a vessel to take her turn at a particular deposit. The “Cassia” was berthed in her turn according to the custom of the port, and the appellants were therefore not entitled to demurrage.²

At advising,—

LORD JUSTICE-CLERK.—The defenders in this case chartered a steamer called the “Cassia” from the pursuers. The charter-party stipulated that the vessel should “proceed to Portugalete, or any other usual ore loading place in the River Nervion, not above Luchana, as ordered by merchants’ agents on arrival, or so near thereunto as she may safely get, and there load in the customary manner from the factors of the said merchants a full and complete cargo of iron ore.” The stipulation as to berthing is that the steamer is “to be loaded at the rate of not less than 400 tons per working day, as customary (Sundays and holidays excepted), after being berthed in turn.”

The facts of the case as they occurred in their order are these. The “Cassia” proceeded on her voyage and arrived opposite the signal station at Galea Point on 17th June 1890. There she received a number for berthing, No. 4. She then anchored and waited to be berthed. On the same day as she arrived the master gave notice to the defenders by letter stating that the “Cassia” was now

choice of a cargo, and have their arrangements with the mineral owners deranged, in order that the ship may be loaded at another ‘deposit’ which happens to be immediately available. But it is said that the defenders should have known, and did know, that the turn list for the deposit of ore to which the ‘Cassia’ was ordered was very full, and that her detention was probable. Detention in this way is not in any fair or reasonable sense attributable to the merchant. The delay is occasioned by the state of the port, and, unless he has guarded against it by his bargain, falls upon the ship, which is only entitled to be berthed in turn at the place where alone the cargo arranged for her can be loaded. The defenders were bound to have a ready cargo, and it is not disputed that they had one at a certain place; but if, at a port where there are various ores, and various loading places or deposits for these ores, a ship-owner means to get dispatch by being allowed to load that ore which happens to be lying at a vacant loading place, irrespective of the merchant’s previous arrangements, he must surely stipulate for it. I cannot accept the view that under this charter-party, and the practice of the river, the merchant was bound to supply such ore as would give the ship regular turn in the sense for which the pursuer contends. That view ignores the requirements of the consignee to whom the charterer may have sold his cargo, and there is no attempt to prove that all the ores shipped in Bilbao River are equally useful to all buyers in all parts of the world, or even at Glasgow, whither the ‘Cassia’ was to proceed.”

¹ Dall’ Orso v. Mason & Co., Feb. 4, 1876, 3 R. 419; Holman v. Peruvian Nitrate Co., Feb. 8, 1878, 5 R. 657.

² Postlethwaite v. Freeland, June 7, 1880, L. R., 5 App. Cas. 509; King v. Hind, April 27, 1883, L. R. Ireland, 12 Q. B., C. P. and Exch. Div. 113.

No. 13.

Oct. 29, 1891.
 Stephens,
 Mawson, &
 Goss v. Mac-
 leod & Co.

The "Cassia."

ready to receive cargo, and that his time would commence according to the charter-party. On 21st June he found that certain vessels which had arrived later than his ship, and received later numbers for berthing when they passed the signal station, had been put into berth in order to receive cargo, although he had not got a berth. He therefore wrote the defenders stating this fact, and giving notice "that the s.s. 'Cassia' time will commence from noon on the 21/6/90 as per charter-party at Glasgow, June 7th, and that I shall also protest and hold you responsible for all detention that may ensue." And on 25th June he again wrote,—"Please take notice that the above steamer 'Cassia's' time will expire at noon to-morrow, 26/6/90,—after which date I shall claim demurrage according to terms of charter-party."

But the defenders maintain that under a certain custom of the port, although certain vessels which arrived later than the "Cassia" were put in to be loaded before her, the charterers of the vessel are not liable for her detention, because according to that custom each vessel which arrived at the port was sent to be loaded at a particular deposit, and the number of vessels at the deposit to which the "Cassia" was sent was such that she could not be berthed till the 27th of June.

I am of opinion that the defenders' contention cannot be given effect to. The charter-party provides that the vessel is to be "berthed in turn," and there is nothing to shew that this implies anything more than the ordinary meaning of the phrase, viz., that the vessel was to get a berth according to the number she received on entering the port. It is said that the ship captain ought to have known that there were certain rules in use at the port for regulating the loading of vessels "in turn," especially rule 5, shewing that these words had a different meaning from the one they ordinarily bear. But I think that rule has got nothing to do with the question. It bears upon the face of it to be a regulation merely to enable the authorities at the port to decide whether two vessels can both be loaded at the place at which they present themselves at the same time, or whether one must wait until the other is loaded. That does not to me appear to be at all inconsistent with the right of shipowners to demurrage if vessels coming into port after their vessel are put to berth before it.

I therefore think that the interlocutor of the Sheriff-substitute should be recalled. I do not go into the matter at greater length as I have perused the opinion of Lord Trayner in which the case is fully stated. I quite agree with that opinion, and have therefore confined myself to these general observations.

LORD YOUNG.—The Sheriff very properly points out that the port with the custom of which we are here concerned is the port of Bilbao. The town itself, which is the ancient capital of Biscay, is situated on the River Nervion, about ten miles up from the mouth, and the port, which is the principal port in the north of Spain, extends from the town down the whole course of the river to the sea. Portugalete is the name of the lowest reach of the river, and to it iron, which is the principal export, is (for the convenience of larger vessels) carried by the Bilbao River Railway Company and shipped from wharves apparently provided by the railway company, and maintained and conducted with the sanction and under the supervision of the harbour authorities. The limits to which the name Portugalete applies, if definite, have not been proved, but it is proved that there are at this place, whatever the length of it, several loading places for iron with distinguishing names or numbers, and assigned respectively

to different mineowners or iron exporters with a view to the convenience of the export trade of the port. Nor are the loading places thus provided confined to Portugalete, but extend up the river towards the town of Bilbao. One at least of the witnesses speaks to "a number of loading places in the river," necessarily above Portugalete, and it is noticeable that the charter-party immediately in question provides that the ship shall "proceed to Portugalete or any other usual ore loading place in the River Nervion, not above Luchana, as ordered by merchants' agents on arrival." This shews clearly enough that the loading was to be where the merchants' agent ordered after the arrival of the ship, provided only that the place should not be above Luchana.

No. 13.

Oct. 29, 1891.
 Stephens,
 Mawson, &
 Goss v. Mac-
 leod & Co.
 The "Cassia."

It is proved that the merchants' agent on receipt of the telegram announcing the sailing of the ship on 11th June, ordered Mr Victor de Chavarri, of Bilbao, to have the stipulated cargo ready against the time of her arrival, and to see that it was shipped as soon as the vessel was in its due order according to the custom of the port berthed to receive it. It is also proved that this was done in due and ordinary course without the delay of an hour.

The place of deposit and loading assigned by the harbour authorities to Chavarri was known as the "Penuco deposit," and on the arrival of the ship in the river the master was ordered to have it berthed there as soon as its turn came. It so happened that there were three ships in turn before her, but these were loaded and dispatched without any avoidable delay, and when her (the "Cassia's") turn came she was berthed and loaded with all possible expedition. This is proved, and nothing to the contrary is even suggested.

The action is based on the averment that the "Cassia's" "time for loading in regular turn commenced at noon on 21st June, but she was not berthed until about 8 A.M. on 27th June," and if the averment is true the action is well founded, and otherwise not. If her turn did not come till the 27th there is no reason for complaint on account of the delay or the time the vessel was detained. Now, this complaint of failure to get her turn is explained by the master in his evidence when he says: "The turn of the 'Cassia' for loading arrived on the 21st at noon. She was not loaded in turn. The s.s. 'Ingoldsby,' the s.s. 'Petunia,' and the s.s. 'Navarra' were loaded before the 'Cassia' after her turn arrived. The 'Ingoldsby' arrived on the 19th, A.M. I cannot say when she left, unless I am allowed to refer to the turn list. The 'Ingoldsby' was put under the tip on the 21st—I believe at noon."

There is no other specification or explanation of the complaint. But these vessels were none of them entered for the same loading place as the "Cassia," but for others which accidentally, although fortunately for them, chanced to be sooner vacant than the Penuco. I am unable to see the relevancy of this fact. There was no undue preference given to these vessels over the "Cassia," and the delay of the "Cassia's" turn at the Penuco would have been exactly the same had they never arrived at all, and the places where they got the cargoes they wanted been unoccupied, or, indeed, non-existent. Would it have been relevant or pertinent to say that had it pleased the merchants' agent to order the "Cassia" to one of the numerous loading places further up the river, but not above Luchana, she might have been loaded sooner than at the Penuco?

I see no reason to doubt the propriety and expediency of the rules prescribed and followed at this great iron exporting port, and constituting its custom. They have existed and been observed for many years with apparently universal approval. There is not a word in the evidence condemnatory of them, and that

No. 13.

Oct. 29, 1891.
Stephens,
Mawson, &
Goss v. Mac-
leod & Co.

The "Cassia."

they were exactly followed in the present case does not admit of dispute, and is not disputed. The master of the "Cassia" does indeed say that he has no knowledge what the term deposit with reference to iron ore at Bilbao means, and cannot say from what deposit the "Cassia" was loaded. This cannot be true, for he says himself,—“I acquired the knowledge of the practice at Bilbao having been there on previous voyages. The 'Cassia' had loaded ore on more than one occasion at Bilbao previously.” The ignorance he alleges is incredible, if the evidence of Mr Penlington and Mr Macleod is to be believed, and is, indeed, contradicted by the whole tenor of the evidence. But it would be idle to dwell on this topic, for if this witness was so stupid or non-observant as to be ignorant of the custom of a port which he had frequently been subjected to, and which was familiar to all others acquainted with the port, the circumstance would be really immaterial.

It would, in my opinion, be unwarrantable and unbecoming to censure the rules and customs of the port of Bilbao, or to condemn the defenders as wrongdoers to the pursuers for submitting to them as they did, exactly as all others did, and continue to do. Then in what respect did the defenders fail in their duty to the pursuers? The only suggestion of omission on their part which I have heard is that they ought to have had the Penuco deposit inserted in the charter-party as the loading place. But they were surely entitled to bargain, the pursuers being willing, that the loading should be at any loading place in the River Nervion not above Luchana which their agent should order after the arrival of the vessel. Further, the naming of Penuco in the charter-party could not even conceivably have benefited the pursuers. The suggestion that they might in that case have refused the charter-party altogether would be fanciful.

LORD RUTHERFURD CLARK.—I have found this case attended with considerable difficulty. But on the whole, I have come to agree with the opinion of Lord Trayner, which I have read.

LORD TRAYNER.—This is a claim for demurrage on account of the detention of the pursuers' vessel in loading a cargo of iron ore at Portugalete. The material facts in the case are not in dispute—the question between the parties depends rather on the construction and effect of the charter-party entered into between them, under which the cargo in question was loaded. By that charter-party it was provided that the "Cassia" should proceed to Portugalete or any other usual ore loading place in the River Nervion and there "load in the customary manner" from the factors of the charterers a full and complete cargo of iron ore, and being so loaded should therewith proceed to Glasgow. It was further provided that the "Cassia" should be "loaded at the rate of not less than 400 tons per working day as customary (Sundays and holidays excepted) after being berthed in turn . . . and ten days on demurrage over and above said lay-days at 16s. 8d. per hour." The ship reached Portugalete, the only loading port to which she was ordered, on 17th June 1890, on which day notice was given to the charterers that the ship was ready to receive cargo. She was not, however, berthed till the 27th June, when her loading commenced, which was completed on the evening of the following day. There was certainly no delay in the loading after it commenced, but the question is, whether the defenders are liable for the detention of the vessel before the loading commenced.

The pursuers say that the "Cassia" if berthed "in turn" according to the terms of the charter-party would have been berthed on 21st June; the defenders say that the "Cassia's" turn to be berthed did not come before the 27th June, when she was in fact berthed and the loading commenced. What, then, is the meaning of the provision in the charter-party that the "Cassia" was to be "berthed in turn," and what was the right of the pursuers under that provision? The natural and ordinary meaning of the words "berthed in turn" would seem to be that the vessel should be berthed for loading in turn with other vessels, according to the order of their arrival at the port, and there is nothing in the charter-party to give these words any meaning other than their ordinary meaning. This meaning, too, was what the words imported according to the rules in force at Portugalete "for regulating the turns of vessels loading." According to these rules "the turn for loading vessels will be taken from the official list of arrivals, each vessel being entered on the company's turn list according to the number given as from the semaphore station at Galea Point." The "Cassia's" turn according to that rule was No. 4 on the 17th of June. That turn, however, she did not get, for it is admitted by the defenders that several vessels which arrived after the 17th of June were berthed and loaded before the "Cassia" was berthed. It was the berthing and loading of these vessels which led to the "Cassia" not obtaining a berth in turn, and to the claim which the pursuers now make for demurrage. If therefore nothing but the terms of the charter-party and the rule of the port to which I have referred are considered, it seems to me to be clear beyond dispute that the "Cassia" was not berthed in turn, with the result that she was detained beyond the stipulated lay-days, and that demurrage is according to the contract due to the pursuers for such detention.

The defenders, however, refer to another rule of the port as supporting their defence. It is rule 4, which provides,—“No vessel will be considered as being ready to load, or available to take turn, unless she has been duly advised to load by the shipper of the mineral; . . . also that there exists a sufficient quantity of mineral in the deposit to load a full and complete cargo,” &c. I think this rule has no bearing on the question before us. It provides for the shipper or charterer doing two things as necessary to any vessel taking or being available for taking her turn at a loading berth. But these two things are incumbent on every shipper as in a question with the owner whose ship has been chartered, whether expressed in the rules of a particular port or not, and any failure on the part of the charterer to observe these things, if such failure resulted in the detention of the chartered vessel, would render the charterer liable for demurrage. It is always the duty of a charterer to advise his factor or agent at the port to which the chartered ship is going that the vessel has been chartered, in order that the factor or agent may await the arrival of the vessel and procure her a loading berth. It is equally the duty of the charterer to have his cargo ready to load when the chartered ship arrives, at least to have it in such readiness that he may be able to load it within the stipulated lay-days. This rule which I have last mentioned has no reference to any duty to be performed by the ship; it is a regulation which provides as between the port authorities at this particular port and the shipper of minerals, but between them only, that unless certain conditions are complied with a ship will not be recognised as available to take a turn for loading. If these conditions are not observed, the shipper must take the consequences.

No. 13.

Oct. 29, 1891.

Stephens,
Mawson, &
Goss v. Mac-
leod & Co.

The "Cassia."

- No. 13.** The defenders' case is, that under this rule they had advised the "Cassia" as a vessel to take ore from a certain deposit, and that this could only be loaded at certain berths—to one of which the "Cassia" was admitted in turn with vessels destined to carry ore from the same deposit, and loaded at the same berths. It appears to me, however, out of the question to say that the shipper by so advising the port authorities could alter the contract in the charter-party or limit the right which that charter-party gave to the pursuers. The charter-party makes no reference to any particular deposit or any particular berth. It stipulates that the ship shall proceed to Portugalete and there load a cargo of iron ore for which she shall be berthed in turn—that is, berthed in turn with vessels as they arrive at Portugalete for iron ore. If the defenders had intended to bargain for what they now contend, they should have stipulated in the charter-party for the right to berth the "Cassia" "in turn" at some particular berth, or at some berth where the ore of a particular deposit alone was shipped. They did not do so, and I think they are now attempting to add to their contract a clause or condition to which the pursuers never agreed. The charter-party obligation on the ship was to proceed to Portugalete and there load a cargo of iron ore on being berthed "in turn." The corresponding right of the ship was to be berthed "in turn" at any berth where iron ore was loaded at Portugalete. There was no contract, and therefore no obligation binding the ship to wait her turn at a particular berth, or at a berth where only the ore of a particular deposit was loaded.
- The charter-party, I should not omit to notice, provides that the "Cassia" is to be loaded "in the customary manner," and the defenders say that that includes the condition for which they now contend. I am satisfied it does not. The "customary manner" of loading was to be followed in loading the ore—that is, by shoot, by hand, by lighter, or whatever manner was usual and customary at Portugalete for loading iron ore. It had nothing to do with the place of loading, and it will be observed that while the charter-party provides that the "manner" of loading is to be the customary one, the provision about being "berthed in turn" is not qualified by any reference whatever to the custom of the port. As I have said, however, the custom of the port as expressed in the rule I first referred to, would have entitled the "Cassia" to a berth on the 21st of June.
- The result of my opinion is that the "Cassia" was not berthed in turn in terms of her charter-party, and that, in consequence thereof, demurrage was incurred for which the defenders are liable. It is not easy to fix the exact amount of the demurrage due, as the hour when the ship should have been berthed on the 21st is not well ascertained. But allowing that her turn came at any working hour of the 21st, and seeing that the loading was not finished till six or eight o'clock on the evening of the 28th, the pursuers do not overstate their claim when they state it at fifty-six hours' demurrage. This entitles them to decree for the sum of £45, 16s. 8d.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against: Find in fact (1) that the 'Cassia' arrived at Portugalete to fulfil the contract contained in the charter-party mentioned on record on 17th Jun 1890; (2) that intimation was given on the same day to the respondents or their agent that said ship was then ready to receive cargo; (3) that said ship was not berthed for loading cargo until

the 27th June; (4) that according to the terms of said charter-party and the custom of said port the 'Cassia' would have been berthed on the 21st June if berthed in turn, and should have been berthed on that day and her loading commenced; (5) that the failure to berth the 'Cassia' in turn as aforesaid was a breach of said charter-party on the part of the respondents; and (6) that said failure to berth and load the 'Cassia' in turn as aforesaid resulted in the 'Cassia' being detained for a period of at least fifty-six hours beyond the lay-days specified by the charter-party: Find in law that the respondents are liable to the appellants in demurrage at the rate specified in said charter-party for the period of detention foresaid: Therefore decern against the respondents to make payment to the appellants of the sum of £45, 16s. 8d. sterling, with interest as concluded for: Find the respondents liable in the expenses of process both in this Court and in the Sheriff Court," &c.

No. 13.
Oct. 29, 1891.
Stephens,
Mawson, &
Goss v. Mac-
leod & Co.
The "Cassia."

J. & J. ROSS, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

ROBERT HILLHOUSE, Pursuer (Respondent).—*McKechnie—Shaw.*
WILLIAM WALKER, Defender (Appellant).—*Crabb Watt.*

No. 14.

Nov. 3, 1891.
Hillhouse v.
Walker.

Process—Sheriff—Appeal—Objection to competency of appeal not stated in time.—In a Sheriff Court appeal for jury trial, the Court in the Single Bills, without objection, ordered issues, and subsequently put the case to the Summar Roll. When the case came out for hearing in the Summar Roll the respondent objected to the competency of the appeal on the ground that the time for appealing had elapsed. Held that it was competent for the Court to entertain the objection although it had not been stated in the Single Bills.

Skirra v. Robertson, June 7, 1873, 11 Macph. 660, followed.

ROBERT HILLHOUSE, aerated water manufacturer, Old Kilpatrick, presented a petition in the Sheriff Court at Dumbarton against W. Walker, aerated water manufacturer, Bridgend, Dumbarton, for interdict and damages.

1st DIVISION.
Sheriff of
Stirling, Dum-
barton, and
Clackmannan.

On 3d April, the Sheriff-substitute (Gebbie) granted perpetual interdict, and allowed the pursuer a proof of his averments of damage, and to the defender a conjunct probation.

On 9th April, the defender appealed to the Sheriff (Blair), who, upon 19th June, dismissed the appeal, of new granted perpetual interdict, and remitted to the Sheriff-substitute to proceed with the cause.

On 23d June, the Sheriff-substitute fixed 15th July as a new diet for proceeding with the proof allowed by interlocutor of 3d April.

On 7th July, the defender appealed for jury trial under section 40 of the Judicature Act, 1825.

On 15th October, when the case was called in the Single Bills, the Court appointed the parties within eight days to lodge the issues proposed by them for the trial of the cause. Thereafter the case was sent to the Summar Roll.

On 3d November, when the case appeared in the Summar Roll, the pursuer objected to the competency of the appeal upon the ground that the defender had failed in terms of section 5 of the Act of Sederunt, 11th July 1828, to appeal within fifteen days of the interlocutor allowing proof,¹ whether the days were held to run from the date of the Sheriff-

¹ Davidson v. Davidson's Executors, July 7, 1891, 18 R. 1069; Kinnes v. Fleming, Jan. 15, 1881, 8 R. 386; Williams v. Watt & Wilson, May 28, 1889, 16 R. 687.

No. 14.

Nov. 3, 1891.
Hillhouse v.
Walker.

substitute's interlocutor of 3d April or of that of the Sheriff of 19th June. It was said that the objection came too late, as it ought to have been stated in the Single Bills. In *Ross v. Brims*,¹ however, the Court *ex proprio motu* took up a similar objection at this stage.

Argued for the defender;—The objection came too late. Like any other objection to a step of procedure as not being conform to Acts of Sederunt, it must be taken in the Single Bills, otherwise the party making it would be held to have waived it.

LORD PRESIDENT.—As regards the appealability of the interlocutor allowing proof, I think each and all of the points raised are concluded by authority. Whether the fifteen days are to be held to run from the 3d of April, the date of the Sheriff-substitute's interlocutor which allowed the proof, or from the 19th of June, the date of the interlocutor by which the allowance of proof was affirmed by the Sheriff-principal, the appeal comes too late, and the case of *Davidson* quoted by Mr Shaw is directly in point.

It has been pointed out that this objection to the competency comes at an inappropriate stage. Here again I am bound to say that I cannot get over the case of *Shirra v. Robertson*, in which what turned out to be an incompetent appeal was sent by interlocutor to the roll, and only objected to when the case came out for hearing. The Court held that they were bound to determine the question of competency when that was raised, even when this was only done at the stage at which the merits were to be discussed. I confess to thinking that, having to deal with an appeal arising *in pari casu* with the appeal in the case of *Shirra*, we must follow that case, and all the more because I observe that the Lord President states that the case was decided after consultation with the Judges of the Second Division.

We must then, I think, sustain the objection to the competency.

LORD ADAM concurred.

LORD M'LAREN.—I agree that, having regard to the case of *Shirra v. Robertson*, we must hold this appeal incompetent.

I should like, however, to be allowed to say that I should not be inclined to regard the circumstances of that case as constituting a precedent for extending the principle there applied to other cases. There are undoubtedly conditions of procedure depending on Acts of Sederunt which may be waived by parties in litigation, and especially such as relate to the time of lodging papers, and according to our practice such conditions will not be enforced by the Court if the parties are agreed in dispensing with them.

As a general rule I should say that where objection is to be taken to a step of procedure as not being taken within the time prescribed by an Act of Sederunt, the objection ought to be taken *in limine*. If it is not taken when the case appears in the Single Bills, the objection may be held to be waived, so that it cannot be revived after the case has been sent to the roll.

That principle has not been applied to the case of appeals from Sheriff Courts, and it is desirable that we should not disturb the existing rule of practice. If the point were open, I must say I cannot see why parties should not be allowed if they please to waive difficulties of the kind, or why, if a respondent has not discovered that he is injured by such an informality, he

¹ *Ross v. Brims*, March 14, 1878, 15 S. L. R. 438; *Shirra v. Robertson*, June 7, 1873, 11 Macph. 660, 45 Scot. Jur. 412.

should be treated as if he were injured by it, when the case comes on for hearing on the merits. **No. 14.**

Nov. 3, 1891.
Hillhouse v.
Walker.

LORD KINNEAR concurred.

THE COURT sustained the objection to the competency of the appeal.

CARMICHAEL & MILLER, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

MRS MARY ANNE NICHOLSON AND OTHERS (Alexander Nicholson's Trustees), Pursuers (Reclaimers).—*Rankine—Goudy.*

MRS CATHERINE MARGARET KENMORE OR M'LAUGHLIN AND ANOTHER, Defenders (Respondents).—*Johnston—Burnet.*

Right in security—Bond and disposition in security—Assignment of portion of bond—Pari passu ranking—Power of sale—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. c. 101), secs. 119, 122, and 123—Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94), sec. 48.—Where the holder of a bond and disposition in security assigns a portion of the bond to another with a declaration that the debts are to rank *pari passu*, either creditor may bring the subjects of the security to sale for payment of his own portion of the debt without consent of the other, but the security of the other will remain unaffected thereby.

IN 1873 Mr James Thomas, of Transy, granted in favour of the trustees of the late Mr Alexander Nicholson, banker, Cupar-Fife, a bond and disposition in security whereby he conveyed to them the lands of Pinnacle, in security of the sum of £6000. The bond contained a power of sale in default of payment. The lands were already burdened with a prior bond for £7000. **1ST DIVISION.**
Lord Low.

In 1883 Nicholson's trustees assigned and disposed to Miss Catherine Margaret Kenmore (afterwards Mrs M'Laughlin) the bond and disposition in security, and also the lands of Pinnacle, "but that only to the extent of the sum of £2000." The assignment contained this clause,—“Declaring always, as it is hereby expressly provided and declared, that these presents, and the said sum of £2000 sterling, . . . shall in all respects rank and be preferred *pari passu* with the said bond and disposition in security, and the remainder of said sum of £6000. . . .”

Mr Thomas having died on 1st June 1883, his testamentary trustees granted bonds of corroboration and dispositions in security to the extent of £4000 as regarded Nicholson's trustees, and of £2000 as regarded Miss Kenmore, and in further security they conveyed to both bondholders the lands of Transy. Each bond of corroboration contained a clause, *mutatis mutandis*, in similar terms, giving equal rights to the two creditors, the clause in the bond to Nicholson's trustees running thus,—“Providing and declaring that the foresaid principal sum of £4000, and interest and penalties herein contained, and the said sum of £2000, the balance of the foresaid sum of £6000 contained in the said bond and disposition in security (with interest and penalties), now due to the said Miss Catherine Margaret Kenmore, and secured over the subjects and others before described, . . . shall be ranked and preferred *pari passu* on the said subjects and others above conveyed, and the rents, feu-duties, and casualties thereof, and also on the prices and proceeds to be realised therefrom, and that irrespective of the order of priority in which these presents and the said bond of corroboration and disposition in security in favour of the said Miss Catherine Margaret Kenmore have been or shall be registered in the Register of Sasines.”

In 1887 Nicholson's trustees and Mrs M'Laughlin, after having called

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

up the loan, entered into possession of the lands of Pinnacle and Transy under an action of maills and duties. The free rents of Transy were not however sufficient to meet the interest upon prior bonds, and the free rents of Pinnacle were not sufficient to pay the interest upon the bonds to which Nicholson's trustees and Mrs M'Laughlin had right.

In 1889 an agreement was entered into between Nicholson's trustees, Mrs M'Laughlin, and Thomas' trustees, whereby the last undertook to convey certain other lands in security, and also to grant a deed of authority containing the fullest powers of management and sale. Accordingly a deed of authority, dated 6th and 15th November 1889, was executed, whereby Thomas' trustees granted as regarded two-thirds *pro indiviso* of the security subjects to Nicholson's trustees, and as regarded one-third *pro indiviso* to Mrs M'Laughlin, full power to realise the several security subjects as if they were absolute and uncontrolled proprietors, including power in their own names as proprietors, or as heritable creditors, or as factors and commissioners for Mr Thomas' representatives, to sell the security subjects. It was declared that the powers granted in the deed of authority should be in addition to, but should not in any way prejudice or curtail the powers and rights of the parties as heritable creditors under the original bond and disposition in security.

Mr Thomas' trustees were unable to pay the sum contained in the bond, and after the usual requisition, the lands of Pinnacle were three times exposed for sale at £11,500, £11,500, and £11,000 respectively, but no purchaser was found.

Nicholson's trustees were desirous of realising the security subjects for the purposes of the trust under which they acted, and proposed to expose the lands again for sale at the price of £10,000. Mrs M'Laughlin refused to consent to this proposal upon the ground that she believed that by holding the property for a time a larger price might be obtained for it.

On 26th February 1891 Nicholson's trustees raised an action against Mrs M'Laughlin, her husband, for his interest, and Mr Thomas' trustees, concluding for declarator, *inter alia*, that the pursuers were entitled, "after due advertisement and otherwise fulfilling the requirements of the Titles to Land Consolidation (Scotland) Act, 1868, the Conveyancing (Scotland) Act, 1874, and other statutes in reference to sale of lands by a creditor under a heritable security, so far as such requirements had not already been fulfilled by them, to sell and dispose in whole or in lots of the said lands and estate of Pinnacle by public roup at Edinburgh; . . . and that the defender Mrs Catherine Margaret M'Laughlin, as creditor in the said bond and disposition in security to the extent of the said principal sum of £2000, interest and consequents, conform to assignation aforesaid, and the defender Henry J. M'Laughlin, for his interest, are bound to consent to and concur in such sale or sales, and failing their doing so within fourteen days after the date of the decree to that effect to follow hereon, that the pursuers are entitled to dispense with such consent and concurrence, and to proceed to sell and dispose of said lands and estate as if the same had been granted; and that on a sale being so carried out, or upon each sale so carried out, if the lands are sold in lots, the pursuers, or their assignees or representatives, either alone or with consent and concurrence of the defenders Mrs Catherine Margaret M'Laughlin and Henry J. M'Laughlin, are and shall be entitled to grant in favour of the purchaser or respective purchasers at such sale or sales, or to his or their assignees or representatives, an absolute irredeemable disposition or dispositions of said lands and others, or of the parts thereof so sold, containing all usual and necessary clauses, and all other deeds necessary for completing the right and title or rendering the sale effectual

to a purchaser or purchasers: And it ought and should be found and declared, by decree foresaid, that the sale or sales to be so carried through by the pursuers, and the disposition or dispositions and other deeds to be so granted by the pursuers to the purchaser or purchasers or their foresaids, whether such sales, dispositions, or other deeds are or shall be made or granted with or without the consent and concurrence of the defenders Mrs M'Laughlin and Henry J. M'Laughlin, shall be as valid and effectual in every respect, and shall confer on the purchaser or respective purchasers as good and complete a right and title, and generally shall have the same effect, all as if the same had been made and granted by the pursuers and the defenders Mrs M'Laughlin and Henry J. M'Laughlin jointly as holders of the said bond and disposition in security, or otherwise for their whole respective rights and interests in or to the said lands and others." And further, for declarator that the pursuers on receipt of the price should be bound to apply it in the first place in payment of preferable encumbrances and expenses, and to apply the balance as follows:—(1) To pay the pursuers and Mrs M'Laughlin in full if the balance proved sufficient for the purpose, and to consign the surplus if any in bank; (2) if the balance proved insufficient, to divide it between them *pari passu* and according to their respective rights in the bond. The summons further contained alternative conclusions for declarator that the pursuers were entitled to sell the lands by public roup, and to grant a valid title in favour of a purchaser, the price after payment of all charges preferable to the debts of the pursuers and Mrs M'Laughlin to be proportionally divided between them according to their respective shares in the bond and disposition in security, or otherwise for judicial sale, and to have the pursuers and Mrs M'Laughlin ordained to execute the necessary deeds in writing for giving the purchaser complete title to the lands, and that the price of the subjects when sold should, after deduction of preferable charges, be divided between the parties *pari passu* and rateably according to their respective shares in the bond; or otherwise, in the event of its being found necessary for the explication of the rights of the parties to the action, that the Court should sequestrate the estate conveyed by the bond, and appoint a judicial factor to realise the security subjects.

The pursuers founded on the above deeds, and averred that they were advised that £10,000 would be a fair sum at which to expose the estate of Pinnacle for sale. They were apprehensive that the value of the estate might decrease, and it was necessary for them to realise the subjects as the income of the trust-funds under their charge had been insufficient to pay in full the annuity to which the widow of the late Mr Nicholson was entitled out of the trust funds held by them. They further averred that they had offered to assign to Mrs M'Laughlin their debt of £4000 and interest, with the security therefor, at the price of £2500, which represented the value of the pursuers' interest in the subjects upon the basis of a price of £10,750 being received for the property, but she had declined to take the assignation.

Mrs M'Laughlin and her husband (who alone defended the action) averred that, looking to the price paid originally for the estate by Mr Thomas and the sums expended by him upon it, they believed that by holding the property for a time a larger price than £10,000 would be obtained for it.

The pursuers pleaded;—(1) The pursuers being, in virtue of their bond and disposition in security libelled on, and, *separatim*, of the deed of authority above mentioned, in the position of joint or common holders *pro indiviso* of the said subjects of security, they are entitled to insist in the present action against the defenders. (2) The pursuers, in respect of

No. 15.

Nov. 4, 1891.

Nicholson's

Trustees v.

M'Laughlin.

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

the defenders Mrs M'Laughlin and Henry J. M'Laughlin refusing to concur in the proposed sale under the bond and disposition in security, are entitled to carry through the sale at their own hands, and grant a complete and unencumbered title to the purchaser upon the footing of accounting to Mrs M'Laughlin for the proportional share of the price effeiring to her assignation in security. (3) The said lands being incapable of division according to the just rights and interests of all concerned, the pursuers are entitled to have decree of sale, as also decree relative to the disposal of the price, as concluded for.

The defenders pleaded, *inter alia*;—(1) The statements of the pursuers are not relevant and sufficient to sustain the conclusions of the summons. (3) The pursuers having assigned to the defender Mrs M'Laughlin a portion of the sum in the said bond, are not entitled either to bring the security subjects to sale at their own hand, or to compel these defenders to concur in bringing them to sale, except upon the footing of providing full payment to these defenders of the portion of the bond so assigned to Mrs M'Laughlin. (4) The pursuers are not *in titulo* to give a statutory title to a purchaser without the concurrence of these defenders, who cannot be compelled to give that concurrence, except on payment.

On 30th June the Lord Ordinary (Low) found that the pursuers' averments were not relevant or sufficient to support the conclusions of the summons: Therefore sustained the first plea in law for the defender, dismissed the action, and decerned.*

* "OPINION.— . . . The pursuers maintain that this is truly a case of common property, that the ordinary rule of law that no one can be forced to remain *in communione* applies, that as the subject is indivisible it must be sold and the proceeds divided, and that the only way in which that can be accomplished is by a sale of the lands which are the subjects of the security.

"The question is one of novelty, but I have come to the conclusion that this is not a case to which the rules in regard to common property upon which the pursuers found, apply.

"The parties are not common proprietors of the lands which the pursuers desire to have sold. They have a joint infeftment in the lands in security, but that infeftment is only a burden upon the right of the granter of the security, and they can never under the bond and disposition in security themselves acquire a right of property in the lands. It is true that they can give an absolute right of property to another, but they can do that only by virtue of the mandate which they hold from the granter. It is therefore difficult to see how the lands, of which the parties are not and never can be proprietors, can be sold on the ground that they are common property, and yet it is these lands, and nothing else, which the pursuers seek authority to sell.

"The summons contains a variety of alternative conclusions, intended, no doubt, to meet different views which might be taken of the rights of parties; but, as I have pointed out, the pursuers' case was entirely rested upon the argument that the claim was one of the sale of common indivisible property. If I had been of opinion that that view was sound, I should have thought that the proper conclusion to give effect to would have been the second alternative conclusion, viz., that for a judicial sale. The first series of conclusions contemplate the pursuers being authorised to sell under the bond without the defender's consent. Such procedure would not be appropriate to the sale of common property, and it was not maintained that if the argument that there was here common property failed, it was in the power of the Court (at all events in the circumstances disclosed on record) to dispense with the consent of the defender, and authorise the pursuers to sell, and to grant a good title to the purchaser without her consent.

"It may be that there is some hardship to the pursuers in not being able to realise the security subjects, but they have themselves to blame, because by the

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

The pursuers reclaimed, and argued;—The conclusions of the summons were framed upon the footing (1) that the power of any one of several *pari passu* bondholders to sell the subject of security so as wholly to disencumber it and to divide the price proportionally was within the purpose and meaning of the Conveyancing Acts of 1868 and 1874, or if not, that (2) such power existed at common law; and the pursuers were entitled to have their rights declared under one or other of these alternatives. Taking the latter alternative first, and assuming that the case of *pari passu* bondholders had been overlooked by the statutes, the common law warranted a sale. The position of matters was this: There had been but one debt originally constituted, of which the property disposed in security was an adjunct, and the original holders of the security had assigned to the defender Mrs M'Laughlin a portion of this debt upon the footing of giving off exactly the same rights in regard to the security subjects as they themselves held. The two parties therefore stood towards each other in the relation of *pro indiviso* holders of a common subject. The owners of the property being left out of view (and as they did not defend the action they were to be presumed to have no interest in the subjects), the pursuers and defenders were substantially in the position of coproprietors of a *res communis*. But it was well settled that any one of several coproprietors had a right to insist that the property, where incapable of division, should be brought to sale, and his interest thereby made available to him in money.¹ Similarly in the case of several coheirs, any one of them could insist on a sale of the assets of the inheritance where these were indivisible, as, *e.g.*, where the whole estate consisted of a heritable bond or bonds. The same rule applied in the case of rights less than property, such as leases, adjudications, and in short in the case of every right in which there was a common interest in a common subject. The Lord Ordinary's view that there was a joint and indivisible mandate could not be maintained. But assuming that the rights of the two creditors were separate, then upon a sound construction of the Conveyancing Acts, the pursuers were entitled to sell the security subjects and pay off the

terms of the assignation which they granted to the defender, they put her into the position of being joint mandatory with them under the power to sell, and deprived themselves of the right of selling without her consent. There might be a case in which the refusal of a person in the position of the defender to concur in a sale was so manifestly unjust and prejudicial to the other creditors that the Court would, in the exercise of its equitable jurisdiction, be entitled to interfere. But no such case is disclosed here. The property has fallen in value, and the pursuers think that it is better to sell now in case of further depreciation, while the defender is hopeful that by holding the property for a time a better price may be obtained. Both these views are intelligible and reasonable, and as the right of the parties to sell rests upon a joint mandate, I do not think that it is possible for the Court to interfere with what is no more than a reasonable exercise of discretion upon the part of one of the mandataries.

"Under the additional powers given to the parties by the deed of authority, I do not think that the pursuers take any advantage, because, although in a question with the granters of that deed the parties to this action are entitled to deal with the lands as if absolute proprietors, they are not in a question *inter se* in a materially different position from that which they occupy under the bond and disposition in security. As under the latter deed they hold a joint mandate to sell, so under the former deed they hold a joint factory and commission to deal with the estate as if they were absolute proprietors. But under neither deed are they actually proprietors, and under both deeds the powers which they possess are joint powers, and must be exercised jointly."

¹ Bell's Comms. 5th edn. p. 64, 7th edn. p. 62; Milligan v. Barnhill, Feb. 8, 1782, M. 2486, Hailes' Decns. 897.

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

defenders. The language of sections 122 and 123 of the Titles to Land Consolidation (Scotland) Act, 1868, and section 48 of the Conveyancing (Scotland) Act, 1874,* was consistent with that view. No doubt the statutes did not expressly mention bondholders having a *pari passu* right of security, but as power was given to a heritable creditor exercising his power of sale to disencumber the heritable subjects both of prior and postponed bonds, the same power must by implication be extended to the creditor in relation to a bond ranking *pari passu* with his own. But the equitable way of disencumbering the lands in this latter case was not by paying the non-consenting *pari passu* bondholder in full, as the defenders contended, but by giving him a proportional share of the price according to his original agreement in his bond. A sale by the pursuers on the footing that the defenders' bond and assignation should be left undischarged was impracticable, except at such a price as would deprive them of nearly the whole value of their debt.

Argued for the defenders;—The conclusions of the action were irrelevant, being framed upon the theory that a heritable creditor had rights similar to those of a heritable proprietor. This was not so.¹ A heritable creditor possessed only limited rights; he was truly but the pledgee of the heritable subject, and at common law he had no power of selling the subject pledged. His only power was derived from the power of sale commonly inserted in the modern bond and disposition in security. Here the *pari passu* creditors had each an equal and separate power of sale. The right of each was independent of that of the other, and might be independently exercised. Hence their position even upon the analogy of ownership was that of part, not joint, owners.² They were not, however, owners in any sense, and had not therefore the title necessary to sue an action of division and sale, to which the conclusions of the present summons really amounted.³ The pursuers' true and only remedy was an action of ranking and sale under the Act 1681, cap. 17.⁴ Further, the power of sale under a bond and disposition in security must be exercised in accordance with statutory regulations. It was really a man-

* The Titles to Land Consolidation Act, 1868, sections 122 and 123, are quoted *infra* by Lord M'Laren in his opinion, p. 56.

Section 48 of the Conveyancing (Scotland) Act, 1874, provides:—"Provisions for disencumbering lands sold under heritable securities when no surplus emerges.—Where lands are sold by an heritable creditor under the powers competent to creditors in heritable securities, and it shall occur that no surplus remains after deducting the debt secured, with the interest due thereon and penalties incurred, and expenses in reference to the possession of the estate (if the creditor had been in possession), including expense of insurance, repairs, and management, and whole expense attending such sale, and after paying all previous incumbrances and the expense of discharging the same, it shall be competent to any notary-public to execute a certificate to that effect in, or as nearly as may be in the terms of schedule L, No. 1, hereto annexed, and the disposition by the creditor to the purchaser shall, along with such certificate, when recorded in the appropriate Register of Sasines, have the effect of completely disencumbering the lands and others sold of all securities and diligences prior and posterior to the security of such creditor, as well as of the security and diligence of such creditor himself, save and except when the security and diligence of such creditor shall be assigned by way of further or collateral security to the purchaser."

¹ Henderson v. Wallace, Jan. 7, 1875, 2 R. 272, per Lord President, p. 276; Scottish Heritable Security Co. v. Allan Campbell & Co., Jan. 14, 1876, 3 R. 333.

² Schaw v. Black, Jan. 15, 1889, 16 R. 336, per Lord Kinnear, p. 337.

³ Brock v. Hamilton, Jan. 27, 1852, 19 D. 701, note.

⁴ Cannon's Trustees v. Lake and Others, June 9, 1883, 21 S. L. R. 101.

date coming in place of the power to distress the debtor for non-payment, which was all the creditor had under the old heritable bond.¹ If the power of sale was exercised, its effect was to disencumber the lands sold of postponed securities only. The sale then must take place subject to and under reservation of all *pari passu* securities. The alternative conclusion for sequestration was only granted under very exceptional circumstances, and the only circumstance stated here was impecuniosity of the trust-estate.

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

LORD M'LAREN.—This is an action against certain persons who are assignees in a bond and disposition in security to the extent of £2000, the original creditor remaining infeft in the subjects to the extent of the other £4000 lent. Following upon the deed of assignation a bond of corroboration was granted by the representatives of the original borrower in favour of the pursuers. Another bond of corroboration was granted in the same terms in favour of the other creditor. These bonds embrace other subjects with which we have no concern.

But what we are concerned with is that in each of the bonds of corroboration there is a clause to the effect of giving equal rights to the two creditors. The clause runs thus,—Declaring that they “shall be ranked and preferred *pari passu* on the said subjects and others above conveyed, and the rents, feu-duties, and casualties thereof, and also on the prices and proceeds to be realised therefrom, and that irrespective of the order of priority in which these presents and the said bond of corroboration and disposition in security in favour of the said Miss Catherine Margaret Kenmore have been or shall be registered in the Register of Sasines.”

The literal and obvious meaning of such a clause is that, first, with regard to the rents, if the creditors should enter into possession, they shall divide the subjects between them rateably for the purpose of effecting payment of their interest, and if necessary of payment of the principal, and if the property comes to be sold for the benefit of the two heritable creditors, they are to be ranked rateably on the proceeds; but *ex figura verborum* nothing is said as to the order in which the creditors may exercise the powers of sale, or as to their respective rights in case of disagreement as to the time and mode of exercising the power.

It is contended by the pursuers that under the clause which I have read either of the persons in right of the security is entitled to call upon the other to consent, or (which I think is the same thing) that either is entitled without the consent of the other to sell just as if the other had given his consent to the sale, the result being that, under those conditions, this clause of *pari passu* ranking comes into operation.

The question is thus sharply raised whether under this clause or under the Acts of Parliament one of the two creditors in possession of the security subjects is entitled to sell them so as to prejudice the security of the other creditor, who has not assented to the sale.

In considering the Acts of Parliament, one must remember that the clauses are framed on the principle that all the rights which the parties are to have are given to them by the deed. The Act of 1868, in those clauses which treat of creditor's rights, confers no rights *vi statuti*, but gives forms of abbreviated

¹ Ross' Lectures, vol. ii. p. 393.

No. 15.

Nov. 4, 1891.
 Nicholson's
 Trustees v.
 M'Laughlin.

clauses which are to be inserted in the bond, interpreting them as having the same meaning and effect as the longer clauses. The effect of this is, that all the rights of the creditor in the bond are supposed to flow from the grantor, and to be contained in the bond, although you may have to go to the statute to find out the meaning of the short clauses thereby authorised. Turning to the 119th section, which gives the import of the abbreviated clauses, we find that the abbreviated clause giving power of sale is interpreted to mean that on making demand for payment in presence of a notary-public and witnesses, and after a period of three months is expired, it shall be lawful for the creditor, "immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose, in whole or in lots, of the said lands and others." Passing over the next two sections of the Act, we find that the 122d and 123d clauses are not interpretation clauses, but are statutory definitions of the powers consequent on the sale. The 122d section defines the obligation of the selling creditor to count and reckon for the surplus of the price, and it provides that he shall consign it, "after deducting the debt secured, with the interest due thereon, and penalties and expenses, and after paying all previous incumbrances, and the expense of discharging the same, in one or other of the said banks, or in a branch of any such bank, in the joint names of the seller and purchaser,"—that is, in order that the purchaser may not be involved in any question as to the application of the price.

If there is no surplus the 123d section comes into operation, and under it "the disposition by the creditor to the purchaser shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself."

Now, in the argument which has been addressed to us, alternative views of the rights of creditors were considered by both parties. One alternative suggested is that either of the creditors has an independent power of sale, and then the question is what is the effect of the exercise of the power by one creditor upon the rights of the other.

The second alternative is that there can be a sale only at the instance of the two creditors acting concurrently. If a sale can only take place by the joint authority and consent of both creditors, then I agree with all which has been said by the Lord Ordinary, to the effect that the Court has no discretionary power to give a higher right than that which the parties have constituted by agreement. The right of sale is given to the creditor for his own protection, and it is his opinion that must determine the question whether he will concur in the sale, the question for him being whether he is likely to realise the full benefit of his security by the proposed sale.

But I am unable to see any good reason for the suggestion which I think the Lord Ordinary has taken from the parties that the consent of a *pari passu* creditor is necessary to a sale.

I think that when a security is assigned to two parties for separate interests each creditor retains for his own protection all rights arising under clauses which may be considered executorial of the right of security; and in that view I cannot see that either the debtor or the *pari passu* creditor has an interest to prevent the other *pari passu* creditor exercising his power of sale. The debtor has to pay up the debt. The other creditor can have no interest, because the effect of a sale is only to disencumber the lands of postponed securities. The security

of a *pari passu* creditor is in no way affected by the sale, because his right does not fall within the description of a security posterior to that of the seller. In this respect there is no difference between the position of a creditor who ranks *pari passu* and that of a preferable creditor. Their securities are unaffected by a sale under the power. The true answer to the argument of the pursuer is that he has an effectual power of sale, but that he can only sell subject to the right of the defender. The pursuer, therefore, may either arrange with the defender to pay off his bond, or he may sell the lands subject to the defender's security. In either case I should suppose there would be no objection to the title on the part of a purchaser.

No. 15.
Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

On these grounds I think the interlocutor of the Lord Ordinary should be affirmed, and the action dismissed.

LORD ADAM.—The object of the action is to determine whether the heritable creditor in the bond for £2000 is bound to consent to the proposed sale of the security subjects at the instance of the original creditor who now holds the bond for £4000.

That is the real question, and the leading conclusion of the summons refers to it, and all the other conclusions are subsidiary to it; and, as I understand, it is not contended by Mr Rankine that if he fails upon it he could maintain any other conclusion.

Now, it appears to me that the action is founded upon a fallacy, viz., that the pursuers and the defender are *pro indiviso* proprietors not only of the original bond for £6000, but of the subjects granted in security of it. When the assignation of the original debt was to the extent of £2000 made to the defender, with the lands in security, and with a power of sale, and corroborated by the debtor, it operated as a complete separation of the two debts. I can see nothing of the nature of a *communio bonorum*, but on the contrary two separate and independent debts existing of £4000 and £2000 respectively, with a declaration that they are to rank *pari passu*.

If that is so, what are the respective rights of the two creditors *inter se*? I think that each of the creditors is entitled to exercise the power of sale of his portion of the debt without the consent of the other. I can see no reason for holding that both creditors must combine before either shall be entitled to sell. Mr Rankine says that the creditors are to rank *pari passu*, and that if we do not declare that one of the creditors is bound to consent to the sale, then there would be no *pari passu* ranking. *Pari passu* ranking means that when the subjects are sold the parties shall rank upon the price. The question is merely as to the power of sale, and as I say, I do not see why each of the creditors should not exercise it.

It is possible there may be a practical difficulty in finding a purchaser unless the price is sufficient to pay the prior debt and the defender's debt. If such a price can be obtained, then the claims of the defender will be fully met. If not, then the pursuer must effect his sale under complete reservation of the defender's rights.

LORD KINNEAR.—I am of opinion that the pursuers and defender are creditors in separate debts, either of which may be discharged or enforced irrespective of the other. It is true that these two creditors hold securities over the same estate. But the securities are just as clearly separate and distinct as the debts,

No. 15.

Nov. 4, 1891.
Nicholson's
Trustees v.
M'Laughlin.

and it follows that either creditor may realise his security independently of the other.

It seems to have been supposed that the pursuers cannot sell without the defender's consent, because a sale by one of these creditors would in some way prejudice the security of the other. But that is a misapprehension. There is indeed one case in which a creditor may sell under a bond and disposition in security to the effect of disencumbering the estate of another creditor's debt without the consent of the latter, and without paying his debt in full—that is the case where lands burdened with prior and postponed bonds are sold by the first bondholder, and do not bring a large enough price to pay the postponed bonds. But that is because the later bondholders have accepted a security with due notice on record that the subject is already burdened, and may therefore be carried away from them for payment of the preferable creditor's debt.

It is very clear that the parties to this case, between whom it is stipulated that their debts are to rank *pari passu*, are in an entirely different position. I am unable therefore to see any reason why the pursuers should require the defender's concurrence in a sale. They cannot compel the defender to realise her security, but they may sell as against the debtor in the exercise of their powers under their own bond, with which the defender has no concern. If they choose to sell, the purchaser must take the land subject to the defender's security, and that will no doubt affect the amount of the price, but that is a consequence of which the pursuers cannot complain, because the defender derives her right from them, and they can do nothing to prejudice the interest of their assignee. The notion that there is any such partnership or community of interest between the parties as the pursuers' counsel has maintained, or that they are joint mandataries, is, in my opinion, without foundation.

The LORD PRESIDENT concurred.

THE COURT adhered.

FRASER, STODART, & BALLINGALL, W.S.—HENDEBSON & CLARK, W.S.—Agents.

No. 16.

Nov. 6, 1891.
Culross
Special Water
Supply Dis-
trict Com-
mittee v.
Smith-Sligo's
Trustees.

CULROSS SPECIAL WATER SUPPLY DISTRICT COMMITTEE, Pursuers
(Respondents).—*Jameson—C. N. Johnston.*
ARCHIBALD DOMINIC SMITH-SLIGO AND OTHERS (Smith-Sligo's Trustees),
Defenders (Appellants).—*W. Campbell.*

Sheriff—Jurisdiction—Property—Possession—Service.—A Sheriff has jurisdiction over the proprietors of lands lying within his sheriffdom in any competent action relating to the possession of these lands, or of things locally situated within them, although such proprietors reside beyond, and are not served with the action within, the sheriffdom.

A Local Authority brought an action in a Sheriff Court to have the proprietors of certain lands within the sheriffdom, through which a pipe belonging to the Local Authority was laid, interdicted from drawing from the pipe in question a supply of water for a particular portion of their lands. The defenders were resident beyond, and were not served with the action within, the sheriffdom.

Held that the Sheriff had jurisdiction to deal with the action, in respect that its subject-matter related to heritable property within his sheriffdom, and that the defenders were proprietors of lands within it.

1ST DIVISION.
Sheriff of Fife
and Kinross.

IN the year 1885 the Local Authority of Culross being desirous of procuring a suitable supply of water for the district, entered into an agreement with Archibald Vincent Smith-Sligo, of Blair and Inzievar, in the county

of Fife, and other proprietors in the district, who were anxious to obtain a supply of water for their respective properties. The Local Authority agreed to proceed forthwith to obtain the formation of a special water supply district, and the other parties agreed to bear certain proportions of the expense of securing the requisite supply of water. It was part of the agreement that the main pipe of supply should be so laid as to give a constant supply of water to Mr Smith-Sligo's estates of Blair and Inzievar, and it was provided that he should have liberty to lay branch pipes to connect the main pipe with these properties, and should pay at a fixed rate for the water drawn off by him. After the agreement was concluded the special supply district was formed, and the works were constructed.

No. 16.

Nov. 6, 1891.
Culross
Special Water
Supply Dis-
trict Com-
mittee v.
Smith-Sligo's
Trustees.

In May 1891 the Committee of Management of the Special Water Supply District of Culross, appointed under the Local Government (Scotland) Act, 1889, brought an action in the Sheriff Court at Dunfermline against Archibald Dominic Smith-Sligo and others, the testamentary trustees of the said Archibald Vincent Smith-Sligo, and, as such trustees, proprietors of, *inter alia*, the estate of Comrie in the parish of Culross, praying the Court to interdict the defenders "from taking for the supply of the estate of Comrie in the parish of Culross, belonging to the defenders, or for any part thereof, or for the supply of any property whatever other than the estate of Blair and Inzievar, belonging to them as trustees foresaid, any of the water which is conveyed by pipes forming part of the water-works" constructed under the agreement already mentioned; and further, "to ordain the defenders instantly to disconnect a pipe which they have recently laid for the purpose of supplying with said water certain portions of the said estate of Comrie, and which pipe they have connected with a pipe forming part of said water-works, . . . and through which pipe recently laid as aforesaid they have, illegally and without the consent of the pursuers, for some time past been drawing a supply of water for portions of the said estate of Comrie."

The pursuers averred that the defenders had laid a pipe from certain parts of the estate of Comrie, for which they wanted to get a supply of water, and had, without the pursuers' knowledge or consent, connected the same on or about 1st June 1890 with the branch pipe which supplied the property of Inzievar, and since then had, notwithstanding the repeated objections of the pursuers, drawn a supply of water through the pipe so laid for the said portions of the estate of Comrie.

The defenders admitted having laid and connected the pipe, but averred that they had a right to do so, in respect that the lands of Comrie were part of the estate of Blair and Inzievar.

They further averred that none of the defenders were resident or carried on business within the sheriffdom of Fife and Kinross, and that they had not been personally cited within the sheriffdom.

The pursuers admitted the truth of this averment, but explained in answer that the defenders were proprietors of large heritable properties within the sheriffdom, and that the subject-matter in dispute was situated within the sheriffdom.

The defenders, *inter alia*, pleaded;—(1) No jurisdiction.

On 27th June the Sheriff-substitute (Gillespie) pronounced an interlocutor repelling, *inter alia*, the first plea in law for the defenders, and before answer as to the relevancy of the defenders' averments, allowed parties a proof of their averments.*

* "NOTE.—Notwithstanding the able argument for the defenders, the Sheriff-substitute is humbly of opinion that the jurisdiction of this Court is

No. 16.

Nov. 6, 1891.
Culross
Special Water
Supply Dis-
trict Com-
mittee v.
Smith-Sligo's
Trustees.

The defenders appealed, and argued ;—The defenders were not resident, nor did they occupy premises within the sheriffdom for the purposes of trade, and the ground of action was nothing more nor less than delict. In such a case it was necessary, if the defender did not reside within the

undoubtedly founded *ratione rei sitæ*, and that personal service within its territory is not necessary, as was contended.

"The defenders' counsel built an ingenious argument on such cases as *Pirie v. Warden*, Feb. 20, 1867, 5 Macph. 597 ; and *Kermick v. Watson*, July 7, 1871, 9 Macph. 984 ; but these cases belong to a different chapter of the Sheriff's jurisdiction. If the question were open, good reason could be given why personal service within the territory should be required in the one class of cases, and not in the other. But the Sheriff-substitute cannot regard the question as open. It appears to him to be settled by authority and uniform practice.

" 'Civil jurisdiction,' says Erskine, i. 2, 17, 'is founded, secondly *ratione rei sitæ*, if the subject claimed by the pursuer lies within the territory, whether the defender resides within it or not.—*Williamson v. Haigie*, Nov. 28, 1835, Dict. p. 4815. And, indeed, if the subject in question be immovable, the Judge of the territory where it is situated is the sole Judge competent, in so far as he has the cognisance of heritable rights ; for things that are immovable are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of that Judge whose jurisdiction reacheth over them.'

"This is an action to regulate the possession of a heritable subject,—a class of action of which the Sheriff Court has undoubted cognisance. Even if it can be said that the action involves a question of heritable right and title, there is no allegation that the value of the subject in dispute exceeds the limit of the jurisdiction conferred on the Sheriff by the Sheriff Courts Act, 1877, sec. 8, which contains an express provision that 'actions relating to questions of heritable right or title raised in a Sheriff Court shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject in such action to the jurisdiction of the Sheriff and Sheriff-substitute of such county.' Nothing is said here as to personal service within the county being necessary.

"Turning back to the passage in Erskine, he goes on to point out how the difficulty arising from the doctrine that a Judge cannot grant a warrant to cite beyond his own territory is got over. He says,—'No suit can proceed against a defender till he be lawfully summoned to appear in judgment ; neither can a Judge issue a warrant to cite one who resides in another territory. Where, therefore, one whose domicile is not within the territory is to be sued before an inferior Court, *ratione rei sitæ*, the pursuer must apply to the Court of Session, whose jurisdiction extends over the whole kingdom, for letters of supplement, which are granted of course, containing a warrant to cite the defender to appear before the Judge of the territory where the controverted subject lies.—*Williamson (sup. cit.)*, November 28, 1835.' Therefore, according to Erskine, the only condition necessary for a Sheriff Court exercising its jurisdiction *ratione rei sitæ* is, not that the defender shall be personally cited in the sheriffdom, but that letters of supplement from the Court of Session be obtained.

"It is not necessary to examine the changes made by sec. 24 of the Sheriff Courts Act, 1838 (1 and 2 Vict. c. 119), and by sec. 12 (1) of the Sheriff Courts Act, 1876 ; for whatever forms may be necessary, the acceptance of service by the defenders' agent amounts at least to an agreement to hold the petition as duly served at their dwelling-houses in Edinburgh,—for this much the pursuers could have done in spite of the defenders.

"It is instructive to notice that when he comes to deal with jurisdiction *ratione contractus* (Inst. i. 2, 20), Erskine points out the necessity of personal service within the territory (or its equivalent in certain cases)."

territory of the Judge before whom the action was brought, that it should be served upon him within that territory.¹ The action not having been served within his territory, the Sheriff had no jurisdiction.

The pursuers argued;—The Sheriff must have power to restrain by interdict injury to property with his territory. The lack of authority on the point was to be attributed to the fact that the Sheriff's power to interfere in such a case had never before been questioned.

At advising,—

No. 16.
Nov. 6, 1891.
Culross
Special Water
Supply Dis-
trict Com-
mittee v.
Smith-Sligo's
Trustees.

LORD PRESIDENT.—The defenders in this petition are the proprietors in trust of certain lands in the county of Fife. Under an agreement with the Local Authority of Culross, a supply of water has been conducted by pipes into certain parts of those lands. Since the laying of those original pipes the defenders have opened a connecting pipe conducting some of the water thus supplied to another part of their lands called Comrie. The Local Authority dispute the right of the defenders to do this, alleging that the lands thus introduced to the benefit of the water supply do not fall within the agreement. The present proceeding is a petition to the Sheriff of Fife praying for interdict against the defenders taking any of the water for the supply of Comrie, and for an order on the defenders to disconnect the pipe which they have laid for this purpose.

The first defence is that the Sheriff has no jurisdiction over the defenders, all of whom reside in Edinburgh. It happens that the defenders accepted service, but this places the question in no other position than if they had been served in Edinburgh. They maintain that, they not having been served within the sheriffdom of Fife, there is no jurisdiction.

In my opinion this plea has been rightly repelled. The subject of the application is the possession of pipes and water laid in lands in Fife, but so far as the present question is concerned it is substantially the same as if the dispute regarded the tapping a natural water-course within that jurisdiction. To restore against unlawful changes in such subjects is a judicial duty which can effectively and conveniently be done by the local Court of the territory alone, as is most clearly seen perhaps in the case of the Judge being asked to appoint the work of restoration to be done at the sight of the Court. I consider that the proprietor of lands in any county is answerable to the Judge Ordinary in any competent action relating to the possession of those lands, or of things locally situated within those lands, whether he be served within the sheriffdom or not.

LORD ADAM.—I concur with your Lordship. The pursuers are proprietors of certain water-pipes which run through the defenders' lands in the county of Fife. The defenders have, according to the petitioners, tapped these pipes and abstracted the water belonging to pursuers, and the leading conclusion of the petition is for interdict against the defenders continuing so to abstract the water. Accordingly this appears to me to be an application to the Judge Ordinary of the bounds for protection of property situated within his territory. It appears to me to be not doubtful that the Sheriff, as Judge Ordinary of the bounds, has *ratione rei sitæ* jurisdiction over persons who are proprietors of subjects situated within his territory, although they may reside beyond his jurisdiction. There is no doubt that the pipes which are the subject-matter of this action lie within the bounds of the Sheriff's jurisdiction, and the question raised is a merely

¹ Kermick v. Watson, July 7, 1871, 9 Macph. 984, per Lord President, 985, 43 Scot. Jur. 542; Bird v. Brown, Aug. 30, 1887, 25 S. L. R. 1.

No. 16.

Nov. 6, 1891.
Culroas
Special Water
Supply Dis-
trict Com-
mittee v.
Smith-Sligo's
Trustees.

possessory one, whether the pursuers are to be protected in the possession of these pipes. I think therefore that it is not doubtful that the Sheriff has jurisdiction.

LORD M'LAREN.—I concur in the opinion of your Lordship in the chair.

LORD KINNEAR was absent.

THE COURT dismissed the appeal.

WALLACE & BEGG, W.S.—TAIT & CRICHTON, W.S.—Agents.

No. 17.

Nov. 7, 1891.
Rowan v.
Gaffney.

C. B. ROWAN, Complainer (Respondent).—*Young—G. Watt.*
RICHARD GAFFNEY, Defender (Appellant).—*M'Kechnie—Crabb Watt.*

Process—Appeal—Implement.—The procurator-fiscal of a burgh presented a complaint to the magistrates craving them to ordain a resident therein to destroy a dog belonging to him, which was alleged to be vicious, or to secure it safely, and failing his doing so for warrant to destroy it or to secure it. After proof the magistrates ordained the respondent to find caution that he would confine the dog, and failing his doing so within twenty-four hours granted warrant to destroy it. The respondent having found caution appealed to the Court of Session. *Held* (1) that the appeal was competent, and (2) that the interlocutor had not by the finding of caution been implemented so as to exclude appeal.

2D DIVISION.
Burgh Court
of Ayr.

C. B. ROWAN, Procurator-fiscal of the burgh of Ayr, presented a complaint to the Magistrates of Ayr against Richard Gaffney, canteenkeeper at the Ayr Barracks, stating that Gaffney was permitting a mastiff, which was vicious and dangerous, to go at large unmuzzled, and that this dog had attacked certain persons. The complaint craved the Magistrates to cite Gaffney to answer thereto; to ordain him to destroy the dog, or to find caution to secure it, or otherwise "dispose of it in some specific manner to the satisfaction of the Court"; and failing Gaffney destroying or securing the dog, warrant was craved to destroy it, or otherwise to secure and safely dispose of it.

The record of the proceedings bore that Gaffney, after objecting to the relevancy of the complaint (which objection was repelled), pleaded "not guilty," and that a proof was led, which was recorded.

The Magistrate pronounced this interlocutor:—"Having considered the foregoing complaint, together with the evidence adduced, finds that the defender's dog in question, on 29th June 1891, on the South Beach, Ayr, attacked and chased" certain persons, "and that said dog on each occasion foresaid caused serious dread and alarm to each of the persons attacked as aforesaid; and that said dog is large and powerful, and is dangerous to the lieges: Therefore ordains the said Richard Gaffney, within twenty-four hours, to lodge sufficient caution that he will strongly chain or fasten up and securely confine the said dog so long as said dog may be in this jurisdiction, under the penalty of £10 sterling; and failing his lodging said caution within twenty-four hours after this order is intimated to him, grants warrant to officers of Court to pass and immediately thereafter take possession of and destroy, or otherwise secure and safely dispose of, said dog, and for that purpose grants warrant to open shut and lockfast places," &c.

In consequence of this interlocutor Gaffney found caution to fasten up the dog securely so long as it should be within the jurisdiction of the Magistrates of Ayr.

Gaffney thereafter appealed to the Second Division, and printed and boxed with his appeal the proof which had been led before the Magistrate.

Rowan objected to the competency of the appeal, and argued,—First, No. 17.
The case was a criminal one, and the appeal, if any, was to the Justiciary
Court. That course had been followed in a case nearly resembling this.¹ Nov. 7, 1891.
[This objection was, however, withdrawn after discussion.] Second, the Rowan v.
appeal, if regarded as a civil proceeding, was incompetent, for the decree Gaffney.
had been implemented. Caution had been found in implement thereof,
and a litigant could not appeal against a judgment which he had imple-
mented.²

Argued for the appellant;—The proceeding was civil, not criminal,³ and being civil, an appeal was competent unless appeal could be shewn to be expressly excluded.⁴ The appellant had been obliged to find caution to prevent his dog being destroyed, but this could not be regarded as implement implying acquiescence in the judgment so as to deprive him of his right to appeal. On the merits, the dog was shewn not to be vicious, and the complaint was groundless.

LORD JUSTICE-CLERK.—It is not now seriously contended, as I understand, that the proceedings are incompetent because these proceedings are criminal in their nature. It is, however, still contended that the appeal is excluded by the fact that the appellant has been ordained to lodge sufficient caution that he will securely fasten up the dog, and that as he has found caution according to the order of the Magistrate he has thereby implemented the decree and barred himself from appealing. In answer to this contention it seems to me sufficient to say that the alleged implement upon which the contention is based is not at all what is intended by the implement of a decree in the ordinary meaning of that expression. In the first place, the appellant is ordained to find caution that he will chain up his dog, and failing his lodging such caution within twenty-four hours, the judgment grants warrant to seize and destroy his dog, or otherwise secure and safely dispose of it. Now, the only course open to him to prevent that was to find caution. But that was not implementing the decree so as to bar the appeal.

LORD YOUNG.—We must decide this case on the merits, that is, we must decide whether the proof before us warrants the judgment. I think that is unfortunate, because in this Court we are not in the habit of interfering with the action of local authorities in putting down any nuisance to the inhabitants of the place in which they have jurisdiction. But I think our entertaining this question is unavoidable. It appears to be the law that a judgment of a magistrate on a matter of this kind may be appealed to this Court with, of course, the possibility of a further appeal to the House of Lords. If the question had been open, I should have been glad to find the appeal incompetent. During the discussion a case was cited in which such an appeal was taken to the Circuit Court of Justiciary along with appeal under the Small-Debt Act. I should have thought that the more fitting tribunal. But the authorities seem to say that the appeal is competent.

LORD RUTHERFURD CLARK concurred.

¹ Bruce v. Duncan, Oct. 13, 1848, John Shaw, 12.

² McDougall v. Gall, June 30, 1863, 1 Macph. 1012, 35 Scot. Jur. 584; McLelland v. Garson, Jan. 10, 1883, 10 R. 445.

³ Duncan v. Greig, Feb. 7, 1848, Arkley, 421; Court of Session Act, 1868, 31 and 32 Vict. c. 100, sec. 64-6.

⁴ Marr & Sons v. Lindsay, June 7, 1881, 8 R. 784.

No. 17. LORD TRAYNER was absent.

Nov. 7, 1891.
Rowan v.
Gaffney.

THIS interlocutor was pronounced:—"Find that the pursuer has failed to prove the allegation of the complaint that the defender has permitted the dog libelled to go at large, and that the dog is vicious and dangerous to the lieges; therefore sustain the appeal, recall the interlocutor appealed against, and dismiss the complaint."

WYLIE, ROBERTSON, & RANKIN, W.S.—JOHN MACMILLAN, S.S.C.—Agents.

No. 18. CALEDONIAN INSURANCE COMPANY, Petitioners.—*Ure*.

ANDREW GILMOUR, Respondent.—*Salvesen*.

Nov. 10, 1891.
Caledonian
Insurance
Co. v. Gilmour.

Appeal to House of Lords—Leave to appeal—Interlocutory judgment.—Circumstances in which the Court refused a petition for leave to appeal to the House of Lords against an interlocutory judgment appointing a proof.

1ST DIVISION.
Ld. Stormonth
Darling.

(SEE previous report, July 18, 1891, 18 R. 1219.)

THIS was an action at the instance of Andrew Gilmour against the Caledonian Insurance Company for recovery of loss by fire on certain premises which were insured with the defenders. The defenders pleaded, *inter alia*;—(1) The present action is excluded by the clause of reference in the policy. (2) In any view, the action ought to be sisted pending the decision of the pursuer's claim by arbitration in terms of the policy. These two pleas were repelled by the Lord Ordinary (Stormonth Darling), on 23d June 1891, and on a reclaiming note the First Division adhered, on 18th July 1891. The defenders now presented a petition for leave to appeal to the House of Lords against the interlocutory judgment then pronounced. Proof in the case had been fixed for Friday the 13th November.

The petitioners urged that the clause of reference on which they founded was in general use by insurance companies, and that it was of the utmost consequence that the judgment of the House of Lords should be obtained upon its construction. This was the only question of importance in the case, and there would obviously be no ground for appeal at a later stage. This was not a mere question of procedure, as in some previous cases where leave had been refused.¹

The respondent argued that there was no reason for departing from the ordinary rule. The case ought to be finally disposed of on a proof, and if the defenders desired they might then go to the House of Lords. The possibility of two appeals at different stages was to be avoided. The rule in such cases was stated by the Lord President and Lord Adam in *Stewart v. Kennedy*, Feb. 26, 1889, 16 R. 521.

LORD PRESIDENT.—If we were to have regard solely to the interests of the insurance company and to its convenience in the conduct of its business, there is probably no doubt that we ought to grant the prayer of this petition, as they would thus be enabled to have a question of great general importance finally settled. But we are bound to keep in view also the interests of the insured, who is quite unconcerned in general questions of law, and wants to get his claim settled as soon as may be. Now, it is to be observed that the petitioners have not evidenced any anxiety to save expense to the opposite party by bringing this application timeously, and before preparations for the proof had to be made. Indeed, this petition is presented to us on the eve of the proof,

¹ Scottish Rights of Way and Recreation Society v. Macpherson, Nov. 16, 1886, 14 R. 74; *Stewart v. Kennedy*, Feb. 26, 1888, 16 R. 521.

and does not therefore come before us favourably, where our duty is to determine upon a balance of convenience. But further, I think we should be slow to interfere with the progress of the action where we see that one result of the proof now impending may be that the defenders will be found liable in so moderate a sum, that on reflection they may consider that they have no adequate interest on this occasion to appeal to the House of Lords. I think we shall best exercise our jurisdiction to-day by refusing this petition for leave.

LORD ADAM concurred.

LORD M'LAREN.—If leave to appeal had been asked at an earlier stage, I am disposed to think that this would have been a strong case for granting an application of this kind. But I think it would be inexpedient to interfere with the progress of the case on the eve of the proof, and when the expense of preparation must so far have been incurred.

LORD KINNEAR.—Mr Ure stated that his clients might in certain circumstances have no interest to take this case to the House of Lords after the proof. But the pursuer has a very strong interest to say that he ought to have an opportunity of having the whole case tried, the day fixed for the proof being now close at hand. If this application had been presented at an earlier date, we should have had a different question for our consideration, but as the case now stands, I think it would not be expedient to grant leave.

THE COURT refused the application, with expenses.

T. & R. B. RANKEN, W.S.—T. McNAUGHT, S.S.C.—Agents.

WILLIAM TULLY, Pursuer (Respondent).—*Dickson—J. Wilson.*

MRS MARY ANNE KERR OR INGRAM, Defender (Reclaimer).—

Johnston—Sym.

JAMES MACKENZIE, Defender (Reclaimer).—*D.-F. Balfour—Chisholm.*

Agent and Client—Negligence—Employment—Title to sue.—A person purchased a house intending that it should be a donation to his nephew, and it was arranged that the seller's agent should prepare the disposition in favour of the nephew. The purchaser informed his nephew of the purchase, that he thought it would be wise to get another agent to revise the titles, and that he proposed to employ B. The nephew having expressed himself as "agreeable" to that proposal, the uncle went to B and asked him to see that the title was properly completed. The titles were sent to B, who made no search for incumbrances. It turned out eventually that there was a bond on the property.

The nephew having been evicted from the subjects by the bondholder, raised an action of damages against the law-agent's representative. *Held* that, as the uncle alone had employed the law-agent, the pursuer had no title to sue.

Held, by Lord Kyllachy, that a person becoming a partner in a law-agent's business at a certain date will be liable for his partner's neglect of duty to a client in carrying through a transaction after that date, although the employment began prior to the date of the partnership.

Opinions reserved in the Inner-House.

Question, whether a claim by a purchaser of heritage who has been evicted upon a bond previously granted by the seller, against his law-agent for damages for failing to search for incumbrances is barred by his not having given notice to the law-agent upon the discovery of the bond, so as to give him an opportunity of removing the burden.

No. 18.

Nov. 10, 1891.
Caledonian
Insurance
Co. v. Gilmour.

No. 19.

Nov. 10, 1891.
Tully v.
Ingram.

No. 19. ON 13th November 1890 William Tully, farmer, Colfin, Portpatrick, raised an action against Ingram & Mackenzie, solicitors, Stranraer, James Mackenzie, sole surviving partner of that firm, and Mrs Ingram, widow and executrix of the deceased partner Alexander Ingram, for £150 as damages for the loss sustained by him through alleged professional negligence in connection with the purchase of certain house property in Portpatrick.

Nov. 10, 1891.
Tully v.
Ingram.

1st Division.
Ld. Kyllachy.

The pursuer averred that in May 1873 he purchased the subjects in question from James Rodger for the sum of £200. That "the late Alexander Ingram was instructed by the pursuer's uncle, John Paterson, Colfin, acting on behalf of the pursuer, to act as law-agent for the purchaser in the transaction, and Mr Ingram undertook the duty." That in breach of professional duty, the firm, or Ingram, notwithstanding their employment as the purchaser's law-agents, allowed the pursuer to pay the price of the subjects without obtaining a search for incumbrances, the result being that in 1889 he was evicted from his purchase at the instance of one Todd, a previous bondholder, who held a catholic security over, *inter alia*, the subjects of the sale.

The pursuer further averred that immediately on receiving notice of the demand for payment of the sum contained in Todd's bond he had communicated with Mackenzie, whose duty it was at once to have given notice of the threatened eviction to Ingram's executrix. That Mackenzie had failed to give such notice, but that as Mackenzie was still winding up the affairs of the firm, which had been dissolved upon Ingram's death on 18th July 1873, and as his accounts with his late partner's representative were not yet closed, notice to Mackenzie must be held to be equivalent to notice to her.

Mrs Ingram denied that her husband had been employed by the pursuer. She averred that Paterson had bought the subjects with the object of presenting them to his nephew, the pursuer, as affording a qualification for the parliamentary franchise. That Paterson had requested Ingram, who acted as Liberal agent in Stranraer, to examine the titles to see that they afforded a good qualification for a vote. That neither Paterson nor the pursuer were clients of Ingram, who made no charge against either of them, and had no communication whatever with the pursuer. She also averred that her position had been prejudiced by not receiving notice of the threatened eviction. If she had received such notice, she might have purged the incumbrance or removed the defect.

Mackenzie averred that Paterson was the purchaser, and that Ingram's connection with the latter was purely a personal matter between himself and Paterson. That he (Mackenzie) entered into partnership with Ingram as at 1st July 1873, but the partnership was not declared to the public till six months thereafter. He came to Stranraer on 14th July 1873, and previous to that had no knowledge whatever of Ingram's business, and had nothing to do with the pursuer in connection with the transaction. That under a clause of the contract of copartnership between him and Ingram the latter was entitled to render personal services to any client free of charge, and that any services rendered in connection with the transaction in question were outwith the partnership affairs.

The pursuer pleaded, *inter alia*;—(1) The pursuer having suffered loss to the extent sued for, in consequence of the negligence and breach of duty of the defenders, or one or other of them, is entitled to decree, in terms of one or other of the conclusions of the summons.

Mrs Ingram pleaded;—(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons against this defender (2) The deceased Mr Ingram not having been employed by the pursuer

the pursuer has no title to sue. (4) The deceased Mr Ingram having only undertaken, as political agent, at the request of Mr Paterson, to see that the conveyance in the pursuer's favour afforded a good qualification for a vote, and to see the pursuer registered as an elector, and having fulfilled all that he so undertook, this defender ought to be assolizied. (6) The pursuer is personally barred, in respect that by his failure to give this defender notice of the threatened eviction, he has prejudiced her position as condescended on. No. 19.
Nov. 10, 1891.
Tully v. Ingram.

Mackenzie pleaded;—(1) The averments of the pursuer are irrelevant, and are not sufficient to support the conclusions of the summons against the defender, Mackenzie. (2) This defender not having been a partner of the late Mr Ingram at the date of the transaction referred to, is in no way liable in connection therewith. (3) *Separatim*, Such services as the late Mr Ingram may have rendered in connection with the said transaction were outwith the partnership affairs, and this defender is in no way liable in connection therewith. (4) *Separatim*, The deceased Mr Ingram having, at the request of Mr Paterson, gratuitously agreed to see whether the disposition in favour of the pursuer, which had been already signed, was correct in form, and having fulfilled all that he so agreed to do, this defender ought to be assolizied.

A proof was allowed, from which the following facts appeared. The property was purchased from a Mr Rodger by Paterson. It was then arranged between them that the seller's agent, Mr Adair, should prepare the conveyance in name of his nephew, the pursuer. Thereafter, in consequence of a call by Paterson upon Ingram, the latter wrote "please send me for revisal draft disposition by James Rodger to William Tully of house in Portpatrick." Adair replied that Paterson not having said anything about its being revised by another agent it had been completed, but he sent the completed deed. After some correspondence as to the title the transaction was settled in Ingram's office on 18th July 1873. Ingram, who retained the titles in his office, died on 15th June 1875. The question as to whether he had been employed in the matter by the pursuer or by Paterson came to depend principally upon the evidence (the material parts of which are given below) of these two persons.* The Court

* The pursuer deponed,—“I am a farmer at Colfin with my uncle, Mr Paterson. For some years before 1873 I was working with him on the farm. I lived in family with him, and got no wages. My uncle was not married at that time. He has married since, but has got no family. I remember him telling me in 1873 that he had bought the two houses in question in Main Street, Portpatrick, belonging to James Rodger, for me, and that he was going to have the title-deeds or disposition made out in my name. He also said that he would go to Mr Ingram and ask him to see that the title-deeds were correct. I was quite agreeable to what he proposed, and said so to him. I said I thought it was all right, and that he could not get a better man than Ingram. Mr Ingram was known as a highly respectable agent in Stranraer. My uncle afterwards told me that he had been to Mr Ingram. I was not present when the price was paid. . . . The property was not purchased with the view of getting me a vote.”

Mr Paterson deponed,—“Shortly after making the purchase I told Mr Tully about it. I told him the price I had paid, and that I had bought the property for him. I also said that Mr Rodger was to pay for the transfer, and that he was to get whoever he liked to prepare it, and that I thought it would be wise to get Mr Ingram to revise the title-deeds, and see that they were properly executed. I did not say anything more to him. We afterwards went to see Mr Ingram. . . . I knew Mr Ingram, and had known him for a considerable time. When I called for him after the purchase I told him I had bought the property from Mr Rodger for Mr Tully, and that Mr Adair was to make the

No. 19.
Nov. 10, 1891.
Tully v.
Ingram.

were ultimately of opinion that it was proved that Ingram had been employed in the transaction solely by Paterson, who was making a present of the subjects to the pursuer, and who alone negotiated with Ingram in the matter. It was further proved that Mackenzie became Ingram's partner on 1st July 1873, but did not enter upon his duties till 14th July. It was a part of the agreement of partnership that for the first six months the partnership should not be disclosed. By clause four of the agreement Ingram was at liberty to render personal services to any client free of charge. Mackenzie in his evidence deponed that none of the price passed through Ingram's hands as far as he knew, that he knew nothing of the transaction till 1889 when the eviction took place, and that he did not intimate the eviction to Ingram's widow because he thought Adair was agent in the transaction.

On 15th July 1891 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds the defenders, Mrs Ingram and James Mackenzie, liable, conjunctly and severally, to the pursuer in the sum of £150 in name of damages, the pursuer being, however, bound, as a condition of payment, to grant to the defenders an assignation of his whole right and interest in the surplus price of the property mentioned in condescendence 8, and being also bound to make payment to the defenders of the business charges due to the late firm of Ingram & Mackenzie in connection with the transaction libelled: Appoints the defenders to lodge in process the draft of such an assignation as they propose, and also their account of the business charges aforesaid."*

transfer, and he (Mr Ingram) was to get the title-deeds and see that they were properly executed. Mr Ingram said he would, and that he would have a search made. Mr Ingram was to act for Mr Tully. That was stated."

In cross-examination Paterson deponed,—“I had some communication with Mr Tully about going to Mr Ingram, but I do not think Mr Tully went with me the first time. I told him, I think, that Mr Ingram would be the proper person to revise the title-deeds, and Mr Tully approved of it, and said he could not get a better man to do it. He did not ask me to go to Mr Ingram. I think I said to him I was thinking about asking Ingram to look over the papers, and he approved of that. I had not told Adair that I was going to Mr Ingram. Mr Ingram never rendered any account against me in connection with the matter. He said it was a small matter, and the charge would be very trifling, and I said for him to make out his account in the regular way for his work. I never spoke to him again about the account. . . . (Q.) Did you not tell Mr Mackenzie that Ingram had said in 1873, when you bought the property, that, the matter being a political one, he would make no charge against you and Mr Tully? (A.) Yes, I told him that Mr Ingram had said he was political agent, and that it would not cost much. I said,—‘Make out your charge in the regular way, for there is nothing political in it.’ That is what I told Mackenzie. (Q.) Is it not the case that no charge was made just because of what Mr Ingram said, that it being a political matter there would be no charge? (A.) I do not know what his intention was. I never understood that that was the reason of no charge being made; I thought if I was getting the title-deeds I would get the charge along with them.”

* “OPINION.— . . . The firm of Ingram & Mackenzie consisted of the late Mr Alexander Ingram, who died in 1875, and Mr James Mackenzie, who still survives. The present action is directed against the dissolved firm and Mrs Ingram (Mr Ingram's executrix, and Mr Mackenzie as now representing the firm); and the questions I have now to decide are, I think, these:—(1) Was Mr Ingram, who carried through the transaction, employed by or on behalf of the pursuer, and did he fail in his duty as a law-agent? (2) Was the transaction a firm transaction, so as to affect Mr Mackenzie, who took no personal charge of it, and was not known at the time to be a partner of the firm? (3) Has the pursuer's claim to redress been affected, at least as regards Mrs Ingram, by his (the pursuer's)

Mrs Ingram reclaimed, and argued;—In order to succeed the pursuer must shew that he employed Ingram to carry out the transaction in ques- No. 19.

failure to give notice to her personally of the proceedings under which he was evicted from the property?

Nov. 10, 1891.
Tully v.
Ingram.

"I confess I do not think there is much doubt as to the employment. It was maintained for the defence that the true employer was the pursuer's uncle, who, it appears, was making the pursuer a present of the property, and who certainly carried through the transaction, including all communications with Mr Ingram. But if I am to believe their evidence—and I see no reason to doubt it—the uncle and nephew, before the transaction was settled, agreed that Mr Ingram should be employed 'to revise the titles,' and that it was in pursuance of this agreement that Mr Paterson, the uncle, went to Mr Ingram and put the matter into his hands. This, I think, established a sufficient privity of contract as between the pursuer and Mr Ingram or his firm.

"Neither do I see much room to doubt that Mr Ingram failed in his duty in omitting to require or procure a search for incumbrances. Indeed, it was not disputed that that must be so, unless it could be shewn that he (Mr Ingram) was employed on some exceptional footing. But the defenders suggest that the employment was exceptional in this respect. They say that Mr Paterson's object was to give the pursuer a vote in the county—that he went to Mr Ingram simply as Liberal agent, so as to make sure that the vote would be good, and that Mr Ingram accordingly, while agreeing to see to the title, made no charge, and undertook no responsibility.

"I have not, however, been able to hold that this is proved. The circumstances no doubt give the suggestion a certain probability, and it is no doubt the fact that Mr Ingram, although he lived two years afterwards, rendered no account for his trouble, and indeed no such account has even yet been rendered, either to the pursuer or his uncle. But, on the other hand, everything, including the correspondence with the seller's agent, was conducted in the usual manner. The seller's agent, who it was at first intended should act for both parties, was on Mr Ingram's employment superseded, and of course relieved of responsibility. The various attendances in connection with the transaction were entered in the books of Mr Ingram and Ingram & Mackenzie, and although no account was rendered, the materials existed for rendering it as in other cases. Moreover, the pursuer's uncle is quite emphatic to the effect that although Mr Ingram proposed to treat the matter as political, and to charge only a trifle, he (Paterson) intimated distinctly that he wished the matter to be treated as an ordinary piece of business, to be charged for in the regular way.

"I may add that, even if it had been proved that the employment was gratuitous, that would not, in my opinion, have foreclosed the question as to Mr Ingram's responsibility. I doubt much whether, when a law-agent undertakes, either gratuitously or otherwise, the protection of a client's interests in such a matter, he can escape the responsibility for professional negligence, except upon clear proof of an agreement to that effect.

"The position of Mr Mackenzie is, however, peculiar, and it is with considerable hesitation that I have come to hold him liable. He became a partner of Mr Ingram as from 1st July 1873, but he did not enter on his duties until 14th July, and it was part of the agreement of partnership that for the first six months the partnership should not be disclosed. Accordingly, on 18th July, when the transaction now in question was settled in Mr Ingram's office, Mr Mackenzie had been only three days in the place, and was not known to the pursuer or to Mr Paterson as having any interest or responsibility in the matter. Moreover, it was part of the agreement of partnership that Mr Ingram should be at liberty, notwithstanding the partnership, to render personal services to any client free of charge. If therefore there had been sufficient evidence that the transaction in question was one of that character, there would probably be little doubt that (the partnership being still latent) Mr Mackenzie would have been free.

"But, as I have already said, I do not think it is proved that Mr Ingram

No. 19.
 Nov. 10, 1891.
 Tully v.
 Ingram.

tion. Now its history, as disclosed by the proof was this,—Paterson bought the subjects, and employed Adair as his law-agent to prepare a conveyance to the pursuer. When he announced his intention to the latter, he at the same time suggested sending the titles to Ingram to be revised by him with a view to their affording a good franchise qualification, and to this the pursuer assented. In short, Paterson assumed the position of a donor, employing in the donee's interest an agent (whom he expected to charge for his services in the ordinary way) to revise the titles embodying the gift, and from first to last Paterson alone was in direct communication in the matter with Ingram. There was then no privity of contract between the pursuer and Ingram, and he was not entitled to sue this action.¹ But assuming that the pursuer had proved employment of Ingram, he was personally barred from insisting in this claim by his failure to give this defender notice of the threatened eviction. This she was in law entitled to have had, in order that she might have had the opportunity of purging the incumbrance or removing the defect.² It was vain to say that notice to Mackenzie was notice to her, for at the time of the alleged fault he was not, so far as the pursuer knew, a partner of the firm, and when notice of the eviction was given to him, the partnership had been dissolved fifteen years.

The defender Mackenzie adopted the argument of Mrs Ingram, to the effect that the pursuer had failed to prove employment of Ingram, and further argued;—Assuming the employment proved, that could not affect Mackenzie. Ingram was employed as an individual before there was any partnership at all. It was a *locatio conductio operarum*, and he could not delegate his duties to Mackenzie, or anyone else with whom he might subsequently agree to share profits. There was *delectus personæ* of him as a man of skill. Further, the alleged negligence occurred before the partnership began. The stage of the proceedings at which the search for incumbrances fell to be made was past before the commencement of the partnership on 1st July. When Mackenzie joined Ingram in partnership, he was entitled to assume that the business had been regularly and diligently done up to that stage. In any case, there was a private and gratuitous service rendered by Ingram to a client of his own, and under

agreed to act in the transaction gratuitously or on exceptional terms, and therefore the question just seems to be whether there is anything which can displace the fact that Mr Mackenzie was a partner of the firm, sharing its profits and also its losses, at the date of the settlement, and for some eighteen days previously. I confess I have not been able to find anything, and therefore I do not see how, if Mr Ingram was liable, Mr Mackenzie can escape.

“It remains to consider as to notice, and on this matter I heard a good deal of argument. I am, however, satisfied that the pursuer's claim to redress has not been barred by any omission on this head. It may be that when a law-agent has failed to see that his client gets a good and unincumbered title, and the client is subsequently threatened with eviction, it is the client's duty to give the law-agent notice, so that, if so advised, he may purge the incumbrance or remove the defect. But, assuming that this is matter of obligation, I think the pursuer here was entitled to assume that Mr Mackenzie, the surviving partner of the dissolved firm, represented the firm for purposes of winding-up. And accordingly as notice was unquestionably given to Mr Mackenzie, I am, on the whole, of opinion that Mrs Ingram and Mr Mackenzie are conjunctly and severally liable. . . .”

¹ Robertson v. Fleming, May 30, 1861, 4 Macq. 167, 33 Scot. Jur. 591.

² Campbell v. Clason, Dec. 20, 1838, 1 D. 270, per Lord Mackenzie, p. 278, 11 Scot. Jur. 196; Erskine Inst. iii. 1, 14; Liquidators of City of Glasgow Bank v. Mackinnon, Dec. 23, 1881, 9 R. 535.

the 5th article of the copartnership it was outwith the partnership business. No. 19.

Argued for the pursuer;—(1) Adair, the seller's agent, had at first acted as law-agent for the parties in the transaction. Before, however, the transaction was settled, the pursuer and his uncle agreed that Ingram should be employed to revise the titles, and it was in pursuance of this agreement that Paterson went upon the pursuer's behalf and employment and placed the matter in Ingram's hands. That established sufficient privity of contract between the pursuer and Ingram, and entitled the former to sue this action.¹ (2) At the date of the settlement Mackenzie had been assumed as a partner of the firm, and therefore at that date he became a partner in the firm's negligence, and that even although he was ignorant of his partner's negligence. Even assuming that he was not to appear to all the world as a partner in the firm for six months after 1st July 1873, he was just in the position of an undisclosed principal, and was therefore bound by Ingram's negligence.² Again, assuming that Ingram was by the terms of the partnership entitled to act gratuitously for any client, that did not exonerate the firm.³ In these circumstances, notice to Mackenzie of the threatened eviction must be held to be notice to Mrs Ingram. The pursuer was entitled to assume that Mackenzie, the surviving partner of the dissolved firm, represented the firm for the purposes of winding-up.

Nov. 10, 1891.
Tully v.
Ingram.

At advising,—

LORD PRESIDENT.—Various questions have been raised in this case, and some of them of great importance, but I have come to be of opinion that the case admits of decision upon one ground in fact.

The liability sought to be established is the liability of a law-agent, and that liability must arise out of a contract of employment. Now, the first question is, who is the person who employed the law-agent, and from whom did the law-agent accept the employment? On that question of fact we stand certainly at this disadvantage that we are deprived by the force of events of the evidence of Mr Ingram, the gentleman said to have been employed, and we must therefore make the best we can of the existing sources of evidence, having regard, however, to that regrettable deficiency.

When one looks at the facts of the case one is struck with this—*prima facie*, Paterson, and not Tully, was here the employer. He bought the house, he paid for the house; he, and he alone, personally directed and dealt with Mr Ingram. Accordingly, it is necessary, in order to the establishment of any privity of contract on the part of the pursuer of this action, that he should make out that that *prima facie* view does not represent the substance and ultimate truth of this transaction. I have come to the opinion that he has failed to make out that he stood to the late Mr Ingram in the relation of employer at all.

It is important to observe the ground upon which the Lord Ordinary has come to the conclusion that Mr Tully has a right to sue this action by reason of his being the employer. He says this,—“It was maintained for the defence that the true employer was the pursuer's uncle, who, it appears, was making the pur-

¹ Webster v. Young, Feb. 20, 1851, 13 D. 752, 23 Scot. Jur. 330.

² Bell's Pr. secs. 359, 224A; Lindley on Partnership, pp. 205, 208, 275, and 276.

³ Currie v. Colquhoun, June 17, 1823, 2 S. 407.

No. 19.

Nov. 10, 1891.
Tully v.
Ingram.

suer a present of the property, and who certainly carried through the transaction, including all communications with Mr Ingram. But if I am to believe their evidence—and I see no reason to doubt it—the uncle and nephew, before the transaction was settled, agreed that Mr Ingram should be employed to ‘revise the titles,’ and that it was in pursuance of this agreement that Mr Paterson, the uncle, went to Mr Ingram and put the matter into his hands. This, I think, established a privity of contract as between the pursuer and Mr Ingram or his firm.” Now, it appears to me that the words in this passage of the Lord Ordinary’s judgment, upon which its whole vitality depends, are the words “agreed” and “agreement.” But I confess I think that an analysis of the evidence shews that that is an over-statement of what passed between the uncle and nephew respectively. If these words “agreed” and “agreement” mean anything which is to give effect to the pursuer’s case, he must make out that that agreement was that Paterson should go and employ Ingram on the instructions of Tully.

Now, this important fact is to be observed as regards the evidence. Unquestionably the man whose evidence one looks to as a primary source of information in this case is Tully himself; and I do not find that Tully in his evidence gives any account of the proceedings which can found the view which the Lord Ordinary states. It is not unimportant to observe that in making the conjecture that the motive of Paterson in giving this house to Tully was out of regard for services which had been rendered to Paterson during a course of years on his farm, Tully does not say in one word, or in any form of words, that there was any arrangement or agreement come to that he should receive remuneration either in the form of a house or in the form of money. He says, on the contrary, that the first knowledge he had of the benevolent intentions of his uncle was when his uncle told him that he had bought the house in question. “I remember him,” he says, “telling me in 1873 that he had bought the two houses in question in Main Street, Portpatrick, belonging to James Rodger, for me, and that he was going to have the title-deeds or disposition made out in my name.” Now, I pause to observe upon that sentence that it seems to negative the idea of there having been any antecedent right, as a result of an agreement, in Tully to get the house or a disposition of the house. This sentence as it stands undoubtedly contains the view that Paterson intimated his intention of carrying through the titles, “and that he was going to have the title-deeds or disposition made out in my name,” as if all that was to be done at the hands of the uncle and not of the nephew.

Now, then, what is said in the evidence of Tully as regards employment? If the case of the pursuer were well founded, one would expect that the uncle would from this moment drop out of the proceedings except as an intermediary between the nephew and the agent. But so far from that being the case, the evidence proceeds in the same strain, the nephew telling what the uncle told him, and the nephew merely assenting to what he was told. He says,—“He also said that he would go to Mr Ingram and ask him to see that the title-deeds were correct. I was quite agreeable to what he proposed, and said so to him. I said I thought it was all right, and that he could not get a better man than Ingram.” Now, it seems to me that taking that evidence the proper word to express the attitude of Tully to the proceedings of Paterson is rather the passive word “assented” or “acquiesced” than “agreed.” There is certainly nothing in the circumstances to impose any duty upon Paterson to act on behalf of Tully. Paterson

seems merely, from a benevolent intention actually carried out, to have informed his nephew of what was in the course of being done, and the nephew seems to have assented to all his uncle's proceedings. He entirely assents to the employment of Ingram. No. 19.
Nov. 10, 1891.
Tully v. Ingram.

Now, that being the evidence of Tully, is there anything in Paterson's statement which gainsays that view? I confess I find nothing at all. It is true that the evidence is permeated by the idea—quite a natural one to be in Paterson's head—of the joint interest of donor and donee in the completion of the title; but I cannot find anything either in what he says or in what Tully says to shew that Tully stepped forward to assist, and either gave himself his consent or required his consent to be given in order to Paterson going on with the transaction. When we turn to the facts of the case that is entirely borne out by the sequel, because Paterson, and Paterson alone, saw Ingram and dealt with him in the sequel as he undoubtedly did at the moment of the first employment.

Well, then, what is there from the side of Mr Ingram? To a great extent the evidence is a blank. But there is no fact which could be appealed to,—no act of Mr Ingram's which could be appealed to on the part of the pursuer to substantiate or even countenance the idea that Mr Ingram took Tully to be his employer, or took anyone else but Paterson to be his employer—the one with whom he dealt, and—it is not unimportant, so far as the evidence goes—the only one of whom he had any personal acquaintance. As I have said, we must not merely implicitly take every word which is stated by the pursuer and his uncle in this case, but we must test the language employed, which sometimes is vague and intricate, by surrounding facts. And I think in what I have said that I have shewn your Lordships that we do not require to do more than to take implicitly, and even literally, every word Tully says in order to shew that he stood entirely extraneous to the relation between Paterson and Ingram, except in the sense that he was ultimately to be presented with the disposition, which was the result of his uncle's employment of Ingram.

Now, if that be the result of an analysis of the evidence, then I confess I think that the pursuer is entirely out of Court. He has not made good to us the only proposition of law which would have helped him in that state of the facts, and that is, that if an agent is employed by A to draw a disposition of a house in favour of B, that that gives B a right of action against the agent in case of any miscarriage of the contents. I do not think that any proposition in law short of that would serve the pursuer in the emergency in which he is placed owing to the state of the evidence; and I think that proposition is one which we cannot sustain.

Now, that affords a complete ground of judgment, because it deprives the pursuer of this action of any title to sue. In arriving at my judgment, which is in favour of both defenders, I am content to take that ground alone. It goes to the root of the case of the pursuer as against Mrs Ingram and Mr Mackenzie.

But I do not think it would be right to conclude without observing that even if this part of the case were to be made good by the pursuer, and even if he could make out that he was the employer, he would still have serious difficulties to encounter.

The Dean of Faculty and Mr Chisholm, on behalf of Mr Mackenzie, have presented a most formidable argument, resting upon no contract of employment

No. 19.
Nov. 10, 1891.
Tully v.
Ingram.

between Mackenzie and Paterson, and to the effect that the new firm did not then exist; and it is contended that inasmuch as Paterson—or for that matter either Paterson or Tully—employed Ingram before ever Mackenzie was a partner, it was impossible for Ingram to delegate that employment or to give any right to the subsequently assumed partner which could affect any previous employer; and that the reason which supports that conclusion would avail as a defence to the subsequently assumed partner against any claim of liability on the part of the employer, which I mention merely for the purpose of saying—although I do not express my opinion upon it—that I think it is clearly formidable to the pursuer.

Another point was taken on behalf of Mrs Ingram. She is concerned to shew now that she received no notice at the time when this burden was found to affect the property. She says, with certainly a measure of support in authority, that when a burden is found to affect a property which it was the duty of an agent to have discovered, it falls to the client to give notice to the agent or to his representatives that this burden has been found to affect the property so that it may be cleared off or taken out of the way. The agent has a manifest interest to have early notice of that, because he might be able to point out defects in the burden, or for that matter he might then and there clear the property of the burden and take it over himself. The fact here suggested was that Mrs Ingram did not receive such notice, unless the notice to Mr Mackenzie was to be held as notice to her. I think that upon that point Mrs Ingram has a very formidable argument in law. As I have said, I refer to that merely as indicating that while I propose to your Lordships that our judgment should be in favour of the defenders upon the single ground to which I have adverted, I am by no means otherwise than much alive to the gravities and difficulties of the pursuer's case which he would have to encounter if your Lordships were to agree with the Lord Ordinary on that point. I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders.

LORD ADAM.—This action is brought by the pursuer against the surviving partner of the firm of Ingram & Mackenzie, and also against the widow of the late Mr Ingram, as in his right, to have it found that Mr Ingram was guilty of negligence in the discharge of the duty which he had undertaken to the pursuer connected with the purchase of a small property in Portpatrick, in so far as he failed to obtain searches, the result of which was that that property was evicted from the pursuer.

I concur with your Lordship in the ground of judgment your Lordship proposes. It is to my mind very clear and satisfactory that we can proceed upon it, because I am also agreed with your Lordship that the questions which remain behind are of great importance, and if we had to consider them—which I do not think we require to do in the view which your Lordship takes of this case—we should have had to take much more time for their consideration.

I agree with your Lordship that there is no evidence here that the pursuer ever employed the late Mr Ingram to do the work in the performance of which Mr Ingram is said to have been negligent; and without proof of that employment it is impossible that the pursuer can succeed. Of course I do not mean to say that it requires to be proved that the pursuer personally employed Mr Ingram. That can be done through an agent or a person having authority from

the pursuer personally ; and there may be cases in which it may be held that a party has undertaken to act as an agent for another without personally communicating with him. But in my view of the evidence and the facts of this case, I think it is free from any such construction.

No. 19.

Nov. 10, 1891.

Tully v.

Ingram.

Now, my view of the truth of this case is just exactly that which Mr Tully, the pursuer, himself states at the beginning of his evidence—[His Lordship here read the passage in the pursuer's evidence, quoted *supra*.] I think that the pursuer has no good ground of action against the defenders after all that we know of the facts and of the real evidence in this case.

What does this evidence disclose ? It seems to me to disclose very clearly that there was a benevolent intention on the part of the uncle to make a free gift of this property to his nephew. As your Lordship pointed out, he bought the property before Tully knew anything about it. He only went to Tully after that and informed him of his benevolent intention, but so far as I can see, until this disposition was obtained and delivered over to Tully, Tully had no title to the subjects at all. To my mind it was the uncle's transaction from the beginning, until he obtained the disposition from the seller and handed it over to Tully.

Now, what would a proposed donee do in such circumstances except what took place in this case ? The pursuer says his uncle told him,—“ I am going to give you this property.” Then he says,—“ It was he that was going to get the disposition.” His uncle says,—“ I think of going to employ Mr Ingram to see that it is all right.” What does the nephew say ? All he says is,—“ I think it is a very good idea.” The word used by him which the Lord Ordinary has interpreted as “ agreed ” is not “ agreed.” He says,—“ I am quite agreeable.” That is the only agreement that ever took place between uncle and nephew. When the uncle proposed to employ Mr Ingram the nephew said,—“ I think he is a very good man, I am agreeable.” Is there any agreement in that ? I think if the Lord Ordinary in his note had said that the pursuer “ was agreeable ” that Mr Ingram should be employed, he would have expressed the truth of the case, but he would have shewn at the same time that the ground upon which he proceeded was unfounded in fact. I think that if we take the pursuer's own evidence to be true—and I think it is true—it puts the pursuer out of Court, for where is there any indication of action or employment by the pursuer of Mr Ingram ? The pursuer is a mere passive instrument in the hands of his uncle. His uncle might, before delivering the disposition to him, have changed his mind. If he had changed his mind and had never made over the property to the nephew, would Mr Ingram have had an action upon such a statement as that against the pursuer Tully for payment of his account connected with this transaction ? I do not see a vestige of ground for that at all. Mr Tully's answer would be,—“ You were employed by Mr Paterson, my uncle ; I had nothing to do with it.”

That brings us to the principle which is to be applied in determining this case, and it is the same which prevailed in the case of *Robertson v. Fleming*, 4 Macq. 167, to which we were referred, because undoubtedly here in one sense Mr Ingram was employed by Mr Paterson for behoof of the nephew,—as it turned out. But we see from that case that the fact that A has employed B to do something for the benefit of C, does not confer on C a right of action against B for any loss which he may have sustained through B's negligence, and for the plain reason that there is no privity of contract between B and C. That is exactly what

No. 19. this case comes to. There is employment by Paterson of Ingram, as Paterson wished to have the benefit of Ingram's services. But these are just the elements which occurred in the case of *Fleming*, and the House of Lords laid it down distinctly that in such a case as that there is no claim for neglect of duty or negligence by the party who suffers against the person who actually committed the delict, because there is no direct employment of the latter by the former. I think that the facts of the present case supply quite a sufficient ground for its decision.

Nov. 10, 1891.
Tully v.
Ingram.

LORD M'LAREN.—The question argued in this case is by no means one of novelty in our law, because in more than one case the question has been agitated—to what extent a person taking benefit under a deed may have a right of action against the agent who prepared the deed in respect of some blunder in the title, or that less has been secured by the deed than the grantor intended? The criterion of liability as laid down by, I think, all the noble Lords who took part in the decision of *Robertson v. Fleming* was this, that in order that a person taking a benefit should have a right of action founded on professional negligence he must be able to shew that the agent was employed by him or with his authority. The Lord Ordinary on this subject appears to me to have taken apparently the correct view of the question involved when he puts the question, Was Mr Ingram, who carried through the transaction, employed by or on behalf of the pursuer? And, Did he fail in his duty as a law-agent? But then his Lordship goes on to affirm that the circumstances establish a sufficient privity of contract.

I agree with your Lordship that we should not be warranted in accepting that view of the facts of the case after the fuller discussion and exposition of these points that we have heard. I think it is natural in such cases to consider first what would be the professional usage or the natural course of the transaction as between man and man. When two persons are entering into a commercial agreement, or an agreement by which some benefit is exchanged against another, then the ordinary course of business is that the agent of the one party draws the deed and the agent of the other revises it, so that each person should have the benefit of professional assistance directed towards his own interest exclusively. But, on the contrary, if a person is going to make a gift to a relative or friend it is not in accordance with the ordinary practice, nor would it occur to one as a natural and reasonable measure, that there should be two agents employed, or that anyone should act at all as professional adviser of the recipient of the benefit. In such a case the person making the gift employs his agent to prepare the deed of gift, as in the case of a testator who employs his own agent to make his will, and never thinks of communicating with or intimating his intention to his legatees. If a father makes a settlement on his daughter in the event of her marriage, supposing that it is not to be put into her contract with her husband but to benefit the daughter, her father would never think of asking her to name an agent in the preparation of a deed. Or supposing the father to give instructions to an agent, would the agent ever imagine that he had a claim against the daughter because the father had told her of his intentions?

I am putting here illustrations which of course admit of being only answered in one way, but they are really not very remote from the case in hand, because I see no evidence here of any communication between Paterson and his nephew on the subject of agency which would be different from what would take place

between a father and his son or daughter when making a gift. Paterson told Tully of his intention, and mentioned that it would be necessary to have the titles revised by Mr Ingram, and Mr Tully assented to this. But in order to make an agent responsible, it is not enough that as between the donor and the donee there should be an assent to employment. It is necessary to shew that he was actually employed on the authority of the donee. On that point I agree with your Lordship that the case has entirely failed, and I therefore am of opinion that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied from the conclusions of the action.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defenders from the conclusions of the action.

SMITH & MASON, S.S.C.—PETER ADAIR, S.S.C.—D. MILNE, S.S.C.—Agents.

WILLIAM DEN (Inspector of Poor for Parish of Meldrum), Pursuer
(Respondent).—*Comrie Thomson—Cooper.* No. 19.

JOHN DUNLOP LUMSDEN, Defender (Appellant).—*Salvesen—Gloag.* Nov. 10, 1891.
Den v. Lumsden.

Poor—Right of parochial board to decree against father for future aliment of illegitimate children.—In an action by a parochial board against the father of two illegitimate children, who had been deserted by their mother, for payment of a sum already expended by the board on the children's aliment, and for payment of aliment at a specified rate until the children should respectively attain the age of fourteen, or should cease to be a charge on the board, the Court, while granting decree against the father for the amount already expended, refused to grant decree for future aliment.

In January 1891 William Den, Inspector of Poor of the parish of Meldrum, raised an action in the Sheriff Court of Aberdeen against John Dunlop Lumsden, for payment of sums in name of aliment of two illegitimate children who had been deserted by their mother, and had become a charge on the parochial board, and of whom the defender ultimately admitted the paternity.

The prayer of the petition, as amended in the Court of Session, was in these terms:—"To ordain the defender to pay to the pursuer the sum of (first) £1, 5s. 9d., being the amount expended by the pursuer as Inspector of Poor of the parish of Meldrum, in alimentering John Dunlop Lumsden and George Addison Lumsden, the children of the defender, from the 20th December 1890 till the date of this action, with interest at the rate of 5 per cent per annum on the said sum from the date hereof till payment; further, to ordain the defender to pay to the pursuer the sum of (second) five shillings weekly for each of the said John Dunlop Lumsden and George Addison Lumsden until they shall respectively attain the age of fourteen or cease to be a charge on the pursuer as inspector foresaid, the first payment of 5s. for each of the said John Dunlop Lumsden and George Addison Lumsden to be made seven days after the date hereof, with interest on each sum of 5s. from the date when it shall become due till paid, and with expenses, and to grant warrant to arrest on the dependence."

After a variety of procedure the Sheriff-substitute (Brown), on 16th June 1891, granted decree both for the sums already expended and for future aliment.

The defender appealed, and argued;—A parochial board was only

No. 20.

Nov. 10, 1891.
Den v. Lumsden.

entitled to recover sums actually expended by them, and was not entitled to decree for a continuing payment such as was asked for here.¹ The pursuer argued that it was competent to grant a continuing decree for payment of aliment.²

LORD PRESIDENT.—The case as it now stands is in this position, that the defender has admitted the paternity of the children named in the prayer of the petition, and has also admitted that expenses to the amount of £1, 5s. 9d. have been incurred by the pursuer in maintaining them.

The case, however, involves another question, a difficulty arising from the position adopted by the pursuer in claiming decree in the form set out in the prayer of the petition, even as amended. I am of opinion that we should not grant a decree for future aliment at a specific rate, if the circumstances of the parents continue such as to make it applicable. The prayer of the petition contains elements of a hypothetical nature, which, in my view, make it not a proper subject for a decree, and there is no authority for granting a decree in such terms. The duty of a parochial board to give relief arises only as circumstances occur to give rise to it. They have no standing relation to the objects of relief which entitles them to assume that they will have a continuing duty to aliment them, and it will depend, as has been indicated, on the circumstances of the two parents whether they will have a right to claim relief from one or both of them.

I propose, therefore, that we should confine our decree to the sum of £1, 5s. 9d. already expended, with interest thereon from the date of the action, and that we should refuse the rest of the prayer of the petition.

LORD ADAM.—I concur. It appears to me that the pursuer has forgotten the true nature of his claim—that it is a claim for relief against those who are liable for the maintenance of the children. Being an action of relief, it follows that the expenses must have been incurred before the action is brought, and it equally follows that no continuing decree for the amount which may in the future be expended in aliment can be granted. I agree that the only competent conclusion is the first—that is to say, for payment of the expenses already incurred.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor :—" Allow the amendments," &c. : " Recall the interlocutor of the Sheriff-substitute : Find that by minute No. 5 of pro. the appellant has admitted the paternity of the children named on record : Find that it is admitted that at the date of the action the sum of £1, 5s. 9d. had been expended by the pursuer on the aliment of the said children, and that the appellant is liable therefor : Decern against him for said sum with interest," &c.

HENRY & SCOTT, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

¹ Duncan v. Forbes, Feb. 8, 1878, 15 S. L. R. 371; Gillies v. M'Dougall, &c., Guthrie's Sheriff Court Cases, 27.

² Anderson v. Heritors and Kirk-Session of Lauder, March 11, 1848, 10 P. 960, 20 Scot. Jur. 332; Kirk-Session of Wigtown v. Dalziel, Feb. 6, 1795, Hume's Dec. 453.

TIMOTHY GALLAGHER, Pursuer (Appellant).—*Salvesen.*
ALEXANDER PATTISON, Defender (Respondent).—*Ure.*

No. 21.

Nov. 10, 1891.
 Gallagher v.
 Pattison.

Process—Appeal—Amendment of record—Expenses.—In an appeal from the Sheriff Court for jury trial in an action at the instance of Timothy Gallagher, a cab-driver, against his employer, a carriage-hirer in Dunoon, named Alexander Pattison, for personal injuries sustained by the pursuer when engaged in driving one of the defender's carriages in Dunoon, the Court were prepared to find the averments irrelevant, and to dismiss the action, and the pursuer was allowed to amend his record only upon payment of the expenses in the cause from the date of closing the record.¹

1ST DIVISION.
 Sheriff of Ren-
 frewshire.

WILLIAM OFFICER, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

**JOHN SLEIGH AND OTHERS (Governors of the Strichen Endowments),
 Pursuers and Real Raisers (Respondents).—*Cook.***

No. 22.

Nov. 13, 1891.
 Governors of
 Strichen
 Endowments
 v. Diverall.

**MRS BARBARA GORDON OR DIVERALL AND OTHERS, Claimants
 (Appellants).—*Morison.***

*Process—Multiplepointing—Appeal—Whole subject-matter of the competi-
 tion—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 53.*—In a multiplepointing in the Sheriff Court one of the claimants was found entitled to be ranked on the fund *in medio*, but no operative decree was pronounced. Effect was also given to an extrajudicial arrangement in regard to expenses. An appeal to the Court of Session held incompetent, in respect that "no final judgment" in terms of the 53d section of the Court of Session Act, 1868,* had been pronounced, notwithstanding that the respondent desired to waive any objection to competency.

A MULTIPLEPOINTING was brought in the Sheriff Court of Aberdeenshire regarding the right to a sum of £250, part of the estate of the deceased Mrs Innes under her deed of settlement, dated in 1881. There were several claimants.

1ST DIVISION.
 Sheriff of
 Aberdeen-
 shire.

On 1st August 1891 the Sheriff-substitute (Grierson) pronounced this interlocutor:—"Finds, under reference to the annexed note, that the pursuers and real raisers are entitled to be ranked on the free fund *in medio* to the extent of the said free fund, in terms of their claim: *Quoad ultra* continues the cause."

This interlocutor was appealed to the Sheriff.

On 13th October following the parties to the action lodged a joint minute, in which they "concurred in stating that they were agreed, in order to curtail the expense of litigation, and enable the parties to obtain

¹ Morgan, Gellibrand, and Co. v. Dundee Gem Line Steam Shipping Co., Dec. 9, 1890, 18 R. 205.

* The Court of Session Act, 1868, sec. 53, enacts,—“It shall be held that the whole cause has been decided in the Outer-House when an interlocutor has been pronounced by the Lord Ordinary, which either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for; and for the purpose of determining the competency of appeals to the Court of Session this provision shall be applicable to the causes in the Sheriff and other inferior Courts,” &c.

No. 22.

Nov. 13, 1891.
Governors of
Strichen
Endowments
v. Diverall.

the opinion of the Inner-House, to crave, and hereby crave, the Sheriff-principal to dismiss the appeal, and to find the whole of the claimants entitled to their expenses, including the expense of competition, out of the fund *in medio*."

The Sheriff (Guthrie Smith) on 15th October, pronounced this interlocutor:—"The Sheriff having considered the joint minute, dismisses the appeals, and finds the whole of the claimants entitled to their expenses, including the expenses of competition, out of the fund *in medio*: Allows accounts to be lodged, and remits the same for taxation, and decerns."

On appeal to the Court of Session an objection was taken by the Court to the competency.

The appellants argued that the interlocutors in the inferior Court disposed of the competition (which raised no other question than the right to the fund *in medio*), and that the requirements of the 53d section of the Court of Session Act, 1868, had been complied with. The expenses had been arranged extrajudicially under the joint minute to which the Sheriff had given effect. The question of the disposal of expenses had been held to be the criterion in such questions of competency.¹

The respondents stated that they desired to waive any objection to the competency.

LORD PRESIDENT.—This case is certainly a fine one, but I am bound to say that I think the interlocutor of the Sheriff is not appealable. There still remains to be pronounced an operative decree. The interlocutor of the Sheriff-substitute merely lays down the principles upon which he is to give final judgment. It is true that these are not complex, but at the same time we cannot avoid the result that the absence of an operative decree makes the judgment an interlocutory one only. So long as it remains of that character I am afraid that the Court is precluded from entertaining an appeal. The parties can easily get the want supplied, but the Act of Parliament lays down a sharp and definite line in regard to what is an appealable interlocutor, and we must give effect to it.

LORD ADAM concurred.

LORD M'LAREN.—If the Sheriff-substitute or the Sheriff had pronounced a formal decree repelling the claim of the present appellant, and had therefore absolved the other claimants from the conclusions of the summons so far as involved in the claim of the present appellant, there would then, I think, have been an appealable interlocutor, because the appellant would then have been put out of Court, and, so far as he was concerned, the whole merits were disposed of. I think that this is the specialty which is recognised by the statute where a distinction is drawn between the case of a competition and that of an ordinary action. But the parties have neglected to take the proper course here, because they did not go to the Sheriff-substitute, and get the formal judgment from him which they ought to have got. I think we have no option but to dismiss the appeal.

LORD KINNEAR concurred.

THE COURT found the appeal incompetent.

KINMONT & MAXWELL, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

¹ Parochial Board of Greenock v. Miller and Brown, May 25, 1877, 4 R 737.

PETER ROY SMYTH, Pursuer (Reclaimer).—*Guthrie Smith—J. A. Reid.*

No. 23.

JOHN MUIR AND OTHERS, Defenders (Respondents).—*Johnston—
W. C. Smith.*

Nov. 13, 1891.
Smyth v.
Muir.

Process—Accumulation of defenders against whom different grounds of action—Shareholder suing in name of two different companies—Competency—Community of interest.—A shareholder in two limited tea companies brought an action against the directors of the companies, the companies themselves, and two private firms of B. & Co. and F. & Co. to have it declared that a sale by B. & Co. to the companies respectively of certain tea-gardens in India “was and is null and void,” and that the defenders, the directors, were not entitled to enter into the sale; and further, that the two firms should be ordained jointly and severally to repay to the companies, in the proportion in which the companies were respectively interested, the sum of £79,000; or otherwise that the directors of the companies all jointly and severally should be ordained to pay to the companies the sum of £79,000.

The pursuer averred that the two firms were represented in the directorate of the two companies; that B. & Co. were largely indebted to F. & Co.; that the partners of the firms, with a view to reduce this debt, made agreements on behalf of the two companies with B. & Co. whereby the tea-gardens, which belonged to B. & Co., and which were practically worthless, were sold to the companies in certain proportions to each at the exorbitant price of £79,000; that the money so received by B. & Co. was applied in reduction of their debt to F. & Co., and that this was a fraudulent scheme carried out by the directors (three of whom the pursuer admitted knew nothing about the scheme) to the loss and damage of the companies.

Held that the action was incompetent in respect (1) that the first alternative conclusion was founded upon two distinct and separate wrongs, one against one corporation and another against another corporation; (2) that the second alternative conclusion must be regarded as a conclusion for damages in which a lump sum was sought to be obtained for separate losses sustained by two separate corporations; and (3) that the pursuer sought to recover the price without offering restitution of the subjects bought.

PETER ROY SMYTH, plumber in Glasgow, was a shareholder to the extent of three shares of £100 each, paid up to the extent of £70 each in the North Sylhet Tea Company, Limited, and of three shares of £100 each, paid up to the extent of £70 each in the South Sylhet Tea Company, Limited. These companies were incorporated under the Companies Acts, the capital of each being £400,000, in 4000 shares of £100 each.

1st Division.
Ld. Stormonth
Darling.

On 12th January 1891 Smyth raised an action against John Muir and Alexander Brown, partners of the firm of James Finlay & Company, merchants in Glasgow, and six other gentlemen, all as directors of the two companies, the companies themselves, and against the two firms of P. R. Buchanan & Company and James Finlay & Company.

The summons concluded to have it found and declared that “a sale by the said Messrs P. R. Buchanan & Company to the said North Sylhet Tea Company, Limited, and to the said South Sylhet Tea Company, Limited, of certain lands, or leasehold rights of certain lands, situated in the district of Sylhet and Presidency of Bengal, India, and known as tea-gardens, with the plant, machinery, and houses thereon, in or about the month of March or April 1885, was and is null and void, and that the defenders, the directors of said companies, were not entitled, and could not legally enter into the said contract to purchase said lands, or the leasehold rights thereof, or the said plant, machinery, and houses: And further, that the defenders the said Messrs P. R. Buchanan & Company, and the said defenders Messrs James Finlay & Company, jointly and severally,

No. 23. **Smyth v. Muir.**
 Nov. 18, 1891.
 or one or other of them, are bound to repeat to the said companies, in the proportion in which the said companies were respectively interested, the sum of £79,000, or such other sum as was paid for said lands or leasehold rights and others, with interest thereon at the rate of five per centum per annum from the date when said sum was paid to the said defenders until repetition or repayment; and the said defenders, Messrs P. R. Buchanan & Company and Messrs James Finlay & Company, jointly and severally, or one or other of them, ought and should be decerned and ordained, by decree foresaid, to repeat and pay the said sum of £79,000, or such other sum as was paid by the said North Sylhet Tea Company, Limited, and by the South Sylhet Tea Company, Limited, with interest as aforesaid, and that to each of said companies in the proportion paid by each respectively: Or otherwise, that the said John Muir, Alexander Marshall Brown, Patrick Robertson Buchanan, Andrew Brown Murray, Sir Robert Drummond Moncreiffe, James Coats junior, and Thomas Glen Coats, all jointly and severally, should be decerned and ordained to make payment to the said North Sylhet Tea Company, Limited, and to the said South Sylhet Tea Company, Limited, of £79,000 with interest."

The pursuer averred that in 1884 the defenders Mr Buchanan, Mr Muir, and Mr Brown were directors of both companies; that Mr Buchanan's firm of P. R. Buchanan & Company was largely indebted to Mr Muir's firm of James Finlay & Company; that the three gentlemen, with the view of reducing the debt, made an agreement on behalf of the two tea companies with Buchanan & Company, the result of which was that certain tea-gardens in India belonging to the firm, which at the time were practically valueless, were sold to the companies for £79,000; and that the money so received by Buchanan & Company was applied in reducing their debt to Finlay & Company.

In cond. 6 the pursuer averred that this transaction was a fraudulent scheme entered into between the parties mentioned, whereby "the said P. R. Buchanan & Company disposed of certain properties, of little or no value in the knowledge of said defenders, to the said tea companies for a large price, which was by said fraudulent scheme applied to the reduction of the foresaid debt due by the said Messrs P. R. Buchanan & Company to Messrs James Finlay & Company, and this scheme was carried out by the said directors of the said tea companies to the loss and damage of said companies, and in default of their duties as directors. Said directors were bound to act only in the interests of said companies, and were not legally entitled to purchase any property without obtaining full knowledge of its value, and without independent valuation, and were specially not entitled to enter into any such transaction for the purpose of or having the effect of benefiting any of the directors, or any firm of which they were partners. In these respects they wrongfully failed in their duty; and as they command a majority of the voting power of the companies, which they are using for the purpose of preventing inquiry into the acts in question, and promoting their own interests fraudulently at the expense of the companies, the present action has been rendered necessary."

The defenders denied the pursuer's averments. In their statement of facts they, *inter alia*, averred that the South Sylhet Company had bought certain of the estates from Buchanan & Company, acting for Mr Buchanan, for £51,000, and that the North Sylhet Company had bought other estates from them, acting for Mr Gow, Mr Buchanan, and others, for £28,000; that the purchases of the estates in question by both companies had been made after due consideration by the directors, who regarded the price as reasonable, and that the estates were valuable, had increased in value

while in possession of the companies, and could not be restored to the vendors without serious loss to the companies, and that Mr Buchanan had ceased to be a partner in each of the companies before these purchases were made. No. 23.

Nov. 13, 1891.
Smyth v.
Muir.

The pursuer, in his answers, averred that three of the directors—Mr Coats, Mr Glen Coats, Sir R. D. Moncrieffe, Bart.—were not aware of the worthless character of the properties offered to them, nor of the financial relations of Messrs P. R. Buchanan & Company and Messrs James Finlay & Company, and that they made no inquiry, accepting Mr Muir's recommendation without question. The pursuer did not aver that Mr Murray was aware of the worthlessness of the properties, or took any part in the alleged fraudulent scheme.

The pursuer pleaded;—(1) As the defenders control a majority of the voting power of the company, and are using this power fraudulently for the purpose of preventing inquiry, and promoting their own interests at the expense of the company, the pursuer is entitled to sue on behalf of himself and others to compel them to make good the funds improperly expended. (2) The contracts of sale by Messrs P. R. Buchanan to the said companies being illegal and *ultra vires*, the pursuer is entitled to decree of declarator as concluded for. (3) The said contracts of sale being a fraudulent scheme for the benefit of firms in which the directors of said tea companies were partners, are null and void.

The defenders pleaded;—(1) The action is incompetent, in respect it relates to two separate contracts between different vendors and vendees. (2) No title to sue. (5) The pursuer's averments are irrelevant, and not sufficiently specific. (10) *Restitutio in integrum* being impossible, the remedy craved is incompetent.

After the record was closed, the defenders obtained leave to amend their record. Their minute of amendment contained the following statements:—

On 27th April 1891 the pursuer sent to the shareholders in each of the companies a circular, with a copy of the record in the action enclosed, and asking the shareholders to support him by becoming parties to the action, but he did not receive any favourable replies.

On 8th May the defenders issued to the shareholders of the companies a notice calling the annual general meeting for 18th May, and annexing an extract from the directors' report to be laid before the meeting, and a copy of the resolutions to be proposed. The extract referred to the present action, and stated that it was being defended, and one of the resolutions was that the report be approved and adopted.

At the date of the meetings (18th May) of the two companies holders of £265,000 of the stock of the South Sylhet Tea Company were present in person, and holders of £66,700 were represented by proxy. Of the North Sylhet Tea Company holders of £266,600 stock were present in person, and holders of £66,200 were represented by proxy. The entire holdings of J. Finlay & Company and P. R. Buchanan & Company and those in their interest and the directors were £135,000 in each company out of a total of £400,000. The pursuer was present at the meetings, and at each of them the directors' report was approved of, the pursuer alone dissenting, and a resolution was passed expressing confidence in the directorate, disapproving of the conduct of the pursuer in raising the action, and authorising the directors to continue to defend the action.

In his answers to the foregoing minute, the pursuer denied that the replies to his circular were unfavourable. He averred that there was one meeting for both companies which had always been treated as practically one, and which, under official circular dated 20th January 1891, it was proposed to amalgamate. He had moved at the meeting as an amend-

No. 23.
 Nov. 13, 1891.
Smyth v.
Muir.

ment that a committee should be appointed to investigate the various matters referred to in the directors' report, but the voting power possessed by the directors made it impossible that the amendment should be carried.

The defenders added a plea in law, to the effect that,—(11) The purchases, the challenge of which is the ground of action, having been confirmed by an independent majority of the shareholders at their meetings on 18th May 1891, the pursuer has no title to sue this action.

On 10th June the Lord Ordinary (Stormonth Darling) found the averments of the pursuer were not relevant to sustain the conclusions of the summons, and dismissed the action.*

* "OPINION.—This is an action of a very peculiar nature. It is brought by an individual shareholder in two limited liability companies, called the North Sylhet Tea Company and the South Sylhet Tea Company, and it is directed against the directors of these companies, the companies themselves, and two private firms—Messrs P. R. Buchanan & Company, of London, and Messrs James Finlay & Company, of Glasgow. There are no reductive conclusions, but the main purpose of the action is to have it declared that a sale by Messrs P. R. Buchanan & Company to the companies of certain tea-gardens in India, made in 1885, was and is null and void, and to have Buchanan & Company and Finlay & Company ordained to repay to the companies the sum of £79,000, being the price of the tea-gardens. There is an alternative conclusion for payment of the sum of £79,000 by the directors, jointly and severally, to the companies.

"The allegations of the pursuer are that these tea-gardens were at the time of the sale 'practically valueless,' that they were the property of the firm of P. R. Buchanan & Company, that Mr P. R. Buchanan, the senior partner of that firm, was then a director of the two companies, that the firm was largely indebted to James Finlay & Company, two of the partners of which firm (Mr Muir and Mr A. M. Brown) were also directors of the companies, and that a fraudulent scheme was concocted between Mr Buchanan, Mr Muir, and Mr Brown, whereby the tea-gardens were palmed off upon the companies at an exorbitant price, in order that the money so raised might be applied in reduction of Buchanan & Company's debt to Finlay & Company. The pursuer does not say that, prior to raising the action, he took any steps to obtain redress within the companies themselves, but he says that the directors 'command a majority of the voting power of the companies,' and that they are using that power to prevent inquiry into the acts in question.

"Since the action was brought, it appears that the pursuer did attempt to enlist his fellow shareholders on his side, for he addressed to each of them a circular asking them to join him in the action, and he alleges that some of the replies were favourable; but certain it is, that at the general meeting of the companies held on 18th May last, a resolution was passed expressing the meeting's entire confidence in the directors, disapproving of the action, and instructing them to continue to defend it. The pursuer proposed an amendment for the appointment of a committee of investigation, but he did not even succeed in finding a seconder.

"The pursuer is the holder of six recently acquired shares of £100 each in the two companies, the total capital of which is £800,000. The case thus presents the remarkable aspect of an attempt made by a man whose interest in the concern is 1/1333d part of the whole, to rescind, on behalf of the companies, contracts made six years ago, with which the companies themselves are perfectly satisfied. The boldness of the attempt is further shewn by the fact that the pursuer, while demanding repetition of the price, does not, because he cannot, offer restitution of the land; and it is not wonderful that the companies should be unwilling to take such a course when it appears from the pursuer's own admission in answer 9 that a very large capital expenditure has been made upon the tea-gardens since their purchase.

"The defenders, besides denying all the pursuer's material averments, state a number of preliminary pleas. Of the first I will only say, that while it has much force in point of form, the companies are so closely connected that I do not

The pursuer reclaimed, and argued ;—As a general rule where a company had been defrauded by the execution of a contract of purchase and

No. 28.

Nov. 18, 1891.
Smyth v.
Muir.

think any practical end would be served by sustaining it ; but if the action were to go on, it would be necessary to call as defenders the vendors mentioned in stat. 11 (i.e., the vendors of the estates to the North Sylhet Tea Company). The second plea, of no title to sue, which is to be taken along with the new plea founded on the proceedings of the recent general meeting, raises the important and interesting question how far an individual shareholder can sue on behalf of a company against the wish of the majority, without alleging either that the act complained of was *ultra vires*, or that it constituted an attempt by the majority to gain some advantage for themselves at the expense of the minority. I was referred to many cases on this point, which would require very careful consideration, if it were not that there are averments here of fraud, which make it, I think, desirable to decide the case on the broader ground of relevancy. I am of opinion that the pursuer, being a minority (and, as it happens, a minority of one), has not stated a case relevant to sustain either his conclusions for annulling the sale, or for recovering the price from the individual directors by way of damages.

“To the conclusions for annulling the sale, the objections are, I think, insurmountable. It is enough, in my opinion, that the pursuer does not, and cannot, offer restitution of the subject of sale. . . . Moreover, while the pursuer avers a fraudulent scheme for enabling the debt of Buchanan & Company to Finlay & Company to be paid at the expense of the companies, it is obvious that the whole sting of this averment lies in the allegation of excessive price, for, apart from that, there was nothing wrong in Buchanan & Company making, or in Finlay & Company receiving, payment of a just debt. Now, it is not said that either Buchanan & Company or Finlay & Company, or their partners, used any arts or practised any misrepresentation or concealment to persuade their brother directors to consent to the transaction, and without their consent the transaction could not have been carried out. Neither is it said that the three persons who alone were parties to this alleged fraud (viz., Buchanan, Muir, and Brown) themselves possessed a majority of the votes in the companies, though it is loosely said that the directors as a whole commanded a majority of the voting power, so that, when the shareholders deliberately adopted and ratified the transaction, I must assume that an independent majority of the shareholders were of opinion that the purchase was not at an excessive price, but for the benefit of the companies. In such a state of matters, I think it would be in the highest degree improper for a Court of law to interfere in the internal regulation of a company, and, at the suit of a single dissentient shareholder, to order an elaborate and costly inquiry into the value of properties which the company itself is determined to retain.

“The same considerations have led me to the result that the pursuer has not stated a relevant case for his alternative conclusion, which is not put, either in his condescendence or pleas in law as a conclusion for damages, but which I am asked to regard in that light. The conclusion is aimed at all the directors ; yet it is not said that four of them (Mr Murray, Sir Robert Moncrieffe, Mr James Coats, and Mr Thomas Glen Coats) were aware of the alleged worthlessness of the properties, or took any part in the alleged fraudulent scheme, or profited in any way by the transaction. Against them, therefore, the conclusion is plainly irrelevant, for I never heard of an action of damages against directors for mere negligence or want of prudence in paying too much for a property, particularly when the company itself was perfectly satisfied with the bargain. Even as against the three defenders who are said to have profited by the transaction, I do not see my way to sustain the relevancy on this head, and thereby to allow a proof, which would involve those very evils which I have mentioned as necessarily arising from an inquiry with a view to cut down the sale. I am far from saying that there are not frauds by directors of a kind for which even a single shareholder might be allowed to recover damages in name of the company, particularly if he could shew that he was prevented from obtaining redress within the company itself by the actual votes of the wrongdoers. But when the alleged

No. 23.
Nov. 13, 1891.
Smyth v.
Muir.

sale, the company alone had title to sue an action to recover the price from the directors or officers.¹ Where, however, the directors controlled a majority of the voting power of the company, and were using that power to defraud the minority, a member of the minority might sue the action in name of the company.² There were ample averments here to bring the pursuer within this exception to the general rule, and he was entitled to a proof of them. Further, there was nothing incompetent in the form of action. Though the action was raised in name of two companies, they were practically one company carrying on the same kind of business in the same district in India, were managed by the same directors, and would probably be amalgamated. Then, again, there was no need for an action of reduction, for the declaratory conclusion that the sale was null and void, and that the directors were not entitled to enter into it, was sufficient.

Argued for the defenders;—The law as laid down in *Gray v. Lewis*³ and *Mason v. Harris*⁴ was not disputed, but it had really no application in the present circumstances, because deducting the voting power of the persons said to be tainted with fraud, there was an overwhelming untainted majority who were unanimous in repudiating the action.⁵ The action, however, was hopelessly incompetent in point of form. In the first place, assuming the pursuer's averments to be relevant, they disclosed a separate ground of action in the case of each of the companies, based on separate wrongs.⁶ Secondly, assuming that the pursuer had relevantly averred fraud (which he had not), the summons as laid could not effect his purpose. A contract induced by fraud was not void, but voidable. It was valid until rescinded, and to rescind it an action of reduction was necessary. But the pursuer did not propose to reduce it, and if effect were given to the declaratory conclusions and the first alternative of the operative conclusion, the companies, of which the pursuer was a shareholder, would recover payment of the whole price they paid for the properties, and would still be allowed to retain them in their possession. The same criticism also applied to the conclusion for damages against the directors. Thirdly, even if the companies desired to give *restitutio in integrum*, they could not in the circumstances do so, and much less could an individual shareholder.

At advising,—

LORD KINNEAR.—The pursuer holds three shares in a limited company called the North Sylhet Tea Company, and three shares in another limited company called the South Sylhet Tea Company, and he brings this action on behalf of

fraud resolves entirely into an allegation of excessive price paid from a sinister motive, and when it appears that a majority of the shareholders, apart from the alleged wrongdoers, are content to abide by the transaction as fair and reasonable, I am of opinion that there is no case for the interposition of the Court."

¹ *Gray v. Lewis*, 1873, L. R., 8 Ch. App. 1035, per Sir W. James, 1050; *Mozley v. Alston*, 1847, 1 Phillips' Ch. Cases, 790; *Foss v. Harbottle*, 1843, 2 Hare's Ch. Rep. 461.

² *Atwool v. Merryweather*, 1867, L. R., 5 Equity, 464, note; *Mason v. Harris*, 1879, L. R., 11 Ch. Div. 97, per Sir Geo. Jessel, 107; *Rixon v. Edinburgh Tramways Co.*, March 20, 1889, 16 R. 653, per Lord President, 657.

³ *Gray v. Lewis*, *vide supra*, note 1.

⁴ *Mason v. Harris*, *vide supra*, note 2.

⁵ *Lindley on Company Law*, 581; *Macdougall v. Gardiner*, 1875, L. R., 1 Ch. Div. 13; *Russell v. Wakefield Water-works Co.*, 1875, L. R., 20 Equity, 474, per Sir Geo. Jessel, 479.

⁶ *Revey v. Murdoch*, March 11, 1841, 3 D. 888; *Harkes v. Mowat*, March 4, 1862, 24 D. 701, 34 Scot. Jur. 348; *Gibson v. Macqueen*, Dec. 5, 1866, 5 Macph. 113, 39 Scot. Jur. 56.

both companies for the purpose of recovering payment of the sum of £79,000 which is said to be the amount paid by both companies to the firm of P. R. Buchanan & Company, merchants in London, as the price of several properties purchased separately by each company from that firm. No. 23.
Nov. 13, 1891.
Smyth v.
Muir.

The first plea in law stated for the defenders is this,—“The action is incompetent in respect it relates to two separate contracts between different vendors and vendees”; and I understand that to mean, that inasmuch as the two companies on whose behalf the action is brought are separate persons in law, the conclusions of the summons are, at the instance of these two separate and independent persons, incompetent conclusions.

The Lord Ordinary observes with reference to this plea, that “while it has much force in point of form, the companies are so closely connected that he does not think any practical end would be served by sustaining it.” But if the plea is well founded at all, it is by no means a merely formal or technical plea, but on the contrary rests upon practical considerations that are very material to the parties. Nor does it appear to me that its validity is in any way affected by the supposed connection between the companies. It is true that the same persons are directors of both, and that others besides the directors may hold shares in both, that they carry on the same kind of business, and that they have properties in the same district in India, and the pursuer says that they may probably be amalgamated. But in the meantime they are distinct and separate corporations, each having its own separate rights and obligations independently of the other. Now, the pursuer’s averments, assuming them to be relevant, disclose a separate ground of action in each of these two companies.

His allegation is that in 1884 the defenders Mr Buchanan, Mr Muir, and Mr Brown were, as they still are, directors of both companies; that Mr Buchanan’s firm of P. R. Buchanan & Company was largely indebted to Mr Muir’s firm of James Finlay & Company; that the defenders whom I have named, with the view of reducing the debt, made an agreement or agreements on behalf of the two tea companies with Buchanan & Company, the result of which was that certain properties belonging to the firm which at the time were practically valueless, were sold to the companies for £79,000; that the money so received by Buchanan & Company was applied in reducing their debt to Finlay & Company; and that this “transaction was a fraudulent scheme entered into between the persons mentioned whereby the said P. R. Buchanan & Company disposed of properties of little or no value in the knowledge of the said defenders to the said tea companies for a large price, which was by the said scheme applied to the reduction of the said debt, and this scheme was carried out by the said directors to the loss and damage of the said companies, and in default of their duty as directors.”

The pursuer deduces from these averments two alternative conclusions—First, a conclusion directed against the firms of Messrs P. R. Buchanan & Company and Messrs James Finlay & Company that these two firms should be ordained, jointly and severally, to repeat and pay the sum of £79,000, with interest, to the North Sylhet Tea Company and the South Sylhet Company, and that to each of said companies in the proportions paid by each respectively; and secondly and alternatively, a conclusion against the directors, jointly and severally, to pay the said sum of £79,000 to the two companies without any conclusion for determining the proportion in which the money is to be paid to each. I think both of these conclusions incompetent. It must be observed

No. 23. that the averments do not mean that the properties which are said to have been valueless were conveyed to the two companies jointly, or that they had jointly paid a lump sum as the price of the whole. The meaning is that each company acquired for itself a separate property or properties, and paid a separate price to the same vendor. The pursuer therefore alleges two distinct and separate wrongs done by the same persons against two distinct and separate corporations. There is thus no community of interest between the two companies, and if they had resolved to challenge the transactions for themselves, I think it clear that they must have brought separate actions for that purpose. The gravamen of the charge is that an extravagant price was paid by each purchaser for certain properties in which the other has no concern. That may be true or it may be false in regard to both purchases. But it is also conceivable that it may be true in regard to one, and false in regard to the other. And therefore in the procedure which would follow upon this summons, if it were sustained, there must be two separate inquiries, which might conceivably result in entirely opposite judgments, and yet the two cases are so tied together that the only separation of interest which the summons contemplates appears to be an apportionment of the sum of £79,000 between the two companies after it has been determined that that sum is payable to both.

Nov. 13, 1891.
Smyth v.
Muir.

I know of no authority by which a summons framed in this way can be supported. It has been held in *Harkes v. Mowat*, 24 D. 701, that where two persons have sustained injuries by one and the same wrong, they may insist for damages in the same action provided the summons contains conclusions applicable separately to each pursuer, and that each takes a separate issue. But the present is a very different case from that, because if there is a good ground of action to either company, it must rest upon an allegation of fraud perpetrated against that company alone in carrying out on its behalf a contract of purchase and sale with which the other company had no concern. It is not a case of separate injuries arising from a single wrong, but of two separate wrongs done to two different persons.

The alternative conclusion seems to me even more clearly incompetent. It is directed against all the directors who were in office at the time of the purchase, jointly and severally. But the pursuer admits that three of these gentlemen knew nothing of the worthless character of the properties, or of the financial relations of Messrs Buchanan & Company and Finlay & Company, and the only charge against them therefore is that they failed in their duty as directors, inasmuch as they accepted Mr Muir's recommendation without inquiry. That being the state of the averment, the conclusion against the directors can only be justified as a conclusion for damages. I am not considering at present whether there is any relevant averment to support such a conclusion against all or any of the directors. But it cannot be suggested that directors who knew nothing of the alleged fraud, and received no part of the price, can be made liable on any other ground except that they are answerable in damages for negligence in the performance of their duty. And therefore the demand is that the defenders shall pay to two companies having no community of interest a lump sum of £79,000, as the amount of loss they have sustained, and there is no suggestion of any division or apportionment of the money. I think the case of *Gibson v. Macquenn* (5 Macph. 113), is directly in point. In that case the respective creditors in two bonds granted by the same person at the same time, over the same subjects raised an action of damages against the law-agent of the borrower, on the allega-

tion that he had delivered the bonds to the pursuers in the knowledge that certain of the signatures were forged. The action was held to be incompetent, and the observations of the Lord Justice-Clerk may be applied in terms to the present case. "The demand is that to these four ladies, who are without community of interest, a lump sum should be paid as the amount of loss sustained by them. That conclusion appears to me to be hopelessly incompetent. We have indeed sustained a summons in which two parties alleged injury by one calumnious statement, but then they asked for £300 each. That was the case of *Harkes v. Mosat*, and I think it was going very far to sustain conclusions in these terms. But here we have no guide or clue to any mode of separating the claims of the two parties, and yet the claims are in their own nature as separate as can be. The one may succeed, while the other fails. The parties are different, and so are the injuries sustained, and yet I think they are so bound up that it is impossible to separate them."

No. 22.

Nov. 13, 1891.

Smyth v. Muir.

I need hardly say that it can make no difference, in so far as this question of competency is concerned, that the action is not brought directly by the two companies themselves, but by a single shareholder who claims to be entitled to sue on behalf of both. For the reasons I have mentioned I am of opinion that the first plea in law should be sustained, and the defenders assoilzied from the conclusions of the summons.

If your Lordships are of the same opinion, we are not called upon to consider the other pleas.

But there is another objection to the competency to which I think it quite necessary to refer, because it appears to me to be perfectly fatal to the action in so far as the first of the two alternative conclusions is concerned. The pursuer alleges that the contracts of which he complains are frauds on the company. But he does not propose to reduce these contracts, and it was explained in argument that he does not seek for reduction, because in his view no reduction is necessary, inasmuch as the declaratory conclusion is well founded and sufficient, namely, that the sale of which he complains "was and is null and void, and that the defenders, the directors of the said companies, were not entitled and could not legally enter into the said contract for the purchase of the lands and leasehold rights," which formed the subject of that contract. Now, that appears to me to be altogether unsound in law. It is very clear in law that a contract induced by fraud is not null and void, but voidable. It is valid until it is rescinded, and accordingly the party defrauded has in general the option, when he discovers the fraud, of rescinding the contract or of affirming it. But he must do either one or other. He cannot take the benefit of the contract in so far as it is beneficial to himself, and reject it in so far as it is burdensome to him. If he affirms it he must affirm it in all its terms. If he reduces it he must give up any benefit he may have before the fraud was discovered, and therefore if the two companies were of the same mind as the pursuer, and were desirous of challenging the transaction which he says has been injurious to them, their remedy would be to reduce the contracts of purchase and sale, to give back the properties they have been induced to buy, and to recover the price from the vendors. It is out of the question to suggest that they could recover the price and yet refuse to give back the properties for which the price had been paid. But that is what the pursuer proposes by the conclusions of his summons. If he were to have decree in terms of the declaratory conclusion and the first of the two operative conclusions, the effect of that would be

No. 23. that the companies of which the pursuer is a shareholder would recover payment of the whole price they have paid for certain properties of which they are at present in possession, and would still be allowed to retain the properties.

Nov. 13, 1891.
Smyth v.
Muir.

The mere statement of this proposition is enough to shew that it is untenable, and that a demand of that sort cannot be regarded as a competent demand. That applies directly only to the first of the two alternative conclusions of the summons. But if we were considering the question of relevancy it might have a very material bearing on this second conclusion also, because the scheme of the action is this—that the companies, having been induced by fraud to execute this contract of purchase and sale, have a direct action for repayment of the price against the vendors, and also against a certain firm into whose hands the price was paid, they being in the knowledge of the fraud; and second, that failing their remedy against the vendors they have an alternative remedy against their own directors, by whose fault or negligence they have suffered the loss of which the pursuer complains. Now, if that be the nature of the second alternative conclusion, it appears to me the defenders have a very material interest to be informed as to the specific ground on which the alternative claim of damages is based—whether they are to pay damages because the company is unable to restore the properties which they have bought, and therefore cannot recover the price from the vendor, or because the company, regarding these properties as advantageous and beneficial properties, declines to restore them. That would appear to me to be a very material point which would require to be the subject of specific averment in an action of damages against the directors. But I make that observation merely by the way, because I am of opinion that the true ground of judgment being that the action is incompetent, we have no concern with any question as to the relevancy of any of the averments on record. If the action is incompetent, we are not to inquire whether the pursuer's condescendence does or does not contain statements that might be relevant in support of some other demand which he has not thought fit to bring before us.

For the same reason I express no opinion on another question, which it would have been necessary to decide had we had any competent action before us, namely, whether the pursuer as a single shareholder has a title to sue on behalf of the two companies. The general proposition is perfectly clear, that where a company has been defrauded by the execution of a contract of purchase and sale, it is the company alone that has any title to complain, because they alone have a right to decide whether they are to give up the property they have bought and to recover the price, or whether the contract should be affirmed because the properties are too valuable to be given up. But then there is no doubt an exception to that rule, of which the pursuer desires to avail himself in this case. The exception is that where the majority of the shareholders of the company are using their voting power to defraud the minority, there the minority may sue an action in name of the company which the majority decline to raise. But whether in a particular case the averments of a fraud of this nature on the part of the majority are sufficient to justify a proof is a question of relevancy which we cannot consider unless it arises in a competent action.

The conclusion to which I come is that the defenders ought to be assoilied from the conclusions of this summons as incompetent. I should propose to sustain the first plea in law for the defenders. It does not appear to me that we can sustain the tenth plea. That is a plea that "*restitutio in integrum*"

being impossible, the remedy craved is incompetent." Now, we cannot tell whether restitution is impossible or not. There is nothing in the record to suggest that it is at all impossible to give back those properties, although there is a statement by the defenders that the properties are valuable, and have increased in value by the possession of the companies, and therefore ought not to be restored. But the true objection to competency is not that restitution is impossible, but that the pursuer proposes to recover the price without offering restitution of the subjects he has bought. That appears to me, as I have said, to be a totally untenable position, and therefore I am of opinion that we should assolvie the defenders.

No. 23.

Nov. 13, 1891.

Smyth v.

Muir.

LORD ADAM and LORD PRESIDENT concurred.

LORD M'LAREN, who was absent at the hearing, delivered no opinion.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defenders, and assolvied them from the conclusions of the action.

ADAMSON & GULLAND, W.S.—FORRESTER & DAVIDSON, W.S.—Agents.

JOHN WALKER (James Somerville Paterson's Trustee), Pursuer
(Respondent).—*W. Campbell—Crole.*

No. 24.

MICHAEL COYLE AND OTHERS (James Paterson's Trustees), Defenders
(Reclaimers).—*D. F. Balfour—Baxter.*

Nov. 13, 1891.

Paterson's
Trustee v.
Paterson's
Trustees.

Bankruptcy—Illegal preference—Lease—Act 1696, c. 5.—By agreement purporting to be a "minute of lease" entered into in 1879 the trustees "let" to A certain pawnbroking premises, together with the stock of pledges therein of the value of £1100, A being bound to pay rent for the premises, and 5 per cent on the value of the stock. It was provided that A should keep books shewing his intronmissions with the business, and that in the event of the stock falling below the value at which it had been handed over to him, the trustees should have a right to enter into possession of the premises and stock, and that A should be bound to cede possession thereof on receiving fourteen days' notice. On 24th April 1888, A executed a deed ceding possession of the premises and of the stock of pledges to the trustees, and they at once entered into possession of premises and stock. Four days later A was sequestered. In an action by the trustee in his sequestration against the trustees, held that under the agreement the trustees had only a personal obligation by the bankrupt to deliver to them in a certain event the pledges then in his possession; and therefore, even assuming the event which gave them a right of re-entry to have occurred, that the deed by which the stock of pledges was transferred to the trustees was ineffectual as having been granted within sixty days of bankruptcy in satisfaction of a prior debt, within the meaning of the Act 1696, c. 5.

THE estates of James Somerville Paterson, pawnbroker in Edinburgh, were sequestered on 28th April 1888. Four days before his sequestration he gave up possession of his shops in Richmond Place and Greenside Row, with the stock of pledges therein, to the testamentary trustees of his grandfather, James Paterson, who were the proprietors of the shops.

1st Division.
Ld. Kyllachy.

On 14th August 1890 this action was raised by the trustee in J. S. Paterson's sequestration against James Paterson's trustees. The conclusions were for payment of £2250, with interest from 24th April 1888, or otherwise, for decree ordaining the defenders to account for their intronmissions with the bankrupt's estate, and for payment of the sum which should be found due.

The pursuer pleaded;—(1) The transfer of said pledges being made

No. 24.

Nov. 13, 1891.
Paterson's
Trustee v.
Paterson's
Trustees.

and granted within sixty days of bankruptcy, and at the time when the bankrupt was known by the defenders to be insolvent, was an alienation struck at by the Statute 1696, cap. 5, and a fraud against the bankrupt's creditors at common law.

The defenders pleaded;—(6) The actings complained of having been lawful and in conformity with the contracts under which James Somerville Paterson possessed the pawnbroking business in question for many years, the defenders should be assoilzied.

The defenders founded on the following deeds:—Agreement described as a "minute of lease" entered into by Michael Coyle and others, the testamentary trustees of James Paterson, as first party, and his grandson James Somerville Paterson as second party, dated 30th December 1878 and 14th May 1879, by which the trustees "let in lease" to James Somerville Paterson, and his heirs and successors, the premises situated at No. 2 and 4 Richmond Place, Edinburgh, "together with the pawnbroking business stock therein of the value of £1100 sterling," belonging to the trustees, from December 1878 to Martinmas 1885, at a yearly rent for the premises of £50, payable half-yearly, "the said James Somerville Paterson and his foresaids paying in respect of the said lease of said business stock therein interest on the said sum of £1100 at the rate of 5 per cent per annum," payable also half-yearly, and it was declared that the premises should be used and possessed by the second party for carrying on the pawnbroking business then carried on there, and for no other purpose whatever.

By the second clause it was provided that so long as the sum of £1100, or any part thereof, belonging to the trustees should be allowed to remain in the business, and not be paid out as thereafter provided for, the second party should be bound to keep regular books shewing his intrusions with the business, and that the first party should have free access at all times to such books, and to inspect the stock of pledges in the premises, and that the second party should make up a balance-sheet every half year, to be exhibited to the first party, shewing the position of the business at the time. The clause then proceeded,—“And with full power to the said first party and their foresaids during the currency hereof, at any time they may think proper, in the event of the stock of pledges at the time being found to be under the amount or value of said sum of £1100, if not paid out, to enter into and resume possession of the premises, business, and stock of pledges and others therein, and to intronit with, sell and dispose of, and realise the same in such manner as they may think proper, without any other warrant from the second party or his foresaids than this agreement, in which case the said second party binds and obliges himself and his foresaids peaceably to cede possession of the said premises, business, goods, and effects to the said first party or their foresaids on receiving fourteen days' previous notice in writing of their intention so to do: Declaring that the said second party or his foresaids shall not be entitled to object to the said first party or their foresaids entering to the possession, management, and disposal of the said premises, business, goods, and effects on any ground or pretence whatever, but shall only be entitled to retain possession on instantly making payment to the said first party or their foresaids, or consigning in bank in their names the said sum of £1100, with interest thereon at the foresaid rate, and rent of premises that may be due at that time, and any expenses that may have been incurred; but declaring that the said first party or their foresaids shall be bound to hold just count and reckoning with the said second party or his foresaids for his intrusions with the said goods and effects, and to pay to him or his foresaids any balance that may

remain after deducting all claims at the instance of the said first party for the said sum of £1100 sterling, interest thereon, rent, and expenses." No. 24.

Nov. 13, 1891.

Paterson's
Trustee v.
Paterson's
Trustees.

In the third clause the second party bound himself to keep the stock of pledges up to the value of £1100 so long as the sum of £1100 remained in the business, and it was provided that the stock of pledges should be insured in the name of the first party, the second party being bound to repay them the premiums of insurance. The fourth clause provided that on the termination of the lease the whole stock of pledges, with the exception of forfeited pledges, which should be sold by auction, should be inventoried and valued by neutral parties. If the valuation exceeded the sum of £1100, and that sum were not paid out, the second party was to be paid the excess; if it fell short of £1100, he was to make good the deficiency, the whole stock then becoming the property of the first party. The fifth clause empowered the second party to remove the stock to other premises, and declared that in that event the stock should still remain the property of the first party. Under the sixth article the second party was entitled to pay out the sum of £1100, in which case only the premises and fixtures would remain the property of the first party.

An agreement, *mutatis mutandis*, identical with the foregoing, was entered into in 1880 between the same parties with regard to premises situated at No. 21 Greenside Row, Edinburgh, the total value of the stock which J. S. Paterson was taken bound to hold being £2250. Of this sum, £350 represented an advance by the trustees to Paterson, who granted a receipt bearing that the money advanced was to be expended "in increasing the stock of goods farmed" by him.

It appeared from a proof that J. S. Paterson entered into possession of the premises and stock at Nos. 2 and 4 Richmond Place and 21 Greenside Row in pursuance of these agreements, which after their termination were renewed annually by tacit relocation.

In 1888 J. S. Paterson was in arrear with the rent and interest due by him to the trustees, and on 24th April 1888 he, without having received the fourteen days' notice to which he was entitled under the agreements, voluntarily executed deeds ceding possession of the premises and stock to the trustees, who at once entered into possession of the premises and stock of pledges therein. Four days afterwards his estates were sequestrated.

The evidence shewed that the defenders had realised a sum of £2430, 1s. 6d. from the pledges delivered to them by the bankrupt.

On 25th July 1891 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the deeds libelled, dated 24th April 1888, were granted by the bankrupt in contravention of the Act 1696, cap. 5, and are therefore ineffectual: Finds that the defenders are bound to count and reckon with the pursuer for the proceeds of the bankrupt's property received by them under the said deeds: Finds of consent that the said proceeds amount to £2153, 10s. 3d., as brought out in the state No. 220 of process: Allows interest on the said sum at the rate 4 per cent from 1st September 1888 until payment, and decerns against the defenders accordingly," &c.*

* "OPINION.—The view which I take of this case is perhaps a narrow one, but it is, I think, sufficient for the decision. I hold that the stock in trade, which was the subject of the deeds challenged, was in law the property of the bankrupt. I further hold that the bankrupt was under no legal obligation to execute the deeds challenged, except after fourteen days' notice. And that being so, I hold that the deeds challenged being executed immediately upon demand, and within four days of sequestration, must be held to have been

No. 24.

Nov. 18, 1891.

Paterson's
Trustees v.
Paterson's
Trustees.

The defenders reclaimed, and argued;—(1) The agreements entered into between the bankrupt and the defenders purported to be minutes of

voluntary deeds granted in satisfaction of a prior debt within the period of constructive bankruptcy, and so to be reducible under the Act 1696, c. 5.

"I am not able to accept the defenders' views of the bankrupt's position. They represent him as having been merely tenant of the two businesses, and of the pledges which formed their stock in trade. The businesses, they say, belong to them, the defenders, and they say that the pledges were their property. Or, if the right which a pawnbroker has in his pledges is not correctly described as a right of property, they say, alternatively, that they are the true creditors in the contracts of pledge made by the bankrupt, he being merely their agent in making those advances, and being bound on the termination of his agency to transfer everything to them subject only to certain pecuniary claims arising *hinc inde* in the event of the value of the contracts being found to be above or below a particular sum.

"I do not think that either of those views is tenable. It is not I think possible to treat a pawnbroker's pledges as an ordinary stock of goods. But if it were so, the law of Scotland does not, as I understand it, enable an owner of goods to retain the property of such goods after he has hired them out, on the footing that the hirer shall dispose of the goods on his own account, and be merely bound to replace them with other goods of equal value. In other words, the contract of steelbow, while recognised out of favour to agriculture, as between landlord and tenant in agricultural or pastoral farms, has never, so far as I know, been extended, *e.g.*, to goods let or attempted to be let with the shop.

"Neither do I think it is possible to treat the bankrupt as being merely the defenders' agent. It is plain, I think, upon the agreements that he was conducting the two businesses for himself; that the contracts he made were his contracts, truly as well as nominally, and that in substance he was the owner for the time of the two businesses and their stock in trade, subject only to an obligation of divestiture, on certain terms, after the lapse of a certain period, or upon the occurrence of certain events.

"It is not therefore, I think, doubtful that the deeds under challenge were alienations of the bankrupt's property in favour of prior creditors. The question is whether being so, and being executed within sixty days of bankruptcy, there is anything to exclude the operation of the Act 1696, c. 5.

"That question, I think, depends on this, whether they were voluntary deeds in the sense of that statute. I cannot doubt that they were deeds in favour of prior creditors in the sense of the statute. The defenders were not, it is true, creditors in a pecuniary debt. It is probably correct to say that they were only creditors in an obligation *ad factum præstandum*. But I cannot agree with the defenders' argument that the statute only applies to pecuniary debts. The case of *Gourlay v. Hodge*, 2 R. 738, is indeed an authority to the contrary.

"Were then the two deeds in question voluntary? I have come to be satisfied that they were. Had the obligation in the two agreements been to divest and cede possession immediately on the ascertainment in the prescribed manner of a deficiency in the stock of pledges, there would have been room for the argument that the bankrupt did no more than fulfil exactly and literally a previous obligation, which he was legally bound to fulfil, and to fulfil there and then. And I confess that, notwithstanding some apparent authority to the contrary, I should have had great difficulty, had the facts raised it, in rejecting that argument. But I have not been able to see any good answer to the pursuer's point, that in any view of his position the bankrupt was not bound—that is to say, could not have been compelled—to execute the deeds in question at the time he did, or at any time prior to the sequestration. He was entitled under the agreements to fourteen days' written notice. He waived that notice and executed the deeds on demand. The result was that the deeds were executed and possession given four days before the sequestration; whereas, if he had stood (in the interest of his general creditors) on his legal rights, the sequestration would have supervened before the deeds were executed. I think, for these

lease, and there was nothing impossible in the idea of letting a group of things. It was done in the case of cattle, manure, &c., in the case of steelbow,¹ and there was a strong resemblance to the present contracts in a class of agricultural leases common in some of the northern counties, where the tenants were taken bound to keep the fences, mills, &c. up to the heritors' standard. If the relation between the bankrupt and the defenders was not that of landlord and tenant, then the bankrupt must be looked upon as the defenders' mandatary put in by them to manage the business, and the profits which he made after paying the five per cent to the trustees must be looked upon as commission. The provisions in the second clause binding the bankrupt to keep books shewing his intrusions, and giving the defenders a right of re-entry in the event of the stock of pledges falling below a certain value, and the provision that the insurances were to be taken in the defenders' name, all favoured the view that the bankrupt was a lessee, mandatary, or agent. Whatever the nature of the contract might be, there was at anyrate no assignment to the bankrupt of the pledges, or of such right of property as the defenders had in them. They were handed over to him to "farm." Further, the second articles of the agreements gave the defenders an immediate right of re-entry on it being ascertained that the stock of pledges had fallen below the stipulated value. The fourteen days' notice did not refer to their right of re-entry but to the tenant's obligation to cede possession. The Act 1696, c. 5, therefore did not apply, in respect that (a) No right of property was transferred by the defenders to the bankrupt, and the trustee's right could not be greater than that of the bankrupt; (b) the deeds of renunciation were unnecessary, as the defenders had immediate right of re-entry after it was ascertained that the stock of pledges had fallen below the stipulated value; and (c) the deeds of renunciation were granted in fulfilment of an obligation from which the bankrupt could not escape.² (2) The event which gave the trustees a right of re-entry had occurred. Interest should not be added to the sums advanced on the pledges, for according to the proof that had not been done when the agreements between the bankrupt and the defenders were entered into. (3) The £350 advanced by the defenders had been advanced to increase the "stock of goods farmed" by the bankrupt, and therefore that sum must be added to the value of the stock originally handed over to him in considering whether he had or had not fulfilled his obligation with regard to the upkeep of the stock.

The pursuer argued;—(1) Whatever the contract might be called, the agreements in effect gave the bankrupt authority to take possession of the pledges and uplift the money paid to redeem them. Though there was no obligation to repay cash, there was an obligation to repay in a more convenient form by handing over the stock of pledges. The contract was therefore one of loan of money, and nothing else. The deeds of renunciation were therefore struck at by the Act 1696, c. 5, as having been granted in security of a prior debt. The cases in which that Act

reasons, that the deed must be held to have been in the sense of the statute 'voluntary,' and must accordingly be set aside.

"As to the amount for which decree shall be pronounced, I understand that the parties are agreed that the sum of £2153, 10s. 3d. brought out by Mr Craig, C.A., in the state No. 220 of process, is correct. I shall accordingly decree for that sum, with interest at 4 per cent from 1st September 1888, being, I think, a fair date to take as the average date of realisation."

¹ Hunter on Landlord and Tenant, i. 312.

² Bell's Comm. (7th ed.) ii. 211; Taylor v. Farrie, March 8, 1855, 17 D. 639, *op. opinion* of consulted Judges, p. 649, 27 Scot. Jur. 266.

No. 24.
Nov. 13, 1891.
Paterson's
Trustee v.
Paterson's
Trustees.

had been under the consideration of the Court established that in order to exclude its operation three points were essential—(a) that the deed should be granted in the ordinary course of business; (b) that it should be granted in fulfilment of an immediate and unconditional obligation; and (c) that that obligation should be to deliver or grant a security over a specific subject.¹ None of the three conditions were fulfilled here—(a) the obligation was not in the ordinary course of business, the whole agreement between the parties being of the most unusual kind; (b) the deeds were granted in fulfilment of a conditional and not immediate obligation; and (c) that obligation did not refer to a specific subject. Further, under the second article of the agreements the defenders were bound to give the bankrupt fourteen days' notice before entering into possession, and the bankrupt was entitled to fourteen days' notice before ceding possession. He had waived his right in granting the renunciations, and the Lord Ordinary was therefore right in holding that they gave the defenders an undue preference.² (2) The event which gave the trustees a right of re-entry under the deed had not occurred, because interest should be added to the amount advanced on the pledges in order to ascertain their value, and if this was done the value of the pledges was found to be more than that stipulated, even taking the advance of £350 into consideration. (3) That advance, however, should not be taken into consideration, as it was not made under the agreements, and so the penal clauses therein had no reference to it.

At advising,—

LORD PRESIDENT.—The estates of James Somerville Paterson, pawnbroker in Edinburgh, were sequestrated on 28th April 1888. Four days before his sequestration he ceded possession of the pledges in his shops in Richmond Place and Greenside Row, to the testamentary trustees of his grandfather, James Paterson, who were the landlords of those shops. The pledges so taken possession of have been realised by James Paterson's trustees; and the question in the present action is whether they can retain the proceeds against the trustee in the sequestration, who claims them mainly on the ground that the delivery over of the pledges by the bankrupt was in contravention of the Act 1696, c. 5.

The defence is rested on the stipulations of two agreements entered into between the defenders and the bankrupt, so long ago as 1879, on the occasion of the bankrupt beginning business. It appears that the business had originally been that of James Paterson, the grandfather; that after his death his son, and then someone else, had been placed in possession, under arrangements similar to that adopted in the present instance, and that the business had thus been continuously carried on for many years. Accordingly, when the bankrupt began business he *de facto* went into possession of a going business in premises belonging to his grandfather's trustees.

The agreements under which he did so apply the one to the Richmond Place and the other to the Greenside Row shops, but their provisions are, in scheme and substance, the same; and the deed relating to Richmond Place was the one taken for illustration at the debate. This agreement, then (to use the singular)

¹ Taylor v. Farrie, *supra*; Stiven v. Scott & Simson, June 30, 1871, 9 Macph. 923, 43 Scot. Jur. 511; Moncreiff v. Union Bank, Dec. 16, 1851, 14 D. 200, 24 Scot. Jur. 87; Gourlay v. Hodge, June 2, 1875, 2 R. 738; Gourlay v. Mackie, Jan. 27, 1887, 14 R. 403; Rhind's Trustee v. Robertson & Baxter, March 4, 1891, 18 R. 623.

² Bell's Comm. (5th ed.) 213, (7th ed.) ii. 198-9.

requires analysis, so as to distinguish its legal results from its phraseology. One part is sufficiently plain, viz., that which lets the shop to the bankrupt at a rent of £50 per annum for six and a-half years from Martinmas 1878 (possession being in fact continued after the expiry of that period from year to year). But, together with the shop, there purports to be let "the pawnbroking business stock therein, of the value of £1100 sterling, belonging to the first party, . . . the said James Somerville Paterson and his foresaids paying in respect of said business stock therein interest on the said sum of £1100 at the rate of five per centum per annum."

No. 24.

Nov. 13, 1891.

Paterson's
Trustee v.
Paterson's
Trustees.

At the termination of the lease the forfeited pledges were to be sold, and the other pledges were to be valued. If the money thus shewn was over £1100 the bankrupt was to be paid the excess; if it was under £1100 he was to pay the deficiency, the extant pledges being delivered over to the trustees. The bankrupt had right under the sixth head of the agreement at any time, on giving one month's notice, to pay up the £1100, and on this being done his obligations were limited to payment of the rent of the shop. On the other hand, so long as the £1100 remained unpaid, the bankrupt was bound to keep up the stock to that value, the trustees having right to examine his books, and also the pledges in the shop. Then follows the clause upon which the defenders acted in the proceedings now challenged,—“And with full power to the said first party and their foresaids during the currency hereof, at any time that they may think proper, in the event of the stock of pledges at the time being found to be under the amount or value of said sum of £1100, if not paid out, to enter into and resume possession of the premises, business, and stock of pledges and others therein, and to intromit with, sell and dispose of, and realise the same in such manner as they may think proper, without any other warrant from the second party or his foresaids than this agreement, in which case the said second party binds and obliges himself and his foresaids peaceably to cede possession of the said premises, business, goods and effects to the said first party or their foresaids, on receiving fourteen days' previous notice in writing of their intention so to do.”

When we turn from this agreement to the facts of the situation it is seen how little the written stipulations correspond with the legal results. When the bankrupt was put in possession of the business there were delivered over to him certain watches, clothes, and other articles held in pledge for loans. His business was, in the ordinary course, to deliver up the pledges to those borrowers who redeemed, becoming proprietor of such pledges as were unredeemed within the statutory period, to sell them in due course, and, on the other hand, to take in new pledges, which in turn were redeemed, or matured and were sold. Accordingly the so-called stock was entirely fluctuating, and the articles which were delivered to him by the defenders in 1878 have necessarily passed out of his hands years before his bankruptcy.

The words of the lease therefore which are applied to the so-called stock are, so far as legal effect goes, wholly inappropriate and ineffectual. When the bankrupt was put in possession of the pledges extant in 1879, with the object that he should deal with them as a pawnbroker for his own behoof, the trustees parted with the only right which they themselves had in those pledges. “Where a thing is lent” (says Erskine, iii. 1, 18), “which cannot be used without either its extinction or its alienation, the property of it must needs be transferred to the borrower, who cannot otherwise have a right from the proprietor to make the

No. 24
Nov. 13, 1891.
Paterson's
Trustee v.
Paterson's
Trustees.

proper use of it." This Erskine says, in discussing *mutuum*, where the lender is proprietor and not merely pledgee; but the principle is applicable whether the lender has the higher or the lower right to bestow on the borrower.

All, therefore, that the defenders held by the agreement under these clauses was a personal obligation by the bankrupt in a certain event to deliver over to them all the pledges he had in the shop, of what sorts soever these might be. The event was the shop being found to contain pledges of less value than the stipulated £1100, and £1100 not being made forthcoming in money.

The question then is whether this is an obligation which can be implemented within sixty days of bankruptcy, and I am of opinion that it cannot. It is, I think, impossible to assimilate the case to those in which the specific performance, within the sixty days of agreements entered into before that period, has been sustained. Two vital differences exist. In the first place, the obligation of which performance was here obtained, is not an obligation to give or to do a specific thing; it is simply to hand over the whole contents of the shop, and the fact that those contents were pledges constitutes a peculiarity, but not a difference. In the second place, under the agreement, performance of this obligation was not stipulated for forthwith as part of the agreement, but, on the contrary, was necessarily not to be so given, but only on demand being made in a certain event, that event being the defenders' interest under the contract coming in danger owing to the diminution of business. In my judgment, this surrender was in contravention of the Act 1696, c. 5, and directly contrary to the spirit of our bankruptcy law.

The ground of my opinion renders it unnecessary to consider the waiver of notice by the bankrupt, upon which the Lord Ordinary has rested his decision. Nor is it necessary to consider, on the one hand, the pursuer's argument that, even assuming the surrender to be unobjectionable on the statute, the valuation did not in fact shew a deficiency of value, inasmuch as requisite allowance fell to be made for the enhanced value of the older pledges; or, on the other hand, the defenders' contention that certain advances by them, subsequent to the agreement, increased the amount of value which they were entitled to require. But our attention was called to a correction which must be made on the sum for which the Lord Ordinary has granted decree, in order to give to the pursuer what was actually realised by the defenders for the subjects in dispute, and it will therefore be necessary, if your Lordships should concur, formally to recall his Lordship's interlocutor, in order to substitute £2430, 1s. 6d. for £2153, 10s. 3d., as the principal sum decreed for.

LORD ADAM concurred.

LORD M'LAREN.—This is a claim at the instance of the trustee on Paterson's sequestrated estate founded on the Statute 1696, cap. 5. The security sought to be set aside was of this nature: The pawnbroking business carried on by the deceased James Paterson passed to his testamentary trustees; and they were desirous of enabling Mr Paterson's grandson (the insolvent trader) to carry on the business for his own profit, while retaining in their own hands a right of property in the assets of the business, so far as they could lawfully do so.

With this object they executed a deed, purporting to be a lease, and dated 14th May 1879, whereby they let to the bankrupt, for a term of years, the premises Nos. 2 and 4 Richmond Place, Edinburgh, together with the pawnbroking business and stock therein, estimated as of the value of £1100. The tenant was

No. 24.

Nov. 18, 1891.
Paterson's
Trustee v.
Paterson's
Trustees.

put under obligation to keep up the stock to the value of £1100; and it was provided that if the stock of pledges (together with any sum which the tenant might have repaid to the trustees) should be found during the currency of the lease to be of less value than £1100, it should be lawful to the lessors (Paterson's trustees) to resume possession of the stock of pledges and other subjects, and to dispose of such stock as their property. The tenant was also taken bound to cede possession of the premises, business, and stock of pledges, upon fourteen days' notice in writing of the intention of the lessors to exercise their powers.

On 24th April 1888, the tenant, being then insolvent, executed, at the request of his grandfather's trustees, a renunciation of his rights under the lease, and the trustees immediately entered into possession.

Four days later, 28th April, the estates of the tenant were sequestrated under the Bankruptcy Act, and the creditors, after consideration, authorised their trustee to institute this action for the recovery of the stock, or its value, as property of the bankrupt. It is to be kept in view that neither the defenders nor the bankrupt are in a position to assert an absolute right to the stock of pledges. The pledges are the property of the pledgers. Nevertheless, the creditor's right in these pledges, with the correlative right of sale which is given by the Pawn-brokers Acts, is a valuable asset; and the question is, whether this right is an asset of the bankrupt, or whether it belongs to the defenders in virtue of their reserved powers under the lease, and the renunciation following on the assumed exercise of these powers.

The Lord Ordinary, on the evidence, found that the deed of renunciation referred to, and also a renunciation of a lease in similar terms of other premises, were in contravention of the Statute 1696, cap. 5. His Lordship's view of the case is summarised in the first paragraph of his opinion, in which he holds that the renunciations are voluntary deeds, because they do not proceed on a notice in writing in terms of the lease. I agree with the Lord Ordinary that the circumstances under which these deeds were granted, especially the absence of the fourteen days' premonition prescribed by the lease, are material to the question of fraudulent preference in the sense of the statute. But in the argument addressed to us the Lord Ordinary's judgment was supported on the view that the so-called lease was a deed incapable of creating an effective security over the stock of pledges, and therefore that, irrespective of any question as to the sufficiency of notice, the deed of renunciation must be taken to be an alienation of the bankrupt estate.

It appeared to us that the case could not be satisfactorily decided without considering the question of the validity and sufficiency of the lease as a deed of security; and as I understand we are all of opinion that no effective security was or could be constituted by a deed which vested the possession of the pledges in the person of the bankrupt, it is proper that in affirming the Lord Ordinary's interlocutor we should state that our judgment proceeds on this ground.

It may simplify the consideration of the question if I suppose, as matter of argument, that instead of a stock of pledges, the parties to the lease of the premises in Richmond Place were treating with respect to an ordinary stock in trade, a stock of goods kept for sale in these premises. The supposition is that the stock was originally the property of the defenders, and that along with the premises they professed to let the stock in trade to Mr Paterson, taking from

No. 24. him an obligation that he should keep up the value of the stock and stipulating for re-entry in case of default.

Nov. 13, 1891.

Paterson's
Trustee v.
Paterson's
Trustees.

The mere statement of such a form of security is sufficient to exhibit its essential unsoundness. Even as regards such part of the goods assigned as might remain unsold at the date of the bankruptcy, it is plain that the security would not be effectual; because in the case supposed the goods are not given on hire (which would mean that the identical goods are to be returned to the lessor), but are given to the grantee to be sold for his profit, the right of the granter being only the right to demand equivalent goods. The granter's right after he has parted with the possession of the goods is accordingly a *jus crediti*, and nothing more; because there is no real distinction between a loan of coin or money with an obligation to repay in equivalent coin, and a loan of a stock of goods with an obligation to restore equivalent goods to be purchased out of the proceeds of sale.

In the case of a loan of money, anyone would admit that the lender's right is limited to a dividend, even if he could prove that the identical sovereigns which he lent were in the pocket of the bankrupt at the time of his sequestration. And so in the case of an assignment of stock to be used by the assignee in his trade, the question whether the goods have in fact been converted is an altogether irrelevant consideration, if the goods were made over to the trader for the purpose of being sold for his profit.

Now, the difference between the present case and the case supposed is that the defenders had not the absolute property of the pledges, but only a qualified right in them which might be made effectual to the extent of the money advanced on pledge by the sale of the pledges. I do not doubt that if a pledgee lends or gives the use of a pledge to a third person under the condition that the specific article is to be restored, the pledger and pledgee retain their respective rights in the thing, notwithstanding the bankruptcy of the person to whom it was entrusted. But if the pledgee makes over the thing to another person, giving that person all the right which he has in it, including the power of sale in the event of the pledge being unredeemed, and stipulating only for restoration in money or money's worth, I see no difference in principle between such an assignment and the case of assignment of the lender's individual property, with a relative obligation to restore the value of the goods. In the case before us, the right of the defenders in the pledges was only a qualified right, but the question of security or preference in bankruptcy is independent of the nature of the right of the cedent in the thing conveyed, and depends only on the quality of the assignee's obligation. If that obligation can be fulfilled by a payment in money or goods *in genere*, the obligation is personal, and only gives rise to a claim to participate in the distribution of the bankrupt's estate. This in my view is all that the defenders can claim under each of the two deeds challenged by the trustee.

It is perhaps unnecessary, but it may be satisfactory to the parties, that I should say that we do not overlook the fact that the form of a lease is used. Where the substance of the contract between debtor and creditor is consistent with the existence of a right of security or real right in the creditor, form may be important, especially in determining the creditor's securities, as in comparing, for example, the cases of a bond and disposition in security and an *ex facie* absolute deed, where the rights and remedies of the parties are different, depending on the terms and clauses of the deed of security. But where, as in

the present case, the contract is not in substance a security contract, it will not be made any better by giving it the name of a lease, while the rights conferred on the grantee are not those of a tenant but of an owner, entitled to dispose of the subject at his pleasure.

No. 24.
Nov. 13, 1891.
Paterson's
Trustee v.
Paterson's
Trustees.

I do not think it is necessary for the purposes of this case to enter on a review of the decisions on this chapter of bankruptcy law. The construction of the Statute of 1696 is now very well understood, and I do not think that the circumstances of any of the previous cases throw much light on this case, which is indeed very special in its features. Probably the nearest case to the present is that of *Gourlay v. Hodge*, 2 R. 738, where the debtor in exchange for an advance undertook, "within one month from this date," to give delivery orders for grain, and the obligation was held only effectual to give a ranking in bankruptcy. The whole subject is most fully discussed in the elaborate and luminous opinion of the late Lord President in *Stiven v. Scott & Simson*, and I shall conclude by reading a few lines from that opinion, which appear to me to be directly applicable to the present case.

"An obligation of a general kind to give security is plainly nothing at all in itself. It is an obligation no doubt that the party is bound in honour to fulfil, but it is an obligation not applicable to any particular subject, and it is not in itself a specific obligation, and until it is made special in some way or other it cannot be said to be a security for the debt at all. In that view it is only when the so-called obligation is fulfilled that there comes to be any security. And, therefore, that is the point of time at which the security is granted, and if that point of time occurs within sixty days of bankruptcy the application of the statute is clear, because that is security given within sixty days for a prior debt."

In the present case the fulfilment of the obligation to restore was the execution of the deed of renunciation. As between the debtor and the creditor there is nothing to be said against the deed, but because it is a deed in satisfaction of an antecedent obligation it is annulled by the statute, and it follows, in my opinion, that the trustee is entitled to decree in terms of the Lord Ordinary's interlocutor, with the variation suggested by your Lordship.

LORD KINNEAR was absent.

THE COURT adhered to the Lord Ordinary's interlocutor, except in so far as it decerned for the sum of £2153, 10s. 3d., with interest, &c., and in place thereof, of consent of parties, decerned for the amount of £2430, 1s. 6d., with interest on said sum at the rate of 4 per cent from said 1st September 1888 until payment, and found the pursuer entitled to additional expenses, &c.

MENZIES, BRUCE-LOW, & THOMSON, W.S.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

THOMAS ROWLEY SEDDON, Petitioner.—*Adam.*

No. 25.

Minor and Pupil—Pupil children resident with father abroad—Payment of trust funds belonging to children.—A father domiciled in England, by the law of which he was not the guardian of his children's estate unless appointed to be so by the Court, presented a petition for himself and his two pupil children, craving the Court to ordain Scots testamentary trustees, who were in possession of a fund belonging to the children, to pay to the petitioner for their behoof the whole or a part of the annual income of the fund. The petition was presented

Nov. 13, 1891.
Seddon.

No. 25. with the consent and concurrence of the trustees. The Court *refused* to grant the order craved, but intimated that they would be prepared to reconsider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian.

Nov. 13, 1891.
Seddon.

1st Division.
Ld. Stormonth
Darling.

By his trust-disposition and settlement, Stephen Adam conveyed his whole estate to trustees, directing them to hold the shares falling to daughters during their lifetime, and to pay to them, or apply for their behoof, the annual income of such shares, the fee falling to their children.

The truster died on 25th May 1889, survived among other children by a daughter Helen, who, on 16th April 1884, had married Thomas Rowley Seddon. She died on 13th May 1891, after having attained majority, and leaving two children, the elder being three, and the younger less than one year old. During her lifetime her father's trustees had duly paid her the income of the share of his estate falling to her, and at her death her share was held by the trustees for behoof of her children.

On 9th September 1891 Thomas Rowley Seddon presented a petition to the Court, "for himself and for his children," and "with consent and concurrence" of Stephen Adam's testamentary trustees, in which he craved the Court to ordain the testamentary trustees of Stephen Adam to make payment to him, "for behoof of his children, . . . of the free yearly interest, or other free yearly income for the time, of the sum to which the said children are entitled under the said trust-disposition and settlement; or otherwise, to ordain the said trustees to make payment to the petitioner of such portion of the interest or other free annual income of the said sum as to your Lordships may seem proper for the suitable maintenance and education of his said children."

The petitioner stated;—The value of the share of Mr Stephen Adam's estate belonging to Mrs Seddon's children (which had not been realised) is estimated at between £7500 and £8500, and the free annual income in respect thereof is estimated at between £300 and £400. "There being no provision in Mr Stephen Adam's trust-disposition and settlement for keeping up the said trust after his daughters' respective deaths to the effect of holding the shares of said daughters for behoof of their issue, the said shares go to the issue of the daughters without limitation of any kind. The petitioner, however, does not desire the trustees to denude of the said trust so far as his children's shares are concerned, but has requested them to retain the management thereof for his children's behoof. The petitioner is not at present in a position, out of his own funds, to maintain and educate his children suitably to their positions and fortunes, having, in or about March 1890, been obliged, owing to his wife's then delicate state of health, to give up a lucrative appointment as manager of a sheep-run in New Zealand with a salary of £300 a-year, and although he has lately, with the assistance of friends, acquired for himself and another an extensive sheep-run in New Zealand, it will, owing to the arrangements on which he has obtained the purchase-money for the same, be a considerable number of years before he can apply any of the profits arising therefrom to his own uses. The petitioner was born in England, but had been resident in New Zealand for thirteen years prior to his return to this country as before mentioned, and he is about to return to New Zealand in the beginning of October 1891 in order to take possession of the property there acquired by him, and to have the same made suitable as a home for his said children, intending to return to England for them within a year. It is therefore necessary that an immediate arrangement should be made with a view to the maintenance of said children. The petitioner has requested Mr Stephen Adam's trustees to pay him the free

decree in their favour. They were therefore not subject to review, and the appeal was incompetent.¹ *Drummond's* case was different from the present, the ground of decision there being, that when a Sheriff had disposed of the merits of an action without pronouncing any finding as to expenses, he was not entitled subsequently to deal with the question of expenses.

No. 26.

Nov. 14, 1891.
Macgillivray
v. Mackintosh.

The pursuer argued ;—It was not incompetent to appeal against a finding of expenses.² Further, it was clearly established by authority that it was competent to appeal against interlocutors which had been incompetently pronounced.³ In this case the interlocutors appealed against were incompetent. The interlocutor pronounced by the First Division on 17th March contained only a limited finding of expenses in the defenders' favour, and as the Sheriff Court expenses were not mentioned in that interlocutor, they must be held as not awarded.⁴ As the interlocutor of 17th March had exhausted the cause, the process ought not to have been transmitted to the Sheriff Court, and the subsequent interlocutors pronounced in the Sheriff Court were incompetent.⁵

At advising,—

LORD PRESIDENT.—In considering the question raised by Mr Baillie as to the competency of this appeal, it is necessary to consider what is the substance and subject-matter of the appeal. The appeal is brought for the purpose of raising the question whether the Sheriff-substitute had the right to deal with the question of expenses at all. The appeal therefore impeaches the competency of the Sheriff-substitute's judgment, and that upon the ground that the judgment of this Court, of 17th March 1891, disposed finally of the question of expenses, by giving the defender the expenses in the Court of Session, and by leaving the rest alone. The appellant says that after this the Sheriff had no power to take up the question of expenses at all.

With regard to the merits of the appeal,—that is to say, the competency of the proceedings in the Sheriff Court,—I am of opinion that the appellant is right. When we see that the question to be raised under the appeal is a question of competency, we are brought straight to the case of *Drummond v. Bryden*, 8 Macph. 277. That case raised the question whether, after a Sheriff-principal had pronounced an interlocutor dismissing an action, and making no finding as to expenses, it was competent for the Sheriff or the Sheriff-substitute to pronounce further interlocutors dealing with the question of expenses ; and what the Second Division found, on appeal, was, that the later interlocutors were incompetently pronounced, in respect that the earlier interlocutor (that is the interlocutor dismissing the action), had exhausted the cause ; and they recalled those later and incompetent interlocutors. While the ground on which the plea of incompetency is maintained here is not the same as in *Drummond's* case, by reason of this case having been exhausted by interlocutor pronounced in this Court, and not by interlocutor pronounced in the Sheriff Court, the principle of that case, it appears to me, applies by parity of reasoning to the present.

¹ *Tennents v. Romanes*, June 22, 1881, 8 R. 824 ; *Thomson & Company v. King*, Jan. 19, 1883, 10 R. 469.

² *Fleming v. North of Scotland Banking Company*, Oct. 20, 1881, 9 R. 11.

³ *Drummond v. Bryden*, Dec. 10, 1869, 8 Macph. 277, 42 Scot. Jur. 125.

⁴ *Grant v. Rose*, June 30, 1835, 13 S. 1007, 7 Scot. Jur. 461 ; *Macdonald v. MacEachan*, Feb. 18, 1880, 7 R. 574.

⁵ *Hamilton v. Bennet, &c.*, March 3, 1832, 10 S. 426, 4 Scot. Jur. 353.

No. 26. the agent of the other party is not entitled to decree in his own name for expenses to which his client has subsequently been found entitled.

Nov. 14, 1891.

Macgillivray
v. Mackintosh.

1st Division.

Sheriff of
Inverness,
Nairn, and
Morayshire.

IN an action of damages for breach of promise of marriage brought in the Sheriff Court at Nairn by Hugh McGillivray against Margaret Mackintosh and William Mackintosh, her husband, the Sheriff (Ivory) on 9th October 1890, pronounced an interlocutor to this effect:—"Finds that the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned, . . . Finds in law that the defender is not liable to the pursuer in damages: Therefore to the above extent and effect sustains the defences, assolvies the defender, and decerns: Finds the pursuer liable to the defender in expenses, and remits to the Auditor to tax the amount thereof and report."

The pursuer having appealed, the First Division, on 17th March 1891, pronounced the following interlocutor:—"Affirm the interlocutor of the Sheriff, dated 9th October 1890, in so far as it 'finds that the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned': Find also in law, in terms of said judgment, that the defender is not liable to the pursuer in damages, and to that extent sustain the defences: Assolvie the defender (respondent) from the conclusions of the libel, and decern: Find the appellant liable to the respondent in expenses in this Court, and remit the account thereof to the Auditor to tax and to report."

On 13th May the Court approved of the Auditor's report on the respondent's account of expenses, and decerned against the appellant for the taxed amount.

The process having been retransmitted to the Sheriff Court, the defenders had the account of expenses incurred by them in that Court audited, and thereafter enrolled the case, and moved the Sheriff-substitute to decern in their favour for the taxed amount.

On 13th July 1891 the Sheriff-substitute (Rampini) pronounced this interlocutor:—"Having considered the account of expenses for the defenders, with the Auditor's report thereon, and the note of objections to the Auditor's report, sustains the objections to the first four items, amounting to £4, 16s.: *Quoad ultra* repels the objections, and with these variations approves of the Auditor's report: Finds that the defender's expenses, as taxed and adjusted in terms of these findings, amount to the sum of £48, 1s. 3d. sterling, and decerns against the pursuer in favour of the defenders for the same."

The pursuer appealed, and on 23d September the Sheriff (Ivory) dismissed the appeal, and affirmed the interlocutor appealed against; found the pursuer liable in the sum of £1, 1s. as the expenses of the appeal, and decerned against him for payment of that sum to the defenders.

The pursuer appealed to the Court of Session.

The defenders objected to the competency of the appeal, and argued;—In the Sheriff Court the appellant had maintained that the account of expenses should have been audited in the Court of Session. Now, he adopted a different attitude, maintaining that no expenses were due. The expenses in the Sheriff Court were carried by the decree for expenses in the Court of Session,¹ and the interlocutors in the Sheriff Court were pronounced merely for the purpose of enabling the defenders to work out the

¹ Sinclair v. Mossend Iron Co., May 30, 1855, 17 D. 784, 27 Scot. Jur. 406.

decree in their favour. They were therefore not subject to review, and the appeal was incompetent.¹ *Drummond's* case was different from the present, the ground of decision there being, that when a Sheriff had disposed of the merits of an action without pronouncing any finding as to expenses, he was not entitled subsequently to deal with the question of expenses.

No. 26.

Nov. 14, 1891.
Macgillivray
v. Mackintosh.

The pursuer argued ;—It was not incompetent to appeal against a finding of expenses.² Further, it was clearly established by authority that it was competent to appeal against interlocutors which had been incompetently pronounced.³ In this case the interlocutors appealed against were incompetent. The interlocutor pronounced by the First Division on 17th March contained only a limited finding of expenses in the defenders' favour, and as the Sheriff Court expenses were not mentioned in that interlocutor, they must be held as not awarded.⁴ As the interlocutor of 17th March had exhausted the cause, the process ought not to have been transmitted to the Sheriff Court, and the subsequent interlocutors pronounced in the Sheriff Court were incompetent.⁵

At advising,—

LORD PRESIDENT.—In considering the question raised by Mr Baillie as to the competency of this appeal, it is necessary to consider what is the substance and subject-matter of the appeal. The appeal is brought for the purpose of raising the question whether the Sheriff-substitute had the right to deal with the question of expenses at all. The appeal therefore impeaches the competency of the Sheriff-substitute's judgment, and that upon the ground that the judgment of this Court, of 17th March 1891, disposed finally of the question of expenses, by giving the defender the expenses in the Court of Session, and by leaving the rest alone. The appellant says that after this the Sheriff had no power to take up the question of expenses at all.

With regard to the merits of the appeal,—that is to say, the competency of the proceedings in the Sheriff Court,—I am of opinion that the appellant is right. When we see that the question to be raised under the appeal is a question of competency, we are brought straight to the case of *Drummond v. Bryden*, 8 Macph. 277. That case raised the question whether, after a Sheriff-principal had pronounced an interlocutor dismissing an action, and making no finding as to expenses, it was competent for the Sheriff or the Sheriff-substitute to pronounce further interlocutors dealing with the question of expenses ; and what the Second Division found, on appeal, was, that the later interlocutors were incompetently pronounced, in respect that the earlier interlocutor (that is the interlocutor dismissing the action), had exhausted the cause ; and they recalled those later and incompetent interlocutors. While the ground on which the plea of incompetency is maintained here is not the same as in *Drummond's* case, the reason of this case having been exhausted by interlocutor pronounced in this Court, and not by interlocutor pronounced in the Sheriff Court, the principle of that case, it appears to me, applies by parity of reasoning to the present.

¹ *Tennents v. Romanes*, June 22, 1881, 8 R. 824 ; *Thomson & Company v. King*, Jan. 19, 1883, 10 R. 469.

² *Fleming v. North of Scotland Banking Company*, Oct. 20, 1881, 9 R. 11.

³ *Drummond v. Bryden*, Dec. 10, 1869, 8 Macph. 277, 42 Scot. Jur. 125.

⁴ *Grant v. Rose*, June 30, 1835, 13 S. 1007, 7 Scot. Jur. 461 ; *Macdonald v. M'Echan*, Feb. 18, 1880, 7 R. 574.

⁵ *Hamilton v. Bennet, &c.*, March 3, 1832, 10 S. 426, 4 Scot. Jur. 353.

No. 26. Our decision does not interfere with the authority of the cases of *Tennents v. Romanes* and *Thomson v. King*, quoted by Mr Baillie, in which the essential element of the incompetency of the judgment appealed against is wanting.

Nov. 14, 1891.
Macgillivray
v. Mackintosh.

LORD ADAM.—The first interlocutor brought under appeal is the interlocutor of the Sheriff-substitute of 13th July 1891, whereby he “finds that the defenders’ expenses . . . amount to the sum of £48, 1s. 3d. sterling, and decerns against the pursuer in favour of the defenders for the same.” That interlocutor was appealed to the Sheriff, who on 23d September adhered, finding the pursuer liable in a small sum of additional expenses.

It is to be observed that these interlocutors disposed only of the question of expenses, and it is on that ground that Mr Baillie objects to the competency of the appeal, and he refers to the case of *Tennents v. Romanes*. That case seems to me to have no bearing on the present. It was a case in which an interlocutor was pronounced disposing of the merits of the cause, and also dealing with the question of expenses. No appeal was taken against that interlocutor, and it was extracted, and then an interlocutor was pronounced decerning for the taxed amount of the expenses. The Lord President then said,—“To bring up to this Court a decree for expenses, to the effect of letting the appellant get into a review of the interlocutors upon the merits, would be, by a mere evasion, to set at naught the provisions of the statute”—that is to say, when the interlocutor disposing of the merits and expenses of the cause had become final, it would have been an evasion of the statute to reopen the case by an appeal against the decree for expenses. I agree with that statement of the Lord President, but the case is not the same here. The present appeal is taken on the ground that the interlocutors appealed against were incompetently pronounced, and there is authority for the view that, when a decree for expenses has been incompetently pronounced, it may be appealed against.

On the merits—that is to say, the question whether the interlocutors appealed against were incompetently pronounced—I agree in thinking that they were. I have no doubt that the interlocutor of this Court, dated 17th March last, disposed of the whole cause. After findings in fact and law, it proceeds:—“Assoilzie the defender (respondent) from the conclusions of the libel, and decern: Find the appellant liable to the respondent in expenses in this Court.” That appears to me to be the only valid finding of expenses in this case. The case of *Sinclair v. Mossend Iron Company*, 17 D. 784, where a general finding of expenses in this Court was held to carry expenses in the Court below, appears to me to have no bearing on the present, because, where there is a special finding of expenses in favour of a party, that necessarily excludes a general finding in his favour. If that is so, as there was no remit to the Sheriff to deal with the question of expenses, I do not see what authority he had to take up the case at all. When the case was brought before him he ought to have found that he could not deal competently with it. I agree, therefore, that the whole proceedings in the Sheriff Court after the interlocutor of this Court of 17th March last were incompetent.

LORD M'LAREN.—By its interlocutor of 17th March 1891 the Court of Session dealt with the first appeal, and, as I think, exhausted the conclusions of the action, and in doing so, we pronounced a finding of expenses in this Court in favour of the defender, but nothing was said of the expenses in the Sheriff Court. It appears to me to follow that it is not competent after that interlocutor of the

Court of Session for the Sheriff to entertain a motion on the subject of expenses, No. 26.
the conclusions of the action being exhausted.

On the question of authority, I agree with your Lordship in the chair that Nov. 14, 1891.
Macgillivray
v. Mackintosh.
there is complete parity of reasoning between this case and the case of *Drummond v. Bryden*. Why we did not give the defender expenses in the Sheriff Court, I do not know. If the Sheriff had power to review Court of Session judgments, possibly cause might have been shewn for altering our decision. The only tribunal, however, now open to the defender is the House of Lords, and I am not sure that even that remedy is available, because I believe it is a rule of that Court not to entertain appeals merely on the subject of costs.

On 27th October the Court pronounced this interlocutor:—"Find that the interlocutors pronounced in the Sheriff Court subsequent to 17th March 1891 were incompetently pronounced, in respect that the interlocutor of this Court of 17th March exhausted the cause, and the Sheriff had no further power to deal with the expenses of process: Find that this appeal is competent: Recall the interlocutors appealed against, and decern: Find the appellant entitled to the expenses in this Court and in the Sheriff Court subsequent to 17th March 1891," &c.

After taxation, the appellant, on 14th November following, moved for approval of the Auditor's report, and asked for decree in name of the agent-disburser.¹

The defenders opposed the motion, stating that the account of expenses in the first appeal, for which they had obtained decree, had not been paid. The appeals were both taken in the same action, and it was only in cases where the subject-matter of two appeals in actions between the same parties was different that compensation was not pleadable.²

LORD ADAM.—I think the rule is that if there are separate actions between the same parties, as in the cases cited by Mr Rhind, the agent for the party in the one case is entitled to decree in his own name as agent-disburser, and therefore the other party cannot set off against that decree a decree obtained by him in the other action. But it is also, I think, equally established that where one of the parties in an action has obtained decree for expenses in the action, the agent of the other party is not entitled to decree in his own name for expenses to which his client has been found entitled. In that case the agent-disburser is not entitled to decree in his own name, and the one account must be set against the other.

In the present case, there is only the one action, and the two accounts have both been incurred in connection with it. It makes no difference that they were incurred upon separate appeals.

LORD M'LAREN.—The rule that compensation of accounts of expenses does not take effect in the case of different actions is a convenient one, because the Judge in the second action may not be the same who decided the first action, and may not have the necessary knowledge of what was done in it. The attempt to set off the expenses in the one action against the expenses in the other might involve an inquiry and further expense. But where both accounts have been

¹ *Stuart v. Moss*, Feb. 6, 1886, 13 R. 572; *Paterson v. Wilson*, Dec. 20, 1883, 11 R. 358.

² *Strain v. Strain*, March 7, 1890, 17 R. 566.

No. 26. incurred in the one action, the Court has full cognisance of the facts of the case, and can deal with the whole subject of expenses. It is quite consistent with the known principles of compensation that in such a case the one account should be set off against the other. I think the accounts here have been incurred in one action, and I therefore think that Mr Rhind's motion that we should grant decree in name of the agent-disburser should be refused.

Nov. 14, 1891.
Macgillivray
v. Mackintosh.

LORD KINNEAR.—I am of the same opinion. I think the rule is quite fixed that compensation may be pleaded where cross awards of expenses have been made in the same action, but not between awards of expenses in different actions. In addition to the reason suggested by Lord McLaren there is this further reason why compensation should not be pleadable in the case of separate actions, viz, that the agent-disburser's right to take decree in his own name cannot be cut down by extrinsic claims of compensation between the adverse parties, and the debt arising from a decree for expenses in another action is clearly an extrinsic debt.

The LORD PRESIDENT was absent.

THE COURT approved of the Auditor's report, and decerned in favour of the appellant for the taxed amount of expenses.

WILLIAM OFFICER, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

No. 27. JOHN TURNBULL SMITH AND ANOTHER (Liquidators of the Benhar Coal Company, Limited), Petitioners.—*Pitman*.

Nov. 17, 1891.
Liquidators
of Benhar
Coal Co.,
Limited.

Process—Correction of error in date in a decree—Nobile officium.—The liquidator of a limited company having presented a note to the Court for authority to sell the superiority of subjects feued by the company under a feu-contract, dated 24th and 29th September 1878, obtained a decree in terms thereof. On its being discovered after the sale that the true dates of the feu-contract were 24th and 27th September 1878, the Court allowed correction of the error in the note, and granted warrant to make a similar correction on the extract decree and record copy thereof.

1ST DIVISION.

ON 19th January 1882, in a note at the instance of the liquidators of the Benhar Coal Company, the Court granted authority to sell the superiority of certain ground feued by the company, and to grant the necessary disposition in favour of the purchaser. After the sale it was discovered by the purchaser's agents that the date of the feu-contract under which the ground was held was wrongly stated in the note—the feu-contract having been described as “of date 24th and 29th September 1878, whereas the true date was 24th and 27th September 1878. The error was continued in the extract decree which was thereafter obtained, and the liquidators now applied to the Court “to authorise the correction of the foresaid error in said note, and also to grant warrant to the Principal Extractor of Court to make the corresponding alteration on the extract decree thereafter pronounced, and to the Deputy Keeper of the Records to make the corresponding alteration in the record copy of the said decree, by substituting the date ‘24th and 27th September’ as the proper date of said feu-contract, in place of ‘24th and 29th September.’ The Court, after taking time to consider the case, granted the prayer of the note.¹

J. & F. ANDERSON, W.S., Agents.

¹ *Authorities cited.*—William White and Others (Small's Trustees), July 1856, 18 D. 1210; Hope v. Hamilton, July 1, 1851, 13 D. 1268, 23 Scot. J. 571.

GREAT BRITAIN STEAMSHIP PREMIUM ASSOCIATION, Pursuers

No. 28.

(Appellants).—*Ure.*JAMES L. WHYTE, Defender (Respondent).—*D.-F. Balfour—Salvesen.*Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

Stamp-duty—Sea insurance—Time policy, including a number of ships—Customs and Inland Revenue Act, 1867 (30 Vict. c. 23), sec. 1, schedule B, and sec. 4—Interpretation Act, 1889 (52 and 53 Vict. c. 63), sec. 1 (b).—The Customs and Inland Revenue Act, 1867, sec. 1, enacts that there shall be charged the several duties respectively specified in schedules A, B, and C to the Act.

Schedule B,*—“ . . . For every policy of sea insurance for time, in respect of every full sum of £100, and in respect of any fractional part of £100 thereby insured, where the insurance shall be made for any time not exceeding six months, 3d.”

Sec. 4† defines sea insurance as meaning, *inter alia*, “any insurance . . . made upon any ship or vessel.”

Section 1‡ of the Interpretation Act, 1889, provides—(1) that in any Act passed after 1850, unless the contrary shall appear (b) words in the singular shall include the plural, and words in the plural shall include the singular.

Held that a time policy of insurance embracing a number of vessels with separate sums insured on each was properly stamped at the duty corresponding to the aggregate sum insured.

On 30th November 1887 John Holman & Sons, shipowners and insurance brokers, London, on behalf of themselves and all persons interested, insured with J. L. Whyte, merchant, Glasgow, and certain other underwriters, 119 steamers, mentioned in a list attached to the policy, for the space of 133 days from 10th October 1887. The policy effecting this insurance was underwritten by Mr Whyte for the sum of £1450, and the aggregate amount insured was £34,690, each vessel having a specific portion of that sum appropriated to it, and the sum being ascertained by adding together the several sums specified as insured on each item comprehended in the policy. Nine of the steamers were insured for full

2D DIVISION.
Sheriff of
Lanarkshire.

* Schedule B of 30 Vict. c. 23, provides,—“For every policy of sea insurance for or upon any voyage, in respect of every full sum of £100, and in respect of any fractional part of £100 thereby insured, 3d. In every policy of sea insurance for time in respect of every full sum of £100, and in respect of any fractional part of £100 thereby insured, where the insurance shall be made for any time not exceeding six months, 3d.; where the insurance shall be made for any time exceeding six months, and not exceeding twelve months, 6d. But if the separate and distinct interests of two or more persons shall be insured by one policy for a voyage or for time, then the duty of 3d., or the duty of 3d. or 6d., as the case may require, shall be charged thereon in respect of every full sum of £100 and every fractional part of £100 thereby insured upon any separate or distinct interest.” This last provision as to “separate and distinct interests” was repealed by the Revenue Act, 1884 (47 and 48 Vict. c. 62), sec. 8 (3).

† Section 4 provides,—“In this Act the expression ‘sea insurance’ means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel; and the word ‘policy’ means any instrument whereby a contract or agreement for any sea insurance is made or entered into.”

‡ The Interpretation Act, 1889, sec. 1, enacts,—“(1) In this Act, and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears (b) words in the singular shall include the plural, and words in the plural shall include the singular.”

No. 28. sums of one or more hundreds of pounds, while the remaining 110 ships were insured for sums which included a fractional part of £100.

Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

The amount for which the policy was stamped was £4, 6s. 9d.

In January 1888 three of the ships named in the policy were wrecked, and became total losses.

In May 1890 the Great Britain Steamship Premium Association, with consent of John Holman & Sons, raised an action against James L. Whyte for payment of the sum of £43, 17s. 9d. as the amount due to them in respect of the total loss of these three steamers on the sum underwritten by the defender. The pursuers in cond. 2 averred that they were insured by the policy to the amount of the sums entered against each vessel in the list in the event of a total loss of the vessels.

The defender pleaded, *inter alia*;—(2) Said policy not being duly stamped, pursuers are not entitled to sue thereon, and the present action should be dismissed, with costs.

On 10th July 1890, the Sheriff-substitute (Erskine Murray) pronounced this interlocutor:—"Finds that the second plea stated by the defender, that the document No. 7/1 of process founded on by pursuers is insufficiently stamped, will fall to be sustained," &c.

On appeal, the Sheriff (Berry) adhered, and remitted to the Sheriff-substitute for further procedure.*

* "NOTE.—The document 7/1, in regard to which a question of stamp has been raised, bears to insure a number of steam vessels for a period of 133 days from a certain date. There are 119 vessels included in the insurance, and the aggregate amount insured is £34,690; but each vessel has a specific portion of that amount appropriated to it. The document has been stamped as if it were one policy, and the question is whether the stamp is sufficient, or whether the document should not be regarded as in effect 119 different policies, and liable to be stamped as such.

"The Act 30 Vict. cap. 23, regulates the stamp-duty on sea insurances, and, by schedule B, a duty of 3d. is imposed for every policy of sea insurance for time in respect of every full sum of £100 and in respect of any fractional part of £100 thereby insured. The interpretation clause (section 4) of the Act declares the expression 'sea insurance' to mean 'any insurance made upon any ship or vessel,' and the word 'policy' to mean 'any instrument whereby a contract for sea insurance is made or entered into.' In light of this clause, the words 'upon any ship or vessel' must be held as inserted after the word 'insurance' in the schedule, and so reading the schedule, I think that, under the language of this statute considered by itself, the insurance on each individual vessel would be understood as a separate insurance, and consequently, that we should have here 119 different policies. But the Interpretation Act, 1889, has been appealed to as having a controlling or governing effect on the construction of all Acts of Parliament passed within the last forty years. By section 1 of that Act, re-enacting a similar provision in a repealed Act of 1850, it is provided that in every Act passed after 1850, 'unless the contrary intention appears, . . . words in the singular shall include the plural.' Hence it is said the words 'upon any ship or vessel' in the Stamp Act, 30 Vict. cap. 23, should be read as including a case of insurance 'upon any ships or vessels,' and consequently the document here should be viewed as a single policy, although it bears to insure a number of vessels. In aid of the argument on this point, reference is further made to the principle that revenue statutes should be construed strictly against the revenue, and favourably to private persons. I am unable to give effect to this argument. If we are to apply the Interpretation Act to the Stamp Act, and read the words 'ship or vessel' as if they were 'ships or vessels,' we must at the same time read other nouns in the same sentence as being also in the plural. In this way we are brought to a definition of 'sea insurances' in the plural, and in ascertaining the meaning of 'sea insurance' in

The Sheriff-substitute, on 8th January 1891, sustained the defender's second plea in law, and dismissed the action. No. 28.

The pursuers appealed, and argued;—Section 4 of the Act of 1867 must be read in the light of section 1 (b) of the Interpretation Act of 1889. As the “contrary intention” in the words of the latter Act did not appear in the Act of 1867, the words “upon any ship or vessel” must be read as including a case of insurance “upon any ships or vessels.” Consequently the document here must be viewed as a single policy, although it bore to insure a number of vessels.¹ If there was any doubt, the Revenue Statute must be construed strictly against the revenue, and in favour of the holder of the policy. But, further, the stamp was in exact accordance with the schedule, which contained no indication that the duty was dependent upon the number of subjects covered by the insurance.

Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

Argued for the defender;—The policy of the statute was to charge duty for each separate risk insured. Here, there were 119 separate risks, and the duty must be calculated not upon the aggregate sum insured, but upon each separate risk, *i.e.*, on each separate vessel. The Interpretation Act, 1889, did not apply, as there was here a contrary intention in the sense of the Act. The case of the *Magistrates of Glasgow* had little bearing upon the present case. In it, it was true, a former Interpretation Act (13 Vict. c. 21, sec. 4), was held applicable, but the Court were driven to this construction, for it was absolutely essential to the working of the Roads and Bridges Act as regarded the question in the case.

At advising,—

LORD YOUNG.—The policy sued on is a “policy of sea insurance for time,” not exceeding six months, on 119 steamers, “as per list attached”; and no objection is stated to it except that it is not duly stamped. If the law were that only one ship can be insured by one policy, this policy would be invalid irrespective of the Stamp Act, but it is not contended that the law is so, or that two or any number of ships may not be insured by one policy.

I therefore assume that at the common law, and irrespective of the Stamp Act, the policy sued on is a valid policy of sea insurance for the time specified on the 119 steamers named in the list attached, and on this assumption proceed to consider the objection that it is, according to that Act, insufficiently stamped. That objection is that, inasmuch as each of the 119 steamers might have been insured by a separate policy, the stamp on the one policy that comprehends them all must equal in amount the sum of the 119 stamps which would have been used had there been 119 policies, one on each steamer, for the sum set against it in attached list. If this view be sound, the objection is good, and otherwise not, for it is founded on no other. I am very clearly of opinion that it is unsound.

The statute which governs the matter of duty on policies of sea insurance is

the singular are left to the guidance of the provision in the Stamp Act itself, under which an insurance on any single ship falls, in my judgment, to be treated as a separate and distinct insurance. The unreasonableness of reading one word in the plural while others in the same sentence are left in the singular, might be exemplified by reading the clause which defines the word ‘policy’ thus, that that word in the singular means ‘any instruments, &c.,’ in the plural. •

“The Sheriff-substitute has dealt with the case as if the insurances here were voyage, and not time policies; the arguments, however, which apply to the two cases do not seem to differ in principle. I agree with him in the result that the document in question is not sufficiently stamped as one policy.”

¹ *Magistrates of Glasgow v. Police Commissioners of Hillhead*, March 20, 1885, 12 R. 864.

No. 28. 30 Vict. c. 23, and it enacts that the stamp-duty on any such policy for time not exceeding six months shall be 3d., "in respect of every full sum of £100 and in respect of any fractional part of £100 thereby insured." The sum insured by the policy in question is £34,690, *i.e.*, the full sum of £100, 346 times repeated, and one fractional part of £100, so that the stamp ought to be of the amount of value of 347 times 3d., or £4, 6s. 9d., and it is of that amount exactly.

Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

The sum insured by the policy is ascertained by adding together the several sums specified as insured on each item comprehended in the policy. But in this there is nothing wrong or unusual. It is on the contrary the familiar, invariable, and I should have thought necessary practice in all policies whether against sea perils or fire. There is no possible objection to a policy embracing any number of items, each insured for a specified sum, and none that I see, or can imagine, against such items being all or some of them steamers, any more than against their consisting of any kind of cargo, pictures, or machinery, or anything else quite capable of being each of them insured by a separate policy. The idea of calculating and estimating the stamp-duty on a policy which embraces several items, not by taking their aggregate amounts, but by supposing that each had been the subject of a separate policy is, so far as I know, quite novel, and I think inadmissible.

I cannot comprehend the view of the Sheriff when he says that he is unable to give effect to the argument that "the document (the policy) here should be viewed as a single policy, although it bears to insure a number of vessels," and that, in his opinion, "we should have here 119 different policies." We have in fact only one policy, and if it is incapable of insuring a number of vessels, we cannot, as I have pointed out, reach any question about the stamp, for no stamp whatever would validate it. On the other hand, if the policy is by the common law capable of insuring a number of vessels and the only question is what stamp (if any) ought by statute to be impressed on it, the legitimate and logical result of the Sheriff's reading of the statute is that this policy does not fall under it, and so need not be stamped at all, for the statute alone can subject it to stamp-duty. The Sheriff's reading of the statute is, that stamp-duty is thereby imposed only on a policy of sea insurance "upon any ship or vessel," the singular "ship or vessel" being incapable, either by the rules of the common law, or by virtue of the Interpretation Act of 1889, of being read in the plural "ships or vessels."

It seems to me that the legitimate and logical result of this view is, that a policy of sea insurance on "ships or vessels" does not fall under the taxing enactment. I need hardly say that the view is, in my opinion, altogether wrong. I see no objection whatever to the applicability of the Interpretation Act, although, as I should reach the same result without it, I regard it as superfluous to the point in question.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The only question raised by this appeal is whether the policy on which the pursuers found their claim is or is not duly stamped. The Sheriff and Sheriff-substitute are agreed in thinking that the policy is not duly stamped and accordingly the action has been dismissed. I differ from the view which has thus been sustained.

The policy in question is curiously expressed. It bears to be a policy

"premiums of insurance" on certain ships. But it was represented at the bar as a proper time policy on the ships themselves, and it can be so read. I take it therefore as a policy of insurance effected over 119 ships, named in the list appended to the policy, for a period of 133 days. The amount or value of the interest insured in regard to each ship is noted against the name of each ship, and I observe that out of the 119 ships only nine of them are insured for full sums of one or more hundreds of pounds, while the remaining 110 ships are insured for sums which include a fractional part of £100. No. 28.
Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

The total amount insured is £34,690, and the stamp impressed on the policy covers, (at the rate of 3d. on every £100 or fractional part of £100, being the duty payable on time policies for a period of less than six months), a sum of £34,700. The stamp is therefore sufficient, if the total sum insured is alone regarded. But the defender's contention is that this is not one policy but 119 policies—one over each ship named—and that the stamp-duty is to be reckoned on each £100 or fractional part of £100 for which each vessel is insured.

The determination of the question before us depends on the terms and construction of the Act 30 Vict. cap. 23, which provides that, after the passing thereof, certain duties set forth in schedule B annexed to the Act shall be payable on policies of sea insurance in place of the duties previously exigible. By section 4 of this Act, the expression "sea insurance" is defined to mean "any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to any ship or vessel." Upon the terms of this clause the defender maintains that the words "any ship or vessel" must be read strictly as expressed in the singular number, and as meaning "any one ship or vessel"; that where two or more ships are covered by the one policy the insurances must be distinct, and duty paid on each as if it were the sole insurance; that, so regarded, the policy founded on is insufficiently stamped.

I do not regard this 4th section of the statute as having very much to do with the question before us. It is an interpretation clause, and nothing more, for defining what shall come within the term "sea insurance"; but as both parties are agreed that the policy sued on is a policy of sea insurance within the meaning of the Act, requiring to be stamped as there provided, any appeal to the interpretation clause to ascertain what is thus admitted seems unnecessary and superfluous. But further, it appears to me that the defender's reading of the clause in question cannot be accepted. The Interpretation Act, 1889, has provided that in all Acts passed since 1850, "unless a contrary intention appear," words in the singular shall include the plural, and the present case seems to be one to which the provisions of the Interpretation Act are applicable. Certainly no "contrary intention" appears on the face of the Act we are construing. Besides, if we read the 4th section of the Act of 1867 in the manner proposed by the defender, such a reading would be destructive of the plea which that reading is set forth to support. The defender says that under the clause referred to a sea insurance is an insurance over any,—that is, over any one ship or vessel. Well, if that is so, the policy in question—which is one over a great many ships—is not a policy of sea insurance within the Act of 1867. Not being a policy of sea insurance within the meaning of that Act, it would require

No. 28. no stamp at all, as that Act is the only one in force which requires stamp-duty to be paid on policies of sea insurance.

Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

As I have said, however, the 4th clause of the Act of 1867 is not of much, if any, importance in the decision of this case. The part of the Act with which we are really concerned is the schedule B annexed to the Act, which is specially declared (section 1) to be a part of the Act. The terms of that schedule leave no room for doubt as to the cases in which stamp-duty is exigible, or as to the amount of the duty required to be paid. It provides that, "in every policy of sea insurance for time," where the time does not exceed six months, there shall be paid a duty of 3d., "in respect of every full sum of £100, and in respect of any fractional part of £100 thereby insured." Now, apply that to the present case. We have a time policy of sea insurance for less than six months whereby there is insured a sum of £34,690. There must be paid a duty of 3d. per £100 on each of the 346 hundreds insured and 3d. more for the odd £90, the fractional part of a hundred. This has been done. It will be observed that the schedule does not say that the duty is at all dependent on the number of subjects which the insurance covers, but gives as the only standard for ascertaining the duty payable the amount insured. And that this is not only in accordance with the words of the schedule, but is in full accordance with its intention, becomes, I think, plain when the concluding part of the schedule is considered. That part of the schedule to which I am about to refer has been repealed, but it may still be referred to, as I propose to do, for the purpose of throwing light upon the meaning and intent of the provisions preceding it which are still operative. The schedule provides that where "separate and distinct interests of two or more persons" shall be insured by one policy, duty shall be payable on each separate interest at the same rate according to the amount or value of the interest "thereby insured." What the separate and distinct interests are which are here referred to may be learned from the terms of the fourth or definition clause I have already quoted. They are the interests of the shipowner in his ship, the merchant in his cargo, it may be of a charterer in the freight, or a mortgagee for his debt secured over the ship. These interests may be involved in, and insurance thereof may cover, one or many subjects in which the interest is centred. Thus, the merchant or shipper may insure a cargo at £10,000, but he may have declared or estimated in a list appended to the policy the value of different parts of the cargo at various sums. This would not make a separate policy for each part of the cargo, each paying its appropriate stamp-duty. The interest is £10,000—that is the sum insured,—and the fact of that aggregate interest or value being distributed over different parts of the cargo would make no difference, according to the Act, in the duty payable in respect of the insurance. So, in the present case what is insured is the shipowner's interest to the extent of £34,690 distributed over various vessels. It is, however, one interest. The fact that the statute provided for the separate insurance stamp-duty in respect of separate interests, and made no reference to the several subjects in which that interest might be centred, seems to me to indicate clearly that in estimating the stamp-duty the several interests were to be regarded, and that the several subjects in which the interest insured exists were not. The words of the statute are that stamp-duty is to be paid on the sum insured under the policy, and this was the correct language to use. It is said popularly that the ship is insured—the cargo and freight are insured. But in fact it is not the ship, cargo, or freight that is insured. It is the insurer's

money interest in any or all of these subjects, and therefore I say that the language of the statute is strictly accurate when it speaks of the sum as insured, and not the subject of which that sum is the expressed value. No. 28.

I am of opinion that the interlocutors appealed against should be recalled, the defender's second plea in law repelled, and the case remitted back to the Sheriff to proceed therein. Nov. 17, 1891.
Great Britain
Steamship
Premium
Association v.
Whyte.

LORD JUSTICE-CLERK.—I have had considerable difficulty in making up my mind upon this case. I was very much moved by the able argument addressed to us for the respondent, but after reconsidering the case, with the aid of your Lordships' advice, I have come ultimately to be of opinion that the judgments of the Sheriffs are wrong.

THE COURT pronounced this interlocutor:—"Repel the second plea in law stated by the defender . . . and to that extent recall the interlocutor appealed against . . . *Quoad ultra* remit the cause to the Sheriff-substitute, with instructions to proceed therein as accords."

J. & J. Ross, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

DAVID JAMES LOW, Pursuer (Respondent).—*Shaw*—C. N. Johnston. No. 29.
MRS MARIANNA MICALLEY OR LOW, Defender (Reclaimer).—*Shennan*—*Younger*. Nov. 19, 1891.
Low v. Low.

Jurisdiction—Foreign—Divorce—Domicile—Matrimonial domicile—Separation—Capacity of separated wife to acquire separate domicile.—*Held* (diss. Lord Young) that where a Scotsman has retained his domicile of origin the fact that he has married the native of a foreign country, and has had his home there for years, does not deprive the Scots Courts of jurisdiction in a question of divorce.

A Scotsman, born in Scotland in 1844, entered the navy at the age of eighteen, and served at sea for four years, when he was married (in 1866) in Malta to a Maltese woman. In the following year he was appointed to a post in the Admiral Superintendent's office in Malta, in which he served till 1873, when he was put upon half pay. He then returned with his wife and family to Scotland, and tried, but failed, to get a situation there. He got one in London. After living for about eight months in the United Kingdom he was seized with bronchitis, and on recovering, was advised by his doctor to go to a warmer climate. He returned with his wife and family to Malta, completely recovering his health, and held various positions there in connection with the navy till 1879, when he was appointed storekeeper in the Naval Hospital there. This appointment rendered him liable to be transferred to any ship or station in the event of war, and could be retained by him till he attained the age of fifty-five, i.e., till the year 1899, when he would have to retire, receiving a pension. After 1873 he returned to Scotland only on two occasions, for two months in 1885, and again in 1890, when he came to give instructions for divorce proceedings against his wife. He had three sons, one of whom had been sent to Scotland for some time, and afterwards went abroad; the second held a situation in Scotland; and the third, born in 1878, was at school in Malta. In 1887 the spouses agreed to live apart, executed a deed of separation, and obtained authority from the Court of Malta to live apart from each other, as required by Maltese law. The deed of separation provided that in the event of the wife incurring "any grievous fault," the present deed should not bar divorce actions before the competent tribunals in the United Kingdom.

In 1890 the husband raised an action of divorce in the Court of Session, and the wife having objected to the jurisdiction of the Scots Court, a proof was led, in which the facts already stated were proved, and the husband, in addition, deposed that he had always intended to return to Scotland, and did so still,

No. 29. *Held* that the husband had never abandoned his domicile of origin in Scotland, that the wife had not, by virtue of the deed of separation, acquired right to set up a domicile for herself, and that the long period of married life spent in Malta would not avail to create a jurisdiction in the Maltese Courts, so as to oust the jurisdiction of the Courts of the domicile; *diss.* Lord Young, who was of opinion that considerations of utility and expediency demanded that the Courts of Malta, as the "matrimonial domicile," should alone be appealed to.

2d Division. **Nov. 19, 1891.** **Low v. Low.** **Ld. Wellwood.** On 23d May 1890 David James Low, designing himself as "at present residing at No. 30 Minto Street, Edinburgh," which was his father's house, raised an action of divorce on the head of adultery against his wife, Mrs Marianna Micalley or Low, "presently residing at Sliema, in the island of Malta."

The defender pleaded that the Court had no jurisdiction.

A proof was led. It appeared that the pursuer was born in Scotland, of Scots parents, in 1844. In 1862 he entered the navy, and served in various ships. In 1866, when he was assistant paymaster in the Mediterranean fleet, he was married in Malta to the defender, who was a born Maltese. In the same year he was transferred to another ship, and in 1867 was appointed to a post in the Admiral Superintendent's office at Malta. In January 1873 he was placed on the retired list, with a pension of 5s. a-day. A few weeks afterwards he returned to Scotland with his wife and family. He lived in his father's house in Edinburgh, and tried to get employment in Edinburgh. He did not succeed in getting employment there, but held a position as a clerk for a short time in a merchant's office in London.

Towards the end of the year 1873 he was attacked with acute bronchitis, and when he recovered, was advised by his doctor to go abroad. He accordingly returned to Malta with his wife and family, and held various positions in the naval service till 1879, when he was appointed storekeeper and cashier to the Naval Hospital there. His health was completely restored. The conditions of this appointment were that, while he held it, he should be available for service anywhere, afloat or ashore, in the event of war, and that he must retire at the age of fifty-five, *i.e.*, in 1899, when he would be entitled to claim a pension.

After 1873 he returned in 1885 to Scotland, to his father's house, for two months, but did not again visit Scotland till 1890, when he came to see about divorce proceedings. Of his three sons, the eldest came to Scotland, and lived with his grandfather for some time, seeking an appointment in the army or navy. He was unable to get one, and went abroad to Demerara; the second son was a clerk in Edinburgh, living with his grandfather; and the third, a boy of twelve, lived with his father in Malta.

In 1887 the spouses quarrelled, and presented a petition to the Maltese Court. The Maltese law allows no divorce *a vinculo*, and to authorise man and wife to live apart it is necessary that the authority of the Court be interponed.

On 12th February the Maltese Court pronounced this judgment:—"The Court having ineffectually recommended a reconciliation to petitioners, and after having duly warned them, has granted the request, and has authorised petitioners to execute the deed of separation according to the terms of the draft countersigned by the Judge."

A deed of separation was accordingly executed setting forth, as a preamble, a declaration by the spouses, without stating other grounds for a separation, with the object of avoiding publicity, that, cohabitation between them being impossible, on account of mutual disagreement, they have entered into the present deed of separation by "mutual consent," after ob-

taining to that effect the authorisation of the Second Hall of Her Majesty's Civil Court. There were various provisions as to the allowance to be paid to the wife, the care of the children, the household furniture, &c., and then followed these conditions, viz.:—" (Sixth) That this deed shall not be prejudicial to the rights appertaining to the appearer, David Low, in case the appearer, Marianna Low, shall incur in any grievous fault as foreseen by article 44 of ordinance, No. 1 of 1873, the commission of which fault, according to the aforesaid ordinance, No. 1 of 1873, would make her forfeit the allowance as established in clause third of the present deed. (Seventh) That in the event foreseen in clause six, the present deed shall not bar the exercise of the divorce actions to be, if ever, entered into before the competent tribunals in England." Among the grievous faults referred to was adultery.

No. 29.

Nov. 19, 1891.
Low v. Low.

Most of the witnesses, among them both the spouses, were examined on commission. The pursuer deponed,—“ I consider Scotland as my home, to which I intend, *D. V.*, to return on the expiration of my present appointment. I have my father, three brothers, two sisters, and my second son living there, as well as nearly all my relations. . . . Cross-examined. —Decidedly I intend to return to Scotland. I have always cherished that intention, and I have spoken in conversation about it. I may mention Dr Messer.”

The pursuer's father deponed,—“ Pursuer is a very ardent Scotchman, and keeps St Andrew's day, hoisting the Scotch flag, and having heather on the table, and all that sort of thing. In any of his correspondence or communications with me pursuer has never indicated a desire or intention to settle in Malta.”

Dr Messer spoke only of the period subsequent to the separation. He deponed,—“ (Q.) Are you aware that the pursuer cherishes the intention of returning to Scotland at the expiration of his present appointment, and has he so expressed himself to you? (A.) He has frequently told me that he intended to return to Scotland, since my appointment here in Malta in May 1888.”

On the other hand the defender deponed,—“ My husband never said he intended to return to Scotland, on the contrary he always expressed a desire to settle permanently in Malta, and it was on that account that he got his appointment as storekeeper in the Royal Naval Hospital, Malta. During the twenty years we lived together he never spoke of returning to Scotland for good. I produce a letter to shew his intention.”*

The Lord Ordinary (Wellwood), on 11th June 1891, pronounced an interlocutor, repelling the defender's plea of no jurisdiction, found “ facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery,” and accordingly gave decree.†

* The letter was written on 4th July 1867 from H.M.S. “ Hydra ” by the pursuer to the defender. It ran thus:—“ . . . My own, own dear sweet little wifey, I have thought of a plan to do if all others fail about my leaving the service ; it certainly is going down in the world, but I don't care for that, or for anything people may think. What I thought of was to get Carnana to take me into partnership with him. I could keep his books, and by being English I could perhaps get him more custom on board ships. What do you think of it? What do I care for but to live quietly and comfortably with my darling wifey? Write and tell me what you think. . . . ”

† “ NOTE.—(After stating the facts)—Balancing these considerations, I do not think that the advantage lies with the defender. The most serious point against the pursuer is his acceptance of the appointment which he at present holds. That appointment, although not permanent, was one which, at its commencement, had about twenty years to run, and it is no doubt an important ele-

No. 29.

Nov. 19, 1891.
Low v. Low.

The defender reclaimed, and argued;—There was a series of cases beginning with cases of Anglo-Indian domicile, which established that residence abroad, although official residence, would, if long continued, set up a domicile there, even although there might be a floating intention present of ultimately returning to the *natale solum* when the period of office was out, or a sufficient fortune made.¹ The appointment here was for a long period, and of the same character as the appointment held in the cases referred to. It had been said that, in order to divest himself of his domicile of origin a man must intend to become a foreigner,² but that doctrine had been exploded in the subsequent case of *Udny*.³ It was not necessary to shew that the pursuer intended to have all his rights regulated by Maltese law.⁴ If a matrimonial domicile had been established in Malta that was enough to entitle the wife to claim to have her rights regulated by Maltese law.⁵ Although the procedure in *Pitt's* case, where the doctrine of matrimonial domicile had been abandoned at the bar of the House of Lords without argument,⁶ had somewhat shaken the authority of *Jack's* case,⁷ matrimonial domicile was still a part of the law of Scotland.⁸ So far it had been conceded that the domicile of the husband was necessarily that of the wife. But was it so in all cases? Not, as here, where there had been a judicial separation.⁹ Even if the deed were voluntary it would, so long as the separation actually endured, give the wife right to acquire and retain a separate domicile.¹⁰ The separation proceedings in Malta were important, as shewing an intention on the part of the husband to submit his status to the law of Malta, and to "hold by his domicile"¹¹ there. [LORD TRAYNER.—Is there not authority for maintaining that although jurisdiction does not exist *ratione originis* solely, yet if a born Scotsman actually returns to Scotland jurisdiction over him, and therefore over his wife, will revive?¹¹] That was limited to cases of contract.

ment in such cases, going to establish a change of domicile, that a man accepts such a post. But it is not conclusive, and on consideration of the whole circumstances of the case in the light of previous decisions, I am not prepared to hold that it has been proved, against the pursuer's denial, that his Scottish domicile has been lost. It lay on the defender to prove that it was abandoned *animo* as well as *facto*; and while she has established a length of residence on the part of the pursuer in Malta, which might be sufficient if intention were proved, she has not succeeded in proving directly, or by implication, that the pursuer ever resolved to abandon his Scottish domicile."

¹ *Bruce v. Bruce*, 1790, 3 Pat. App. 163 (Lord Thurlow); *Ommaney v. Douglas*, 1796, 3 Pat. App. 448; *Clarke v. Newmarch*, Feb. 13, 1836, 14 S. 488, 8 Scot. Jur. 241; *Commissioners of Inland Revenue v. Gordon*, Feb. 4, 1850, 12 D. 657, 22 Scot. Jur. 233; *Wauchope v. Wauchope*, June 23, 1877, 4 R. 945; see also *Fraser on Husband and Wife*, p. 1259.

² *Moorhouse v. Lord*, 1863, L. R., 10 Cl. H. L. 272.

³ *Udny v. Udny*, June 3, 1869, 7 Macph. (H. L.) p. 92; see Lord Westbury at p. 100.

⁴ *Douglas v. Douglas*, 1871, L. R., 12 Eq. 617.

⁵ *Jack v. Jack*, Feb. 7, 1862, 24 D. 467, 34 Scot. Jur. 234.

⁶ *Pitt v. Pitt*, April 6, 1864, 2 Macph. (H. L.) 28, 31 Scot. Jur. 522, 4 Macq. 627.

⁷ Per Lord President in *Stavert v. Stavert*, Feb. 3, 1882, 9 R. 537.

⁸ *Fraser*, 906-7; *Allison v. Allison*, June 15, 1839, 1 D. 1025, 11 Scot. Jur. 529.

⁹ *Tovey v. Lindsay*, 1813, 1 Dow, 117, see Lord Chancellor Eldon, 138; see also *Dolphin v. Robins*, 1859, 3 Macq. 563.

¹⁰ Cf. Lord Medwyn in *Allison v. Allison*, *supra*, note 8.

¹¹ His Lordship referred to Lord Ivory's note to Erskine, i. 2, 19.

No. 29.

Nov. 19, 1891.
Low v. Low.

Argued for the pursuer;—The pursuer himself was the highest authority on the question of intention. If the Court believed him, his evidence was conclusive of the whole matter. None of the cases had been decided against the oath of the person whose domicile was in question, and its force had often been recognised. It was the fact of the party's evidence being laid before the English Court in *Wilson's* case,¹ that enabled that Court to come to a different conclusion from that reached in the Court of Session, where his evidence was, at that time, not admissible. Now, the pursuer here was corroborated by his father, and by the whole course of his own conduct. No "domiciled Scotsman in his senses" would go to Malta to live the rest of his life there any more than to Burmah.² The old doctrine of Anglo-Indian domicile was now exploded, the conditions of transit were so different, and the change from the Government of the Company to the Government of the Queen had entirely changed the aspect of a man's residence in India.³ Formerly on going to India a man changed, in a manner, his allegiance, but that was not so now, nor was it so when a man went to Malta. If the "duties of office" called a man to a place and kept him there, he would not acquire a domicile, for he would have no choice in the matter.⁴ This doctrine of the persistency of the domicile of origin had been pushed so far as to hold a man who had been absent from Scotland for seventy-two years, a large part of it in the service of the Crown, to be at his death still a Scotsman *ratione originis*.⁵ The doctrine of "matrimonial domicile" was no longer a part of the law of Scotland, if it ever had been.⁶ There was no authority for Lord Fraser's statement that a separated wife could have a separate domicile. Lord Fraser referred to the statute, but the statute said nothing of it. Authority was the other way.⁷

At advising,—

LORD JUSTICE-CLERK.—The only important matter here is whether we have or have not jurisdiction to deal with the case, for I understand that your Lordships are all satisfied—as I am—that, if we are entitled to deal with it, the pursuer upon the facts is entitled to divorce.

But there is an important question of jurisdiction raised. It is said that we have none in respect that the pursuer has ceased to have a domicile in Scotland, and is now domiciled in Malta.

In such a case as this, a case of divorce, it may make the very greatest difference, as regards the remedy available, where a man's domicile is, and it cannot be denied that anomalies may result from the decision of the Court on the question of domicile, *e.g.*, the wife, who was a Maltese by birth, and had lived there for nearly the whole of her married life, might have to come here for a remedy, if she desired one, while, if Malta was the proper *forum*, the husband on his side would only be entitled to a separation, the law of Malta not authorising divorce *a vinculo*. These and many other anomalies are the results of

¹ *Wilson v. Wilson*, 1872, L. R., 2 P. and D. 435, in the Court of Session March 8, 1872, 10 Macph. 573, 44 Scot. Jur. 295; *Steel v. Steel*, July 13, 1888, 15 R. 896.

² See Lord President in *Steel v. Steel*, *supra*.

³ See *Jopp v. Hood*, Feb. 28, 1865, 34 L. J. Ch. 212, 4 De Gex. J. and S. 616.

⁴ Per Lord Westbury in *Udny*, *ut cit.*; see also *Bell v. Kennedy*, May 14, 1868, 6 Macph. (H. L.) 69, 40 Scot. Jur. 476.

⁵ *Patience*, 1885, L. R., 29 Ch. Div. 976.

⁶ See Lord Deas and Lord Shand in *Stavert's case*, *ut supra*.

⁷ *Dolphin v. Robins*, 1859, 3 Macq. 563; *Lesseur*, L. R., 1 P. D. 139.

No. 29. differences in the marriage laws of different countries, but they cannot affect the determination of the question of domicile.
 Nov. 19, 1891.
 Low v. Low.

Now, it is certain that the pursuer never gave up his domicile of origin, if we believe his statement. Is there any ground for disbelieving it? It is the defender who must shew that the domicile of origin was *animo et facto* given up and a new domicile adopted. We have really to consider the question whether if Mr Low were now dead, leaving no settlement, the law of Scotland or the law of Malta would rule his succession. What are the facts with which we have to deal in testing the truth of the pursuer's own statement, which, if true, would undoubtedly establish that he remained a domiciled Scotchman? The pursuer entered the navy many years ago. He served in the navy till 1867, when he was put on half-pay. It so happened that in 1867 he was able to get a naval appointment on shore in the Admiral Superintendent's office at Malta. He held that appointment till 1873, when he retired from the navy on half-pay. He immediately returned to Scotland with his wife, and after a short stay in Scotland, where he endeavoured to get employment, he obtained a situation in London. Before the year was out he had a severe attack of acute bronchitis, and under medical advice, and under medical advice only, he left this country and went back to Malta. He had a good chance of employment there, as he was known there, the climate would suit his health, and his wife was a Maltese. All these considerations may have weighed with him in choosing Malta as a residence for health.

His health was re-established after his return to Malta, and in 1879 he obtained an appointment as storekeeper and cashier in the Royal Naval Hospital there. That is certainly the point at which the case for the defender obtains force, if it has any. The regulation under which he holds his appointment was that there would be compulsory retirement at the age of fifty-five. It is, however, necessary to notice that that appointment did not preclude him or save him from the duty of serving in the navy in the event of war.

These are the facts of the case, if you add this, that, still retaining this employment, he has lived in Malta ever since. He has visited Scotland very rarely, but the reason for that is that his income is small, and he cannot afford to travel backwards and forwards.

Has he then lost his Scots domicile? It does not appear to me that there is anything in what I have said to militate against his own statement, which plainly means that he holds by his domicile of origin. The only point that can be taken is that he accepted this situation, which was for a very considerable period. But many people have to take appointments for long periods in places in which they do not desire to settle down. It must always be remembered that it was bad health which drove him from Scotland, and he might very well not wish to return to Scotland until he had made sure that his health was completely restored. Having then got this appointment, which would leave him, when it ran out, a man of middle age with a pension, he thought it better to stay still longer in Malta.

It can hardly be disputed that Malta was an unlikely place for a man to resolve to settle in, if it was open to him, while still in middle life, to leave it with a pension providing for his later life. Therefore, without going beyond the evidence of conduct, I think it clear the pursuer never lost his Scots domicile.

But there remains a piece of evidence which is of importance. In 1887 the spouses agreed that they should separate. That was a voluntary separation, and it was necessary by the law of Malta that it should receive the *imprimatur* of

the Court. Of itself, the fact of the spouses agreeing to apply to the Court would go to support the defender's case, for she may point to the pursuer having voluntarily submitted himself to the jurisdiction of the Maltese Court. But there is a remarkable provision in the deed of separation, put in in the interest of the pursuer, which is entirely inconsistent with the idea that he had *animo* given up his Scots domicile. The provision I allude to is this, in the 7th article, that if the wife shall commit any "grievous fault, the present deed shall not bar the exercise of the divorce actions to be, if ever, entered into before the competent tribunals in England." England is put in by the Maltese lawyer (meaning, no doubt, the country of Great Britain), and thus, in 1887, we have it recorded that the pursuer had it in his mind that this Court was the tribunal to which he had a right to appeal, and would appeal for redress, in the event of his wife's "grievous fault," and that he took care not to deprive himself of his right to resort to it. It is difficult to see how a man in 1887 could so stipulate that the jurisdiction of the Courts of the country of his birth should rule his rights if *animo et facto* he was then a Maltese.

No. 29.

Nov. 19, 1891.
Low v. Low.

On the whole matter, I am of opinion that there is no evidence that the pursuer ever gave up his Scots domicile, and as a necessary result of that opinion, looking to the facts proved, and exercising our jurisdiction, we must give decree of divorce.

LORD YOUNG.—This case presents no feature of interest, except the legal question to which your Lordship has referred, but that is a very interesting question, and I cannot help regretting that the evidence on the subject had to be taken in the manner in which it was, *i.e.*, upon commission, and not before a Judge who would have seen the witnesses.

On the legal question—to which any of the desultory remarks I may have to make apply—we are familiar with the subtlety and difficulty of questions of domicile. That difficulty is not diminished, but rather increased, by decisions, and by various judicial *dicta* to which we have been referred. In its own nature it is a difficult question, and no discussion of it can proceed without abundant use of vague and indefinite language. We have to encounter such words as "temporary" and "permanent." These are relative terms. Nothing in the world is permanent; everything is temporary. Then we have "*animus re-munendi*," while we all know that the minds of human being are constantly fluctuating.

But what we have to aim at in endeavouring to reach any general rule is to follow considerations of general expediency and utility.

I cannot help thinking that a good deal of difficulty is raised by the use of language such as we are familiar with, *e.g.*, "losing a Scots domicile." The loss is not worth talking about if the loser can resume it when he pleases, and there is much authority to the effect that he can become Scots again by a mere change of intention. The great test we heard of in argument—the domicile that is referred to in such cases—is the domicile of succession. That again, as regards considerations of expediency and utility, is of very little importance, when it is in the power of every person to declare by a couple of lines what law shall regulate his succession.

Now, viewing the considerations of expediency and utility which arise in this case, what have we? Substitute any country you like for Malta. What is the question? The man was born a Scotsman; it is no matter when he left the

No. 29.
 Nov. 19, 1891.
 Low v. Low.

country, but he set out to make his way in the world. There is a rule, founded on considerations of utility and expediency, that no change shall be effected by a man's shifting about with the regiment, if he is a soldier, or with his ship, if he is a sailor. That is a very convenient rule. This man was in the navy, but he retired in 1867. In 1866 he married in Malta, and made a home there in the ordinary sense of that word. He set up a house there, and lived with his wife there. He had no home elsewhere in the ordinary sense. He came home in 1872 or 1873 for a brief period, but with that exception he lived in Malta and made his home there. He married a Maltese, and lived with her there for twenty-five years. He has employment there, and the climate suits his health.

The wife has committed a matrimonial offence. The question on which these considerations of utility and expediency are to be appealed to is,—are the consequences of that offence to be determined by the Courts of the place where the home of these persons has been for a quarter of a century, or by the Courts of Scotland? Your Lordships are of opinion that the Courts of Scotland are to determine them. I must say that to my mind every consideration of expediency, utility and good sense is against that. I feel the force of the decisions and the *dicta* on this subject, but my mind always goes back to what was said long ago by Lord Thurlow that there is very little profit in speculating as to what a man's intention as to his ultimate home may be. He has made his home abroad. Of course he may change his mind. Is jurisdiction to fluctuate with the fluctuations of his mind, and change half-a-dozen times in a week?

Suppose we know that when he brought this action he intended to return to Scotland, but that he had since changed his mind, and now intended to remain in Malta, would that change oust our jurisdiction? Or is the state of mind in which he was when the action was brought to rule the question?

The rule ought to be, as I think, that when a man makes a home in any country, although he may be greatly attached to his place of birth, and intend to return, still his domicile for all purposes—and the convenience of the rule is specially illustrated by reference to domestic questions such as this—should be determined by the place of his domestic home, and his attachment to the place of his birth should not influence the consideration of the matter. Just reverse the present case. A Maltese comes to Edinburgh, devotedly attached to Malta, his *natale solum*, but Scotland is the place where he can make his livelihood, and he obtains a situation here. He marries a Scottish lady, and makes a home here, and resides here for twenty-five years. Then he complains of a matrimonial offence committed by his wife, committed here, in Edinburgh, and raises an action against her in the Courts of Scotland. She says “No, you must go to Malta; you are devotedly attached to Malta. You are a Maltese, and the consequences of my offence must be determined by the law of Malta.” Is not that an absurdity? But it is exactly, in law, the same case as you have here.

I know the facts which constitute a “home” in the ordinary sense. Are these facts not present here, constituting a “home” in Malta? Many Scotsmen, not a few, go to London. If you ask any one of them,—have you abandoned Scotland? Everyone of them, without exception, would answer “No, I intend to return to Scotland.” But if any one of these men makes a home in England, marries a wife there, sets up an establishment there, and derives an income from a situation in England, I do not think he would be very respectfully treated, if he pleaded in an action against him by his wife,—“I am

still passionately attached to Scotland. I am a Scotsman, and you must go to the Court of Session." No. 29.

This case suggests these same considerations. This Maltese man, who has been a quarter of a century in Malta, and since 1873 has never returned to this country, except for a few weeks to give instructions for this action, who is fixed in a situation there for twenty years, is complaining of his Maltese wife for her conduct in Malta. He should resort to the Maltese Court with his complaint. It is not fair to compel her to come here.

Nov. 19, 1891.
Low v. Low.

LORD RUTHERFURD CLARK.—I agree with your Lordship in the chair.

LORD TRAYNER.—Two questions have been argued before us under the defender's reclaiming note,—(1) Whether the defender is subject to the jurisdiction of this Court, and (2) whether the pursuer's averments of adultery on the part of the defender have been proved.

On the second question,—that is, on the merits of the case, I shall say nothing beyond this, that the proof adduced, in my judgment, is quite sufficient to establish the pursuer's averments, and to entitle him to decree of divorce.

The question of jurisdiction is, at first sight, attended with more difficulty, but upon consideration of the argument offered and the authorities cited, I have come to be of the opinion expressed by the Lord Ordinary, and that without doubt.

Speaking generally, and apart from a specialty in this case, which I shall afterwards consider, I suppose there is no doubt that the defender's domicile is the same as that of her husband. A wife cannot have or acquire, *stante matrimonio*, a domicile different from her husband's. Then what is the pursuer's domicile? His domicile of origin is admittedly in Scotland, and that domicile is and must continue to be the only domicile by which his succession can be regulated, until he abandons it and acquires another. I say the domicile which regulates his succession, because after what took place in the House of Lords in the case of *Pitt*, and the opinions delivered by Lord Deas and Lord Shand in the case of *Stavert*, I regard it as practically settled that the domicile which regulates succession is the domicile from which jurisdiction arises to deal with questions of divorce. Such jurisdiction will not be afforded by what has been called the matrimonial domicile, nor by the *locus delicti* combined with personal service, nor by the mere residence in this country for forty days. Nothing short of what was termed in the case of *Pitt* a complete or absolute domicile,—that is one which will regulate succession, affords jurisdiction to deal with a case of divorce. In this sense, therefore, the pursuer's domicile is in Scotland, unless, as I have said, he has lost it by abandonment, and by the acquisition of another somewhere else. In support of her plea, which I am now considering, the defender avers that the pursuer has lost his Scots domicile, and has acquired one in Malta, which he now holds. The *onus* of proving this averment lies on the defender, and it is essential to the success of her plea that she should establish the averment she has made. In my opinion she has entirely failed to do so. There is not a tittle of evidence to support this averment beyond her own statement, while on the contrary the evidence of the pursuer, his conduct at Malta, his reasons and motive for going there and remaining there so long as he has done, as well as the evidence of other witnesses examined on his behalf, satisfy me that he has not abandoned his Scots domicile, but has retained, and intended to retain it. The pursuer's domicile being in Scotland, it follows that the defen-

No. 29. der's domicile is there also, and she is therefore subject to the jurisdiction of this Court in the present case.
 Nov. 19, 1891.
 Low v. Low.

It is said, however, by the defender that in respect of a judicial separation between her and the pursuer, she (the defender) no longer follows the domicile of her husband, but may acquire, and has acquired in Malta a separate domicile of her own. I am not satisfied that the separation of the parties was a judicial separation as we understand the term. The separation did not proceed on any judicial inquiry as to the alleged causes therefor, indeed the deed of separation produced, which was sanctioned by the judicial authority, bears in terms that the parties had entered into it "by mutual consent." It rather appears to me that the separation of the parties was the result of an extrajudicial agreement into which they had entered, but which required, by the law administered in Malta, the consent or interposition of the Judge to allow of them acting upon it by living apart from each other. All that the Judge seems to have done, being all that his duty required him to do, was to endeavour to bring about a reconciliation between the spouses, failing in which, he authorised the separation. But, even taking the separation to have been judicial, it is certainly not clear that it so separates the parties to the effect of enabling the defender to acquire a domicile different from the pursuer. It may have the effect of enabling her to carry on business for herself, to sue and to defend questions arising out of such a business without the consent or intervention of her husband, may give the Courts of Malta jurisdiction over her, which, apart from the separation, they would not have had, and even give her a domicile to found such jurisdiction. But it does not, so far as I see, affect her status as the pursuer's wife, or the rights and privileges which that status confers, except in so far as by the agreement she had renounced them. Assuming, however, that the separation was judicial, the terms of the agreement,—that is, the conditions on which separation was decreed,—bar the defender from pleading it as she does. For one of these conditions was, to state it shortly, that in the event of the defender committing adultery, the separation should not prevent the pursuer seeking the remedy of divorce before the competent tribunals in England, by which I understand the competent tribunals of the United Kingdom. The defender cannot now, therefore, in respect of the separation, object to the pursuer seeking here that remedy, which, by a rather remarkable provision, was reserved to him by the conditions of that separation.

On the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

THE COURT adhered.

CURROR, COWPER, & CURROR, W.S.—WALTER C. B. CHRISTIE, W.S.—*Agents.*

No. 30. GRANITE CITY STEAMSHIP COMPANY, LIMITED, Pursuers (Appellants).—*W. Campbell—Salvesen.*
 Nov. 20, 1891.
 Granite City
 Steamship
 Co., Limited,
 v. Ireland &
 Son. DAVID IRELAND & SON, Defenders (Respondents).—*Ure—*
W. L. Mackenzie.

Ship—Discharge—Demurrage—Excepted causes.—By charter-party it was agreed that a vessel should, after loading, proceed to Leith docks "and deliver the cargo of coal "alongside any safe wharves, crafts, or depots." The cargo was to be taken from alongside the vessel "at the merchant's risk and expense according to the usual custom at loading and discharging ports." Forty-eight running hours were allowed for discharge, after which demurrage was stipulated for

The "Linn o' Dec."

"except in case of strikes, . . . detention by railway or cranes, . . . or No. 30.
 any other cause beyond the control of the charterers which may impede the
 ordinary lading and discharging of the vessel." On the arrival of the vessel at Nov. 20, 1891.
 Leith, in consequence of a strike of railway servants the charterers could not be Granite City
 supplied with waggons to remove the coal by railway as they had arranged with Steamship
 their customers to do, and did not discharge the vessel within the running v. Ireland &
 hours. There was no rule of the port that coal must be discharged into waggons, Son.
 or forbidding its discharge on the quay. In an action by the owners for demur- The "Linn o'
 rage in respect of the charterers' failure to discharge within the running hours, Dee."
held that the charterers had failed to shew that the discharging of the vessel had
 been impeded by any of the excepted causes.

THE GRANITE CITY STEAMSHIP COMPANY by charter-party, dated 21st 2D DIVISION.
 January 1891, agreed with David Ireland & Son, coal exporters and mer- Sheriff of For-
 chants, Dundee, that the company's steamship "Linn o' Dee" should pro- farshire.
 ceed to Tyne Dock and there load a cargo of coals, and should then proceed
 to Leith Docks and deliver the same to the affreighters or their assignees
 "alongside any safe wharves, crafts, or depots, as ordered by receivers.
 . . . The cargo to be put on board and taken from alongside the vessel
 at merchant's risk and expense, according to usual custom at loading and
 discharging ports. . . . Running hours to be allowed the said freighters
 for loading, as per colliery guarantee, and forty-eight running hours for
 discharging the said cargo, except in case of holidays, Sundays, colliery
 pay-days, idle days, riots, strikes, lock-outs, idle time, or restriction of out-
 put at the colliery or collieries with which the steamer is booked to load,
 frosts, storms, floods, detention by railway or cranes, accidents to machinery,
 or any other cause beyond the control of the charterers which may impede
 the ordinary loading and discharging of the vessel."

The ship made two consecutive voyages under this charter-party, and
 on arriving at Leith, on both occasions, found that waggons could not be
 procured by the charterers to remove the cargo, owing to a strike of rail-
 way servants then existing all over Scotland. The charterers had arranged
 to deliver the coal to the Edinburgh Gas Commissioners by rail from
 Leith. The charterers made no other arrangements for discharge, either
 by procuring carts to carry away the coal, or by obtaining leave to put the
 coal on the quay. The ship was on both occasions detained beyond the
 running hours, and the owners raised an action to recover the amount of
 demurrage in the Sheriff Court at Dundee. They founded on the charter-
 party and the fact of the delay, pleading;—(3) The defenders were bound
 to use all available means at their disposal at the port of discharge for
 taking delivery of cargo, and having failed to do so, they are liable for
 demurrage.

The defenders pleaded;—(2) The delays upon which demurrage arose
 having occurred through causes beyond the control of the defenders, and
 falling under the exceptions specified in the charter-party, the action
 should be dismissed.

A proof having been allowed to establish the cause of the delay, it was
 proved that the defenders had made no application to the authorities of the
 docks for leave to store the coals on the quay, that there was no rule at
 Leith that delivery of coals should be made in any particular manner, and
 that, if the defenders had bestirred themselves in time, they could have
 had the coals removed from the vessel's side in carts, if not carted all the
 way to the Gas Commissioners' works.

The Sheriff-substitute (J. C. Smith), on 10th June 1891, assoilzied the
 defenders, finding "that the charge for demurrage was not incurred, in
 respect that the cause of delay was the failure of the North British Rail-
 way to supply waggons to receive the coals carried by the ship owing to

No. 30.

Nov. 20, 1891.
Granite City
Steamship
Co., Limited,
v. Ireland &
Son.

The "Linn o'
Dee."

a 'strike' of their servants, and that said 'strike' or 'detention by railway,' which impeded the discharging of the vessel, fell within the aforesaid exception expressly, or as a cause not within the defenders' control."

On appeal, the Sheriff (J. C. Thomson), on 18th August, found "that the delays upon which demurrage arose occurred through a cause beyond the control of the defenders, which impeded the ordinary discharging of the vessel," and therefore assoilzied the defenders.

The pursuers appealed to the Court of Session, and argued;—None of the excepted clauses applied. "Strikes" did not include railway strikes, and railway detention had reference to the loading. But, in any event, nothing had occurred to delay the discharge, even although the coals could not have been removed from the quay. The shipowner had nothing to do with the supply of waggons. He knew nothing of the defenders' arrangements for removing the cargo, and was not affected by them. The charterer must have the waggons or some other means of conveyance ready, if he wished to take away the coals.¹ He was not entitled to use the ship as a warehouse without paying for it. It had been proved as a fact that he might have arranged for their removal. If there had been a rule of port requiring discharge into waggons, or forbidding discharge on the quay, that would have raised a different question.² The case of *Postlethwaite v. Freeland*³ was distinguished, because there the discharge was to be in a reasonable time.

The defenders relied on the evidence to shew that they could not have removed the coal faster owing to the railway strike; and that their case was covered by "strikes," or by the general clause at the end of the charter-party. They cited *Postlethwaite v. Freeland*.³

LORD JUSTICE-CLERK.—The Sheriff and Sheriff-substitute have in this case pronounced practically the same judgment, but I am sorry to say that I cannot agree with them.

The charter-party definitely fixes a certain number of hours for discharge, after which there is to be demurrage, and it gives a number of exceptions which should be excuses for delay.

Only two of these exceptions could possibly come in here, viz., "detention by railway" and "strikes." But "detention by railway" does not mean detention by reason of failure on the part of those charged with the railway management to supply waggons to take the cargo away. It means detention caused by delay in bringing the coals from the pit to be loaded on the ship. As to the other excepted cause—"strikes,"—I think that what is meant is a strike of stevedores or dock labourers, or possibly a strike of seamen. It is difficult to see how a strike of railway servants could affect the discharge of the ship. But suppose it could, and that that is one of the things that is excepted, all that the facts come to in this case is that the railway company could not bring trucks alongside the vessel, because of the strike among their servants. But then there is nothing here to indicate that any particular mode of discharge was contemplated as there was in *Wyllie's* case. There is no custom of the port, no rule that the discharge must be made into trucks.

¹ *Grant v. Coverdale*, 1884, L. R., 9 App. Ca. 470; *Budget & Co. v. Birnington & Co.* 1891, L. R., 1 Q. B., p. 35.

² *J. & A. Wyllie v. Harrison & Co.*, Oct. 29, 1885, 13 R. 92; *Kruse and Others v. Drynan & Co.*, July 9, 1891, 18 R. 1110; see also the "*Carisbrooke*" 1890, L. R., 15 P. D., p. 98.

³ *Postlethwaite v. Freeland*, 1879, L. R., 5 App. Ca., p. 599.

The charterers then are in this position, that they must consider whether it will pay better to incur demurrage, or to incur the cost of finding some other method of discharge. It is not proved that they were active in making arrangements for her discharge, or that they could not have got the vessel discharged if they had taken the proper steps. The owner of the vessel has nothing to do with that expense. He had a distinct stipulation as to discharge, and, as I have said, there is no evidence to shew that the delay was due to causes over which the charterers had not control. I hold it to be proved that they could have had the vessel discharged, had they taken active steps to meet the difficulty that railway trucks could not be brought alongside. No doubt they might have been put to considerable trouble and expense, but that was their misfortune, and it was for them to consider which misfortune would be the greater, to incur the extra expense in discharging, or to incur the pursuers' charge for demurrage.

No. 30.

Nov. 20, 1891.
Granite City
Steamship
Co., Limited,
v. Ireland &
Son.

The "Linn o'
Dee."

LORD YOUNG.—I think it is not proved that the delay here was due to any of the causes excepted in the charter-party. It is not proved that the vessel could not have been discharged on the quay. I am unable to concur in the views on which the Sheriff-depute has proceeded. He says,—“I think it is unreasonable to say that they should have taken delivery upon the quay, although there were no means available for removing the cargo.” I should rather have been disposed to say that it was unreasonable to expect the ship to remain till the charterers found means for removing the cargo.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I agree in all that your Lordship and Lord Young have said, and I think the case is not attended with the least difficulty. The charterer undertook to discharge the cargo within forty-eight running hours, and did not do it. He is therefore responsible for the detention beyond that time according to a well-fixed rule of law. The only answer he can make is that his case is taken out of the ordinary rule by a clause in the charter-party which exempts him from that responsibility. He appeals to the clause of exemption, which undoubtedly is very broad in its terms. But all the excepted causes are subject to this qualification, viz., that they shall impede the ordinary discharge of the vessel. It has not been shewn that any of the excepted causes existed which prevented the cargo in question being discharged in the ordinary way, over the ship's side. The owner of the vessel has absolutely no concern with the difficulties which the charterer may have in removing the cargo from the quay, on which it has been discharged.

THE COURT, after findings as to the periods of detention on each voyage, found “that the detention of the ship on the said two occasions was not due to any of the causes specified in the charter-party, as exceptions to the defenders' obligation to pay demurrage if delivery of the cargo was not taken within forty-eight hours; find in law that the defenders are liable to the pursuers for demurrage, . . . Therefore recall the interlocutor of the Sheriff-substitute, of date 10th June 1891, and the interlocutor of the Sheriff-depute, of date 18th August 1891, and decern against the defenders for payment to the pursuers of the sum of £62,” &c.

JOHN RHIND, S.S.C.—HENDERSON & CLARK, W.S.—Agents.

No. 31. HENRY LOWENFELD (Liquidator of the Universal Stock Exchange Company, Limited), Pursuer (Reclaimer).—*Sol.-Gen. Murray—Dundas—Deas.*

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

RICHARD K. HOWAT, Defender (Respondent).—*Jameson—Dickson.*

Et e contra.

Process—Proof—Production of document after close of proof.—It is matter for the discretion of the Court whether they will allow a document to be produced and put in evidence by a party after he has closed his proof.

Circumstances in which the Court permitted a document which was technically essential to the pursuer's title to be so produced.

Contract—Gaming—Contract for payment of differences.—An account was opened with a stockjobber for the purchase and sale of stocks. Large transactions followed, resulting in a debit balance against the customer and the closing of the account by the jobber. In answer to an action for payment of the balance, the customer pleaded that the original agreement had been for payment of differences, and that the transactions were therefore void. It appeared that each transaction was commenced by a written order by the customer asking the jobber to sell to him (or buy from him) certain stock, in return to which the jobber sent a sale note (or purchase note) stating that he had sold to (or bought from) the customer the stock specified in the order at a certain price, for delivery on a certain day. Some of the customer's purchase orders expressed his desire to resell on a certain profit being realisable for the stock. The contract notes bore that every purchase or sale by the company was a *bona fide* transaction for delivery. The customer deposed that there had been an original agreement that the dealings were to be for differences only. The jobber gave contrary evidence. *Held* that it had not been established by evidence that the transactions were not what the written documents expressed, contracts of sale enforceable by law, and decree given accordingly.

1ST DIVISION.
Ld. Kyllachy.

IN the beginning of April 1889, Richard K. Howat, Mabie House, Dumfries, opened an account for transactions in stocks and shares with the Universal Stock Exchange Company, Limited, carrying on business in London as stockjobbers and share-dealers (of which Mr Henry Lowenfeld was managing director), with a nominal capital, as at that date, of £100,000 in 10,000 shares of £10 each, the number of shares taken up being 2953. Numerous transactions were entered into between them during April. Each transaction was commenced by a written order by Howat asking the company to sell to him (or to buy from him) certain stocks, in return to which the company sent him a contract note, stating that they had sold to him (or bought from him) the stocks mentioned in his order at a certain price for delivery at a certain date. Some of the purchase orders by Howat stated that he wished to resell on a certain profit being made.* On the back of the orders and notes the terms of business of the company, which had been made known to and approved of by Howat before he opened the account, were set forth, and these were also embodied in a pamphlet entitled "How to operate" issued by the company, and received by Howat some time previously.† The stocks

* The first transaction was :—Mr Howat to Exchange Company. "2d April 1889.—Please sell me twenty East London Ry. stock and close, half per cent profit." Copy of contract sent by Exchange Company to Mr Howat,—“London, E.C., 2d April 1889.—Sold to R. K. Howat, Esq., to be delivered by us to the purchaser on 28th June, subject to the terms printed on back. £20,000 East London @ 15½ = £3025.”

† The terms of business were, *inter alia* ;—“1. In all transactions the company acts as a stock and sharejobber, buying from clients and selling to them direct, on the company's sole responsibility, and in no case does the company act as broker or agent for a client. . . . 2. Every purchase or sale of stocks or shares contracted by the company is a *bona fide* transaction for delivery,

dealt in were Home Railways, in which by the end of April there was a considerable fall in price. The amount of the transactions, when the account was closed on 28th June following, represented a sum of £1,287,683, 16s. 7d., and upon this there was a balance due by Howat of £4812, 2s. 10d. That balance was brought out after allowing him credit for two sums of £2242, 1s. 3d. and £3592, 2s. 6d., the price of certain stocks of Brighton A and Dover A held by him before he entered into the transactions referred to and sold by him to the company.

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

In August 1889 the company went into voluntary liquidation, with a view to reconstruction, and Henry Lowenfeld, as liquidator, brought an action against Howat for payment of the £4812, 2s. 10d., with interest at 5 per cent.

The defender averred that, with the exception of the Brighton A and Dover A sales, no *bona fide* purchases or sales were made. "The whole other pretended sales and purchases were mere gambling transactions for differences, and represented no real purchases or sales. The pursuer, or said company, never had the said stocks or shares in their possession or under their order; neither they nor the defender had funds to purchase or pay for the same, and the pursuer and his company represented to the defender throughout that he would never require to pay any money, but simply pocket the proceeds of successful gambling."

the company always being prepared to deliver or take up, on the settling day specified in the contract, any and every stock or share which it may have bought or sold. Clients may, if it suits their convenience, repurchase or resell to the company, or any other stock-dealers, any stocks or shares which they may have previously bought or sold. The company shall, however, have no power to compel them to do so, the company's intention on entering into any and every transaction being to deliver or take up the stocks bought or sold by them. 3. The company charges no commissions or fees of any kind, but contangoes at current rates on stocks sold to clients on fortnightly accounts, or interest at the rate of 4 per cent per annum on the purchase-money from date of purchase until completion on all other accounts, will be charged by the company; but any interest or dividend that may become payable during this time is to be paid by the seller to the purchaser. 4. Every transaction entered into by the company is to be completed on the settling day specified on the contract. Should, however, clients find it inconvenient to deliver or take up any stocks or shares which they have bought or sold on such settling day, they can, upon terms to be mutually agreed upon, arrange with the company to postpone the delivery until the next settling day; but as it is the company's intention, on entering into the bargain, to deliver or take up all stocks or shares which they may have previously bought or sold, the company cannot be compelled by clients to thus postpone the delivery of stocks. . . . 10. The company is frequently applied to for advice as to the probable fluctuations in the prices of stocks, and is willing to advise its clients, but any suggestions or advice so given are to be accepted by the clients on their own responsibility, and the clients are not in any case to hold the company liable or in any way responsible in respect of such advice or suggestions, or anything done in consequence thereof. Clients should always remember, before accepting any advice or suggestion, that the company acts as principal or jobber, and is therefore an interested party. 11. The company shall have a lien, until the account is closed and properly settled, upon all stocks, shares, moneys, or other valuables in its possession belonging to clients, for their due performance of any and every contract or engagement, which they may have entered into; and should any client fail to fulfil any such contract or engagement, the company shall have the right and power to forthwith repurchase all stocks undelivered, and resell all stocks unpaid for at the time, at tape prices, appropriate all his moneys, stocks, shares, or valuables in its possession, or such part thereof as will be necessary to settle the account, at market prices, and proceed to recover whatever amount might still remain due to the company after such realisation, from the client in default."

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

The defender pleaded ;—(1) The pursuer has produced no title to sue, and he has none. (4) The transactions upon which the alleged debt by the defender to the pursuer arose, not being real transactions, but gambling transactions for differences, the defender is entitled to absolver.

Howat sued the company for payment of the proceeds of the Brighton A and Dover A stocks, the defenders pleading, *inter alia* ;—(2) The pursuer being indebted to the defenders' company, and having been credited with the price of said stock in his general account, and having acknowledged the same to be correct, the defender is entitled to absolver.

Proof was led, from which it appeared that Howat was twenty-four years of age, and had lived with his father without being brought up to any profession; that after his father's death he had gone to London and had visited Lowenfeld at his office, leaving upon the latter the impression that he had an income of about £2000 a-year; that an account was subsequently opened between them, Lowenfeld deponing*

* Lowenfeld deponed, *inter alia* ;—" We were quite ready to fulfil the contracts we entered into either by accepting or taking delivery of the stocks; it was always at defender's request that delivery was not taken or given. . . . The £1450 Brighton A and £3100 Dover A stocks are, I believe, the stocks he referred to at his first interview with me. I think that was in the spring of 1889. He told me he had bought them for speculation, but found it would not pay him as the commission was so high, and that was the reason why he wanted to deal with us. . . . Purchases and sales went on between us in terms of the account produced. . . . Cross.—All the transactions appearing in the account sued on began with purchases, except the Brighton A and Dover A stock. The stocks were purchased from the company by defender. When he wanted to resell he would give his orders in the ordinary way, I suppose. (Q.) What did you understand by closing? (A.) I understand he wanted to buy off us so much stock, and so soon as it shewed him a profit of $\frac{1}{2}$ per cent he wanted to resell it to us, to take his profit instead of keeping it as an investment. We should not be losers by that transaction. The transaction one enters into one day has nothing to do with the transaction one has on the second day. I had no means of knowing what defender's intentions were with regard to taking up the stock which he offered to purchase on 23d April 1889. I do not see why he should not have been able to take up £400,000 of those stocks. They are all first-class railway stocks, and if he had provided a 5 per cent margin—£20,000—he could have got plenty people to take them up for him. Besides these stocks he had open all the stocks which appear upon the creditor side of the account under date 26th April, and it was that that made me close the account with him. It was when it dawned upon me that the defender could not take up the stocks which were standing in his name as at 26th April, amounting to £600,000, that I closed the account. . . . That made £6000 of difference on each 1 per cent of rise or fall. No doubt things did look rather black and not satisfactory on that date, and our letter would be the ordinary letter any stockbroker or jobber would write to a customer, when he thinks he is incurring a liability he does not care to incur. When we received defender's telegram to close, as he did not give any instructions to take up, we understood the word close in Stock Exchange slang to mean that he was to resell to us. We accordingly closed, and sent him the appropriate note. On 25th April 1889, I cannot say that we had purchases current covering the £600,000 of stocks which we had undertaken to deliver to defender on the 26th, but we had purchases current in the various stocks mentioned to a very large amount, and we may have had such purchases current for the full amount. . . . Re-examined.—When we sold the £600,000 worth of stock to defender we bound ourselves by writing to deliver it. (Q.) And you were prepared to do so if called upon by him? (A.) Quite prepared. (Q.) And in like manner where you bought from him were you prepared to take delivery? (A.) Quite prepared. (Q.) And to pay or credit him in account with the proceeds? (A.) That is so. . . . "

that Howat had been told that the terms of business upon which the company was prepared to deal were those above referred to, and no other. Howat's evidence was to a contrary effect.*

After Lowenfeld had closed his proof in the action at his instance, his counsel craved leave to put in evidence a copy of the resolutions for winding up the company and appointing him liquidator, certified by the Registrar at Somerset House, the first copy which had been put in not having been so certified and the original minute-book having been lost. Counsel for Howat objected, on the ground that the pursuer had closed his proof, and the Lord Ordinary sustained the objection.

In the action at Lowenfeld's instance the Lord Ordinary (Kyllachy) accordingly pronounced this interlocutor:—"Finds that the pursuer has not produced any title to sue; therefore, and to that effect, sustains the first plea in law stated for the defender, and dismisses the action: Finds neither party entitled to expenses, and decerns."†

* Howat deponed,—". . . It was quite understood that the transactions were to be for speculation only, not for delivery. That was distinctly said by both of us in Mr Lowenfeld's private office when I saw him. He spoke about speculating in £5000 or £10,000 worth of stock, and I asked, 'Are you obliged to pay for that?' and he said no, it was merely a speculation. He said they never paid for stock at all, it was never delivered, the transaction was only for the difference in the price. They never called on clients, he said, to pay for stock. The book 'How to operate' explains that a transaction for the purchase of stock is closed by reselling. The whole correspondence, including the orders and transactions, were entered into and proceeded on the footing I have stated, that there was to be no delivery given on either side, and nothing paid but differences. The only exception was the transaction in Dover A's and Brighton A's stocks, which I had formerly bought through Herries, Farquhar, & Co. The whole of the orders I gave to pursuer's company were in writing, either in the correspondence or on orders. When I gave the orders which are referred to in this action, I never intended to take delivery of the stocks. It would not have been possible for me to do so. . . ."

† "OPINION.—The first of these actions is raised by Mr Henry Lowenfeld, designing himself the liquidator of the Universal Stock Exchange Company, Limited, against Mr Richard Howat, a younger son of the late Mr Robert Howat of Mabie, Dumfriesshire, and it concludes for payment of £4812, 2s. 10d., being the balance alleged to be due to the pursuer's company upon certain transactions in shares and stocks as per the account beginning 2d April and ending 10th May 1889.

"The second action is a counter action raised by Mr Howat against the company, concluding for payment of a sum of £5834, 3s. 9d., being the price of certain railway stocks sold by Mr Howat to the company in April 1889, and of which price the company refuse payment on the ground that after crediting Mr Howat with its full amount he is still due them on their total transactions the above-mentioned balance of £4812, 2s. 10d.

"Both actions therefore substantially involve the same questions, viz., whether the debt entries in the company's account form a good charge against Mr Howat; and that again depends (for there is no question of the correctness of the account) upon the further question, whether the transactions between the parties were proper purchases and sales, or were, as Mr Howat alleges, mere gambling transactions, of which the only obligation on either side was for payment of differences.

"On this question, having considered the proof and the various writings produced, I have come to the conclusion that my judgment must be in favour of the company. I think the documents sufficiently instruct that whatever facilities this company may give for speculation in shares and stocks, and whatever temptations in that direction it may put in the way of inexperienced persons, its transactions are real transactions, under which delivery of stock sold,

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

No. 31. In the action at Howat's instance the defenders were assolized. Howat reclaimed in the second action, and Lowenfeld in the first.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

Argued for Howat;—(1) The contract was one for payment of differences only. The evidence shewed that that was the footing upon which

and acceptance of stock bought, is made matter of obligation, and may be enforced. That is certainly the effect of the documents, and in particular, of the pamphlet, 'How to operate,' which the company circulated, and of the printed terms and conditions which are brought under the notice of every customer, and are endorsed upon every bought or sold note which the company issues, and although the defender alleges that it was understood between him and the company that there should be no delivery on either side, but merely payment of differences, the officials of the company are emphatic the other way; and altogether I am bound to say that I think it is the effect of the evidence that whatever may have been contemplated as the probable mode of working out the transactions, it was simply made matter of contract that if it suited (as in certain states of the market it might suit) the interest of either party to demand delivery or acceptance, such delivery or acceptance might be enforced. In short, the business carried on by the company appears to be substantially the same as that of a jobber on the Stock Exchange. They appear to buy and sell indifferently, being ready to buy or to sell any stock quoted on the Stock Exchange at the market price of the day, and their profit as a rule arises, not upon the rise or fall of a particular stock, but upon what is called the turn of the market, which is really a sort of commission. It is not alleged that in the transactions in question the prices charged were not fair prices, or that Mr Howat was unfairly dealt with. He would apparently have suffered exactly the same loss if he had bought and sold the particular stocks through a broker on the Stock Exchange, and although the transactions were certainly of sufficient magnitude to have suggested doubts as to Mr Howat's ability to carry them out, except by payment of differences, I cannot say that I think it is proved that he could not have made arrangements to do so, if necessary, or that there is anything in the amount of the transactions which is necessarily inconsistent with the company's view of the contract.

"On the whole, therefore, I must, in Mr Howat's action, grant absolvitor to the company, and a corresponding result would have followed in the company's action but for the difficulty as to the liquidator's title to sue, which, so far as concerns his action, seems to me to be insuperable.

"The title of the liquidator depends, of course, upon the minutes of the company, and the proper evidence of the winding-up and of the liquidator's appointment is of course the minute-book of the company, kept and signed in terms of section 67 of the Companies Act of 1862. That being so, and Mr Howat having denied on record the pursuer's title, and tabled a plea of want of title, and called for production of the minutes, it was, I think, incumbent on the liquidator to have produced the minutes or to have produced some statutory equivalent. It appears, however, that the minutes have either been destroyed or lost, and the only document produced before the close of the liquidator's proof in support of the liquidator's title was a copy from Somerset House, No. 78 of process. That document was produced as a certified copy, said to be admissible under section 6 of the Companies Act, 1877, but apparently by some oversight it is not certified or signed by the proper officer, and is accordingly, in my opinion, of no value. After his proof was closed the liquidator sought to remedy this defect by producing a second copy properly certified, which copy is No. 81 of process, but Mr Howat's counsel, while willing to allow production of the minutes, declined, in the absence of the minutes, to allow this new copy to be put in evidence. He objected that the pursuer's proof was closed, and I confess I see no answer to this objection.

"I must therefore in this action find that the pursuer has not instructed any title to sue, and shall therefore dismiss the action. And with respect to expenses, I think the only course I can follow is to find no expenses due to or by either party in either action."

it was originally agreed that business was to be done. The extent of the transactions differentiated the case from that of *Shaw*,¹ in which they were on a very much smaller scale. According to Lowenfeld's own statement Howat had represented himself as "good for £15,000," and yet the company asked him on 26th April to take up stocks to the amount of £600,000. It was to be noticed that in every case (excepting the Brighton A and Dover A sales) Howat was a buyer; he was what on the Stock Exchange was termed a "bull," *i.e.*, a person who bought stocks that he had not taken and could not actually take up. No doubt, upon the face of them the bought and sold notes represented real transactions, but if in truth the transactions were not real, and the inception of the original agreement was a dealing for cover, that shewed what the true contract was. (2) Upon the question of Lowenfeld's title to sue the first of the two actions it was quite true that a certified copy of the appointment of the liquidator would, in terms of the 6th section of the Companies Act, 1877, be good evidence of his title to sue the action. But the document which had been produced was not so certified, and it was too late to supply its place. It must be kept in view that the document which it was now sought to produce was not even in the inventory of documents put in by Lowenfeld at the close of the proof, and the Lord Ordinary had therefore rightly rejected it. The 72d section of the Court of Session Act, 1868, making provision for additional proof in the case of appeals before the Inner-House, excluded such additional proof in cases originating in the Court of Session.

No. 31.
Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
limited, v.
Howat.

Argued for Lowenfeld;—(1) The objection to title was of the most technical and unreal kind.² No doubt the certified copy of the liquidator's title which had been produced was not at first sufficiently authenticated. The objection to it had come too late after the proof had been closed. (2) The transactions of sale and purchase of stocks were admittedly real upon the face of the documents, and the proof corroborated their nature as shewn by the documents. The test was whether there was a contractual obligation to deliver and accept the stock sold, and it was clear here that there was.³

At advising,—

LORD PRESIDENT.—The first question which has to be determined in order to enable us to reach the general question that has been argued is as to the title of the pursuer of the action at the instance of the liquidator of the Stock Exchange Company. This of course is a purely technical question of practice, and it is now admitted by Mr Dickson that there is no statutory incompetency in the Court allowing a document or title to be put in after the party who founds upon it has closed his proof. That being so, the question necessarily is one for the discretion of the Court, and I cannot say that the present case seems to present a very difficult question of discretion.

No doubt after a party's case is closed on the evidence after a proof, the Court ought to be very careful in allowing it to be reopened and redeveloped. But in this case the matter is one of the merest formality; and in regard to the measure and extent of the proof proposed to be offered a most exact estimate can be formed by the party opposing its admission, because the document in

¹ *Shaw v. Caledonian Railway Co.*, Feb. 20, 1890, 17 R. 466; *cf.* also *Heiman v. Hardie & Co.*, Jan. 7, 1885, 12 R. 406.

² *Robertson v. Thom*, Dec. 29, 1848, 11 D. 353, 21 Scot. Jur. 96; *Christie v. Thompson*, Jan. 28, 1859, 21 D. 337, 31 Scot. Jur. 186.

³ *Shaw v. Caledonian Railway Co.*, Feb. 20, 1890, 17 R. 466, Lord Shand, p. 475; *Newton v. Cribbes*, Feb. 9, 1884, 11 R. 554.

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

question differed from the document already produced by containing a docket of two lines. Accordingly I cannot help thinking that, sitting as we are now as a Court of review, it is our duty to permit the reception of this document. I therefore propose to your Lordships that we should allow the claimer to open up the proof for the reception of this document, and that we should deal with the title accordingly. So standing this title, there is no further objection made to it, because the pursuer is then the authentic and authorised liquidator of the company, and he is the creditor in the obligation sued on.

Accordingly that brings us to the question upon which truly both actions turn. It is raised by the fourth plea of the defender in the action at the instance of the liquidator against Mr Howat. He pleads that "the transactions upon which the alleged debt by the defender to the pursuer arose, not being real transactions, but gambling transactions for differences, the defender is entitled to absolvitor." I think that plea very fairly states the legal question in the case. As the transactions stand on the writings which evidence them, there is no doubt that they are transactions of sale of stocks. It appears that in some of the documents—in the contracts for the purchase—there is an order that in a certain event, viz., if there shall be a profit, there shall be a resale; but that does not seem to me really to alter the complexion of the case. Therefore, on the face of the documents, there is no doubt that these are sales enforceable by law, and can found the claim which is now made by the liquidator.

But it is said in the plea in fact that these are not real transactions. It is unnecessary to say that the fact that the transactions are evidenced by writing would not at all preclude the possibility of establishing that the writings are merely simulate, and represent another and totally different transaction from that which was really entered into. Our law knows cases of that kind where writings are used merely as a cloak and for collateral purposes, and where the substance of the transaction is entirely contrary to what is set out in the writings. But where writings evidencing a contract are to be so dealt with, and to be shewn not to set forth the truth of the transaction, but to be merely a device, it is necessary that some very definite and plain evidence should be brought for that purpose.

In this case the first thing which strikes one is that there is in the testimony of the two witnesses examined a direct conflict as to whether at the inception of these transactions there was or was not an agreement that they were to be merely transactions for differences as distinguished from what they purported to be in the documents which passed on each occasion. Mr Howat asserts that that agreement was expressed in words at his meeting with the liquidator. The liquidator pointedly asserts the contrary. If the evidence stood alone on the bare conflict of the two witnesses there could be no doubt that we should not be entitled to set aside the documents as being veils or cloaks and not realities. But Mr Dickson has founded upon a number of circumstances, which he says bear irresistibly in the direction of his contention. I cannot say that I am all convinced by them, even when they are taken collectively. It is necessary to see what is the proposition which Mr Dickson requires to make out by the aid of these circumstances. It is not enough for him to shew that both parties contemplated that these transactions might be fulfilled in the way of a resale taking place at the expiry of the natural period. I think, for my part, that looking to the various circumstances he has arrayed in support of his argument it is highly probable—nay, one may go the length of saying it is certain—th

both parties contemplated that, at all events in the ordinary case, there should be a resale. And in some cases to which I have already adverted that expectation is expressed in words. But does that in itself, in the words of the plea, prevent the sales which are set out from being real transactions? On the contrary, it merely shews that the real transactions were expected to be financed in one way instead of in another. He has said, for instance, pointedly, that the very inadequate capital, as he describes it, which is known to be possessed by this company is totally disproportionate to the gigantic figures which even this account produces. But whether it is prudent to enter into engagements in which there might be embarrassment if they were enforced specifically is one question. It is quite another matter when you know the way in which those transactions are generally met to say that the smallness of the capital shews that the transactions are not real, but on the contrary are simulate.

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

The other points which the reclainer has taken seem all to be susceptible of the same explanation, and that brings us back to the question raised by his plea, whether he has made out that gambling transactions for differences is the proper description of what was done between this gentleman and the manager of the company. I take it that, as was pointed out by Lord M'Laren in a previous case, it is extremely unlikely, as a matter of human probability, that a case will readily occur in which there is evidence producible that there was an agreement that there should be no transaction, and that matters should not be in the ordinary course of business.

It appears to me that there is here not merely a case of failure on the part of Mr Howat to shew that there was this antecedent or concurrent agreement that there should be no sale of stocks, but merely a gambling transaction for differences, but that the probability is really the other way. I think if one comes to form a conclusion on the state of the facts it is much more likely that the arrangement was that the transactions should be as was expressed in the writings, that the legal rights of parties should stand as so expressed, but that the attention of both parties should be directed towards escaping from the unpleasant consequences which might be brought about if, contrary to the interests of both, delivery were demanded and given.

The parties were not in dispute as to the law, and the decision which I propose that your Lordships should pronounce will be entirely in accordance with the principles which are laid down in the previous cases, both English and Scottish. Therefore in the action at the instance of the liquidator he is entitled to decree, and for the same reason the action at the instance of Mr Howat falls to be dismissed.

LORD ADAM.—I agree with your Lordships about the propriety of allowing the liquidator now to produce his title to sue—that is, to produce a document which had been produced before. The only difficulty was that there was an inadvertence to notice that what he had produced was not a certified copy. I think that is a mere inadvertence, and that it is quite within our power to allow a certified copy to be produced now. If that is so, then there is no further objection to the pursuer's title as liquidator of the company.

That being so, the only question that remains is the question on the merits, whether the transactions in buying and selling between this liquidator and Mr Howat, in shares and stocks, were real transactions? What I understand by a real transaction is a transaction in which the pursuer was to be seller or buyer as the case might be, and which could by law be enforced against the other

No. 31.

Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

party. If that be so I think, on the authorities, that the transactions in the present case are real transactions. If Mr Howat could enforce delivery of any of the stocks he bought from Mr Lowenfeld that was a real transaction. That is my view of the law applicable to such a case.

Now, it is not disputed that the documentary evidence shews upon the face of it—unless we can get behind it—that that was the nature of the transactions here.

There are bought and sold notes in every case, and so far as appears from the documents everything bought and sold was a real transaction. Now, I do not think anyone can dispute that it is competent to get behind the notes, and to shew that the contract apparently expressed upon the document was not a real contract between the parties; that although that contract so far as appears could be enforced, nevertheless it was, by some other contract or some other agreement provable by writing or parole, not a real transaction, and that that was the state of the fact. I do not in the least doubt that such a contract could be proved. I can quite understand that the contract might have included that, but I agree with your Lordships that there is no evidence of that here. I do not find in the state of the evidence that there was any such agreement or any necessity for such. I have no doubt at all that Mr Lowenfeld, the dealer in these stocks, knew his position quite well, and knew that any contract or agreement he made with Mr Howat for dealing in differences would render all his transactions with him illegal. In the circumstances, he would conclude that there was no necessity whatever for him to enter into such an understanding with the purchaser. I have no doubt, on the other hand, Mr Howat understood in his own mind perfectly well that Mr Lowenfeld would deal with him practically only for differences, and that the parties expected that that would be the course of dealing. But that to my mind is not enough. That is a great deal short of what I think is necessary. I think the party who admits that the contract disclosed by the documents does not shew any such transaction is bound to shew some other contract or some other thing which could be enforced by the one against the other, which would prevent either of them founding upon the contract produced. I find no such contract produced, and that being so, I think it is a real transaction, and that Mr Lowenfeld is entitled to recover the whole sum.

LORD M'LAREN.—The Lord Ordinary has decided the case on the question of Mr Lowenfeld's title. As I understand the argument, the Lord Ordinary's judgment is maintained because it is suggested that we have no power to allow additional evidence which the Lord Ordinary in his discretion has not seen fit to allow. We were referred to the provisions of the Court of Session Act, 1868, giving power to the Judges of the Inner-House on hearing an appeal from the Sheriff or inferior Courts to allow additional evidence to be taken before themselves. It was represented that the giving of that power in reference to cases coming before us on appeal was exclusive of the existence of a similar power in reference to actions which originate in this Court. But the conditions of the two cases are entirely different. It may have been very right to give a power of allowing additional evidence applicable to cases coming from the inferior Court which are defective in the matter of proof, in order to remove any doubt that may have existed as to whether the Supreme Court could deal with a Sheriff Court case otherwise than as an appellate Court. But when a case comes before us from the Lord Ordinary we are not reviewing the Lord Ordinary's judgment in the capacity of a Court of appeal. It is not a process of appeal at all; it is

a reclamation, or, in other words, a rehearing of the case by the same Court differently constituted, and everything that might have been done by a single Judge may be done by the Court at the rehearing. Therefore it appears to me that it was quite unnecessary that the Act of 1868, which is not an exhaustive code of procedure, should deal with this subject, the power of this Court having existed all along, and being unquestionable. I am sure all your Lordships have known instances where this Court has ordered evidence to be taken on questions which have not been dealt with by the Lord Ordinary, because, perhaps in the view he has taken, evidence on those particular points was unnecessary. I am of opinion that we ought to allow production to be made, as your Lordship has suggested, of Mr Lowenfeld's title.

No. 31.
Nov. 20, 1891.
Liquidator of
the Universal
Stock Ex-
change Co.,
Limited, v.
Howat.

On the merits of the case I may say, as I said in the case of *Shaw*, that it will always be extremely difficult to reduce a Stock Exchange transaction, or one carried out in a similar manner to a Stock Exchange transaction, to the level of a gambling debt. I think one of the difficulties is this, that the dealer generally has no interest as to the particular mode in which the settlement is to be effected. It is a matter of perfect indifference to him whether the account is to be closed by a resale or by a delivery of stock, because if his customer likes to take delivery of the stock the broker has only to go into the market and to supply himself at the market price of the day. It is therefore antecedently very unlikely that a dealer should enter into a subsidiary engagement that would be of no benefit to himself in the eventual settlement, and which would expose the original transaction to be set aside on the ground of illegality if it turned out to be favourable to himself. The unsupported evidence of either party would not in ordinary circumstances be sufficient to displace the inference arising from the documents, especially when the evidence of the dealer is to the effect that the transaction was a real transaction and in accordance with the documents. I must say that as regards such Stock Exchange transactions as are carried out in the ordinary course of business, the distinction between contracts for differences and real transactions is of purely theoretical interest, and really does not offer to speculators in stock any available means of being released from their obligations.

LORD KINNEAR.—I have no doubt that the pursuer should be allowed an opportunity of producing his title, although it certainly ought to have been produced before the close of the proof.

Upon the merits I also agree with your Lordship. There is no question as to the law that the Court may refuse to enforce bargains which are not real transactions between the various parties, but are mere wagers for differences on the prices either of stocks or any other commodity. I agree that the test which must be applied in order to determine whether any particular transaction is of that kind or not—whether it is a real transaction of purchase and sale, or a mere wager for differences—is to inquire whether or not by the contract as proved the purchaser would have an action to compel delivery of the subject sold and the seller to have the price paid. Upon the contract as it appears from the face of the documents, I do not think there can be any question that in that sense the transactions between the pursuer and defender were real transactions. The only difficulty appears to me to arise from the evidence of Mr Howat, because if we were to accept that evidence, I should be very much disposed for myself to come to the conclusion that there was no real contract at all, but a mere gambling transaction, which neither party intended to have any effect otherwise

No. 31. **Nov. 20, 1891.** Liquidator of the Universal Stock Exchange Co., Limited, v. Howat. than by payment of differences. But then the evidence of Mr Howat is directly contradicted by the evidence of Mr Lowenfeld, and the Lord Ordinary, who saw the witnesses, has come to the conclusion that we must accept Mr Lowenfeld's testimony and reject Mr Howat's. Reading the evidence and the documents before us, your Lordships have come to the same conclusion, and I certainly am not prepared to differ from your Lordships and the Lord Ordinary. I therefore agree in the judgment which your Lordship proposes.

IN the action at Lowenfeld's instance this interlocutor was pronounced:—"Recall the Lord Ordinary's interlocutor; allow the reclaimer to put in evidence copy resolutions No. 81 of process; and the same having been done at the bar, decern against the defender for the sum sued for, with interest as concluded for: Find the defender liable in expenses," &c.

IN the action at Howat's instance the Court adhered.

SIMPSON & MARWICK, W.S.—J. & A. HASTIE, Solicitors—Agents.

No. 32. **Nov. 20, 1891.** Macrae v. Mackenzie's Trustees. **HORATIO ROSS MACRAE** (Neil Buchanan's Judicial Factor), Pursuer (Respondent).—*Jameson—N. J. Kennedy.* **MRS ELIZABETH THOMSON OR MACKENZIE** (Kenneth Mackenzie's Trustee), Defender (Reclaimer).—*Dickson—J. Wilson.*

Superior and Vassal—Feu-contract—Transmission of obligation to erect buildings upon personal representatives—Real burden.—A proprietor by feu-contract feued certain ground to three partners of a company, "and the survivors or survivor, and the heir of the last survivor," as trustees for behoof of the company, "with and under the burden of the whole conditions, reservations, burdens . . . which are declared to be real burdens affecting the lands conveyed," viz., that dwelling-houses of a certain value should be erected by the above-named vassals within two years upon the lands, and be upheld by them in good order, and insured and rebuilt if burnt down, "and failing such houses being erected . . . then and in that event these presents . . . shall, in the option of the superior, become null and void." After the lapse of the two years the last surviving partner of the company died in possession of the subjects without having implemented the obligation to build, and his widow, who had been appointed sole trustee under her husband's settlement, did not take up the feu.

The superior raised an action against her as her husband's sole trustee, concluding to have her ordained to implement the obligation, and failing implement to pay damages.

The Court *assolized* her from the conclusions of the action, holding (1) that as the obligation was by the express terms of the feu-contract imposed solely upon the vassals holding the lands under the contract it did not transmit against the last vassal's personal representative, and that (2) as the conclusion of the summons was for implement of a personal obligation attaching to the defender herself, and no such obligation was prestable, she was not liable in damages.

Opinions that under the terms of the feu-contract there was a personal obligation to build imposed upon the vassal in possession of the subjects, and that it might have been enforced by the superior by the ordinary remedies available to him at common law, notwithstanding the option expressly given him by the deed to irritate the feu in the event of the vassal's failure to build.

| *Opinions* that the obligation to build would transmit and be enforceable against anyone taking up the feu.

1ST DIVISION. **Ld. Wellwood.** BY feu-contract, dated 26th May 1875, the trustees of Neil Griffiths Buchanan, of Knockshinnoch, Ayrshire, of the first part, contracted and agreed with John Mackenzie, John Hyslop, and Kenneth Mackenzie

copartners carrying on the business of coalmasters at New Cumnock, under the firm of "Bank Coal Company" of the second part, in manner following:—"That is to say, the said first parties, in consideration of the feu-duty and other prestations after stipulated, hereby in feu-farm dispone to and in favour of the said John Mackenzie, John Hyslop, and Kenneth Mackenzie, and the survivors and survivor of them, and the heir of the last survivor, as trustees and in trust for behoof of their said company and the partners thereof, present and future, according to their respective rights and interests therein, or to any other person or persons who may hereafter become partners of their said company, heritably and irredeemably," certain portions of ground, amounting to nearly four acres, in the parish of New Cumnock, Ayrshire. The tenendas clause ran thus:—"To be holden the said subjects and others of and under the said first parties and their successors for payment of the feu-duty and other prestations after mentioned; but always with and under the burden of the whole conditions, reservations, burdens, qualifications, and irritancies underwritten, which are declared to be real liens and burdens affecting the said two pieces of ground hereby disposed, *videlicet*—That dwelling-houses, offices, and other buildings of the yearly value of at least £50 sterling per annum, or of the capital value of twenty years' purchase thereof, shall be erected by the said second parties within two years, upon both or either of the said two pieces of ground hereby feued, at the distance of not less than twenty-five feet from the centre of the said turnpike road . . . and that the said second parties shall maintain, uphold, and keep the said houses so to be erected in such good order and repair as will be sufficient to make them yield such rent, or continue of such value in all time coming: And failing such houses being erected, or in the event of the same, after having been erected, falling into decay, or being destroyed by fire, and the said second parties failing to rebuild the same within one year and six months after they and their foresaids shall have been required by the said first parties, or their successors, so to do, then, and in that event, these presents, and all following thereon, shall, in the option of the said first parties, become null and void."

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

By the reddendo clause the second parties bound themselves to pay to the first parties and their foresaids the sum of £38, 7s. 10d. of feu-duty yearly, and further "by acceptance hereof" the second parties bound and obliged themselves to insure the houses to be erected on the ground against fire, and to rebuild them if burnt down.

The company entered into possession of the two pieces of ground, and continued to possess them till 1889, during which time they regularly paid the feu-duty.

John Hyslop died on 7th March 1878, and in 1879 the company was dissolved. John Mackenzie died on 16th May 1885, and with a view to complete the winding-up of the company's affairs Kenneth Mackenzie in 1889, with the consent of the trustees of the late John Mackenzie, disposed and conveyed the subjects contained in the feu-contract to himself, his heirs and successors whomsoever.

On 20th May 1890 Kenneth Mackenzie died, the stipulation in the feu-contract regarding the erection of houses upon the ground conveyed not having been implemented.

Mr Macrae, who had been appointed judicial factor in 1888 upon the trust-estate of the late Mr Buchanan, called upon the widow of Kenneth Mackenzie, as his sole trustee and executor, to implement the obligation, but she intimated by letter that "she did not claim the property feued under the feu-contract," and repudiated all liability in connection therewith.

No. 32.
 Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

On 19th February 1891 Mr Macrae raised this action against her, as sole trustee under her husband's settlement, concluding to have her ordained to erect upon the portions of ground conveyed by the feu-contract "dwelling-houses, offices, and other buildings of the yearly value of at least £50 sterling per annum, or of the capital value of twenty years' purchase thereof, . . . and when erected to maintain and uphold the same in such good order and repair as will be sufficient to make them yield such rent or continue of such value in all time coming . . . and in the event of the defender failing to erect the said . . . buildings, or in the event of decree for specific implement as aforesaid not being pronounced . . . the defender should be decerned and ordained to pay the sum of £600 sterling . . . in name of damages."

In cond. 13 the pursuer averred;—"In the event of the defender failing to implement the obligation to erect said buildings, the pursuer will suffer loss and damage to the extent of £1000, which corresponds to the pecuniary amount of the said obligation to build houses and others of the yearly value of £50 per annum, or of the capital value of twenty years' purchase thereof, or otherwise, to the saleable value of an undoubted annual payment of £38, 7s. 10d., being the amount of said feu-duty, less £400, the present value of the buildings already on said feu, and the feu itself as vacant ground. This leaves £600 claimable in name of damages."

The pursuer pleaded;—(4) In any view the pursuer is entitled to decree against the defender to erect dwelling-houses and others, as concluded for. (5) Alternatively, in the event of the defender not being ordained or failing to erect said buildings, the defender should be found liable in damages, in terms of the conclusion of the summons therefor.

The defender pleaded;—(1) The pursuer's averments are irrelevant. (2) No title to sue. (5) The defender being under no obligation to implement the terms of the feu-contract, she should be assolizied.

On 8th July the Lord Ordinary (Wellwood) pronounced this interlocutor:—" . . . Finds that, at the date of his death, the late Kenneth Mackenzie was personally bound, under the feu-contract condescended on, to erect buildings of the character and value specified therein, and that he failed to erect the said buildings within the time fixed: Finds that the said personal obligation is now binding on the defender as his general representative: Finds that it is inexpedient to order specific implement of the said obligation by the defender; . . . appoints the case to be put to the roll for further procedure," &c.*

* "OPINION.— . . . I am of opinion that the pursuer has stated a relevant case for inquiry. The defence is that, under the feu-contract, the condition of the erection of buildings by the second parties is merely a real burden which perhaps might be enforced against the vassal actually in possession, and failure to implement which might be followed in the option of the superior by irritancy of the feu, but that is not a personal obligation or debt which transmits against the representatives of the deceased vassal who do not take up the feu. I am of opinion that this defence is not well founded. The condition that buildings of the character and value of those specified 'shall be erected by the second parties' was a condition of the grant which was personally binding on the disponees, and became prestable, and should have been implemented within two years after the date of the feu-contract, a period which expired during Kenneth Mackenzie's lifetime. It is true that it is provided that, in the event of the second parties failing to build, the feu-contract shall, in the option of the first party, become null and void. But this provision, I take it, is in addition to the first party's right to demand and enforce implement of the obligation; and it scarcely can be disputed that the pursuer could have enforced it against the original vassal, or claimed damages instead of irritating the feu.

The defender reclaimed, and argued ;—The obligation in question was expressed in the ordinary words of style used in feu-contracts for making such an obligation a real burden running with the lands conveyed. It was a continuous obligation, which in the absence of express stipulation to the contrary was enforceable against the vassal in actual possession of

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

"The obligation to build is just as much a matter of contract and condition of the right as the obligation to pay feu-duty. Now, the established rule in regard to the latter condition is, that the representatives of a deceased vassal are liable for arrears of feu-duty which became due during the vassal's lifetime, although they are not liable to implement such conditions of the feu as do not become due or prestatable until after his death. As the Lord President says in *Aiton v. Russell's Executors*, 16 R. 625,—'Under a feu-charter the vassal, by acceptance of the feu, puts himself under a personal obligation to pay the redendo, and subjects his representatives to pay whatever feu-duties may become due during the possession of the feu. That obligation becomes on his death a personal debt. On the other hand, his heir, if he takes up the succession in like manner becomes liable for feu-duties.' The decision in the case of *Aiton*, which was founded on by the defenders, does not, I think, apply, because it related to payment of feu-duties which became due after the vassal's death.

"The logical result of this would be that the defender should be ordained to implement her husband's obligation by building in terms of the feu-contract. But it appears to me that this is not a case in which specific implement should be enforced. No doubt specific implement is not impossible, but I think it would be inexpedient and unreasonable to ordain the defender to erect upon the pursuer's land buildings from which she can derive no benefit, especially as such a decree can only be enforced by imprisonment, if indeed that is competent.

"It seems to me that the pursuer's true claim is one of damages, if he can qualify damage. It will be for consideration what is the true measure of the claim. That is not a very simple question. The purpose for which the feuar was taken bound to build, so far as the superior was concerned, was not to make the buildings the superior's property, but to secure the superior's feu-duty by increasing the value of the subjects. If Mr Mackenzie had built, and the defender after his death declined to enter, no doubt the pursuer would have got back the land with the buildings on it. But if the feuar had built on the ground, it is not probable that the defender would have declined to take up the feu. Again, if the pursuer had irritated the feu during Mackenzie's lifetime in respect of his failure to build, he would have simply got back the lands without buildings on it. The present is a third case. The feuar dies, having failed to build, and his heir, as she is entitled to do, declines to take up the feu. The superior has not lost any feu-duties to which he was entitled, but he is thus left with the land on his hands, without the buildings which should have been erected. The land will therefore bring a smaller return, if sold or feued again, than if buildings had been erected; but is the superior entitled to the whole of the difference?

"I was referred by the pursuer to the case of *Napier v. Speirs' Trustees*, 9 Sh. 655, as a case in which the Court ordered specific implement by ordaining the representatives of the deceased vassal to build. That case is full of specialities, and is not very well reported. But it appears that, in the course of the inquiry ordered by the Court, it was ascertained that not merely the original feuar but also his trustees had been in possession of the feu. It would also seem, although this is not so clear, that the trustees were given an opportunity of building in order to avoid irritancy of the feu. For instance, the Lord Justice-Clerk says,—'Our present interlocutor must bear that now the condition of the contract shall be implemented within a reasonable time or the irritancy take place.'

"The case of *Moore v. Paterson*, 9 R. 337, may be referred to for opinions to the effect that the Court will, in some circumstances, not order specific implement, even although the *factum prestatum* may not be impossible of performance.

No. 32.
 Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

the feu, because it went "with the proprietorship of the time."¹ After his death, however, it did not transmit against his personal representative,² unless he had expressly bound himself, his heirs, executors, and successors, conjunctly and severally, to perform it,³ or (in the case of ground-annuals) had expressly bound himself and his representatives as well as his "successors" in the ground-annual.⁴ In the present case the obligation was imposed upon the vassal holding the lands under the grant for the time being, and upon no one else. The following cases relied upon by the pursuer could be thus explained. In *Marquis of Abercorn v. Marnoch*,⁵ the ground of judgment was that there were mutual personal rights created by the nature and terms of the arrangement between the parties. In *Hunter's*⁶ case, the question in the present case could not arise, because the action was raised by the superior against the first vassal who was still in possession of the lands. In *Napier v. Spiers' Trustees*⁷ there was a distinct personal obligation by the vassal imposed on himself, his heirs, and assignees, to build and maintain buildings. In any case, under the special terms of the grant, the superior's remedy was to irritate the feu, and as he had neglected to avail himself of that remedy, he must be held to have acquiesced in the non-fulfilment of the obligation.⁸ There being then no obligation enforceable against the defender, she could not be made liable in damages for its breach. It was said that the obligation not having been fulfilled by Kenneth Mackenzie during his lifetime, it transmitted at his death, like an obligation to pay arrears of feu-duty, against the defender as his personal representative. This question, however, could not arise on the present summons, the theory of which was that the defender should be ordained to pay damages, not for her husband's breach of the obligation, but for breach of an obligation attaching to herself.

Argued for the pursuer;—Under a feu-contract the vassal by accepting the feu placed himself and his representatives under a personal obligation to the superior to perform all the obligations contained in the feu-contract.⁹ This liability was always implied even though it was not expressed. The terms of a feu-contract were not those of a grant, but of a sale, and a sale necessarily implied a counter obligation as to price, which in a feu-contract was the obligation to pay feu-duty, and to fulfil the other prestations of the feu.¹⁰ Indeed, since the cases of *Marquis of Abercorn* and *Napier*,¹¹ it had never been doubted that in all building feu-contracts

¹ *Marshall's Trustee v. Macneill & Co.*, June 19, 1888, 15 R. 762, per Lord Shand, p. 772; *Marquis of Tweeddale's Trustees v. Earl of Haddington*, Feb. 25, 1880, 7 R. 620.

² *Police Commissioners of Dundee v. Straton, &c.*, Feb. 22, 1884, 11 R. 586, per Lord President, p. 590; *Marshall's Trustee v. Macneill & Co.*, *vide supra*, note 1; *Magistrates of Glasgow v. Hay, &c.*, Feb. 23, 1883, 10 R. 635, per Lord President, 638; *Aiton v. Russell's Executors*, March 19, 1889, 16 R. 625.

³ *Police Commissioners of Dundee v. Straton, &c.*, *vide supra*, note 2; *Burns v. Martin*, Feb. 14, 1887, 14 R. (H. L.) 20.

⁴ *Small v. Millar*, Feb. 3, 1849, 11 D. 495, 21 Scot. Jur. 143; *Gardyne v. Royal Bank*, March 8, 1851, 13 D. 912, 23 Scot. Jur. 410 (H. L.) May 13, 1853, 1 Macqueen, 358.

⁵ *Marquis of Abercorn v. Marnoch*, Jan. 26, 1816, F. C., and June 26, 1817.

⁶ *Hunter v. Boog*, Dec. 16, 1831, 13 S. 205, 7 Scot. Jur. 107.

⁷ *Napier v. Spiers' Trustees*, May 31, 1831, 9 S. 655, 3 Scot. Jur. 458.

Magistrates of Edinburgh v. Begg, Dec. 20, 1883, 11 R. 352.

⁹ *Bell's Prin.* sec. 700.

¹⁰ *Hunter v. Boog*, *vide supra*, note 6; *Napier v. Spiers' Trustees*, *supra*, note 7.

¹¹ *Marquis of Abercorn v. Marnoch*, *vide supra*, note 5; *Napier v. Spiers' Trustees*, *vide supra*, note 7.

there was an implied personal obligation to erect houses as a security for the feu-duty. The fact that the obligation was made a real burden did not detract from its personal character.¹ The claim was analogous to that for arrears of feu-duty, which could undoubtedly be enforced against the personal representative of a deceased vassal.² The option of irritating the feu was just an additional remedy to what the law had already given to the superior, and it could not be maintained that by being given it he was deprived of the ordinary common law remedies of an action *ad factum præstandum*, or of damages in the event of non-fulfilment of the obligation. He was entitled then to ask the Court to order specific implement against the defender of the obligation to build.³ Failing that, damages. It was perfectly obvious that the land without the buildings stipulated to be erected would bring a smaller return if sold or feued again than if the obligation had been implemented.

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustees.

At advising,—

LORD KINNEAR.—The only question which we have now to decide is, whether the judgment of the Lord Ordinary is right in so far as it gives effect to the conclusion of the summons by which the pursuer seeks to have the defender, as the personal representative of the deceased Kenneth Mackenzie, ordained to implement an obligation to build on certain lands in which Kenneth Mackenzie died infeft, and, failing implement, to pay damages for the loss sustained by the pursuer from such failure.

I think it is material to see, in the first place, what was exactly the position of Kenneth Mackenzie, the deceased, whom the defender represents, under his title. By feu-contract between the superior and Kenneth Mackenzie and others the superior conveys to him and two other persons named—John Mackenzie and John Hyslop—and the survivors and survivor of them, and the heir of the last survivor, certain lands, as trustees in trust for behoof of a company. Now, the effect of that conveyance was that Kenneth Mackenzie and his two partners were made conjunct fiars in the subject during their joint lives, but that on the death of the first deceiver of the three fiars the feu was not divided—the share of the first deceiver passing, in terms of the conveyance, on his death, to the other two, instead of descending to his own heirs, and the share of the second deceiver, in like manner, passing, upon his death to the sole survivor and his heirs. Therefore during the joint lives of John Mackenzie and John Hyslop, Kenneth Mackenzie was joint fiar with them in the lands. After their death he became the sole fiar and the sole vassal liable to the superior in the prestations of the feu. It appears that for reasons which were probably perfectly valid, but with which we have nothing to do, he was advised to execute a new conveyance in his own favour. But that made no difference in his feudal relation to the superior.

Again, it is of no consequence to the feudal relation, and therefore it is of no consequence to this case, what were his liabilities to the representatives of his deceased cofeuars or copartners during their lives, because he became on their death the sole vassal of the superior and the only person liable to perform the prestations of the feu-contract. Now, Kenneth Mackenzie died in 1890, and

¹ Marquis of Abercorn v. Marnoch; Marquis of Tweeddale's Trustees v. Earl of Haddington, *vide supra*, notes 1 and 5.

² Aiton v. Russell's Executors, *vide supra*, note 2.

³ Napier v. Spiers' Trustees, *vide supra*, note 7; Bell's Prins. iii. 29.

No. 32.
 Nov. 20, 1891.
 Macrae v.
 Mackenzie's
 Trustee.

it is said that the defender is the sole trustee under his trust-disposition and settlement, and it is upon that ground that the action is brought against her. We know nothing as to her beneficial interest under this trust-disposition, and in particular, we are not informed whether she had any right to take up the feu, or whether it passed to the heir of the last vassal. I infer from the statement in the 12th article of the condescendence that the pursuer means to represent that the feu was conveyed to her, because he says that she is desirous of disposing of it, but he does not explicitly state that. At all events, I take it to be clear, from what is stated upon the record, that she is not now in the position of being the pursuer's vassal in these subjects. That being so, it appears to me to be of no consequence to inquire whether that is because Kenneth Mackenzie's right to the lands has passed to someone else, or because she, having right to take up the estate as disponee, has refrained from doing so. The only ground in law which the pursuer alleges against the defender is, that she is the personal representative of her deceased husband, and if she is liable in that character, it is of no consequence whether the estate has passed to the heir of the last vassal or to some stranger disponee, or whether it is in the *hereditas jacens* of the deceased. If she is not liable in that character, then it is equally of no importance what has become of the estate. The only question therefore is, whether the defender, as the personal representative of the late vassal, is liable to perform the conditions of the feu-contract.

Now, the particular condition which she is required to perform in this action is to erect certain dwelling-houses, and after having erected them, to maintain and uphold them in good order. I am unable to agree with the Lord Ordinary in thinking that any obligation to that effect has been imposed upon the representatives of the late vassal, so as to subject them to an action for specific implement of the obligation.

The general rule in the construction of feu-contracts upon which the Lord Ordinary considers that this case depends is perfectly well settled. It had been settled long before the cases of *Aiton v. Russell* and *The Police Commissioners of Dundee v. Straton*, to which his Lordship refers; but it is stated nowhere more clearly than in the judgment of the Lord President in the latter case. The only difficulty in these arose from the imposition of an obligation on the vassal, and his heirs, executors, and successors whomsoever. If that means that all the heirs, executors, and successors are bound conjunctly and severally, then there can be no doubt they are all liable *in solidum*, and no question would arise: but if they are not bound jointly but severally, then a question which is sometimes of difficulty arises—since the vassal has bound himself and his executors to a certain extent, and his successors in the feu to a certain extent—on what conditions the obligation arises against each of the different sets of successors.

Now, the rule which has been laid down in the cases to which I have referred is perfectly clear, at all events in its application to the main prestation in a feu-contract—the obligation to pay feu-duty—because the Lord President says,—“According to invariable practice, an obligation imposed in the terms which I have quoted is an obligation upon the vassal himself so long as he remains vassal and lives, and after his death upon his heirs and executors, for payment of arrears, but upon his successors in the feu only, to the exclusion of his personal representatives, for payment of the feu-duty in future.” Now, if the obligation which we have to consider had been expressed in the same terms as those which are contained in an ordinary feu-contract, and if the vassal had thus bound

himself and his heirs, executors, and successors to build and uphold the buildings after they had been erected, I confess I should not have thought there was much difficulty in applying the general rule explained by the Lord President to such a case, because it really rests upon this principle—that every continuous obligation in a feu-contract or feu-charter, in the absence of special stipulation to the contrary, must be transmissible and enforceable against the vassal in the feu, and not transmissible or enforceable against the personal representatives of the deceased vassal, who are not themselves vassals in the feu.

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

In applying that rule I should certainly think it very difficult to suppose that a superior imposing an obligation to build houses upon his land should look to anyone for the performance of that obligation, excepting to the owner of the land for the time being, and it is not conceivable that he should look to anybody else for implement of an obligation to uphold and maintain houses after they had been erected. Therefore, if the condition in question were imposed upon the vassal, and his heirs and successors, by the words of the obligation in ordinary feu-contracts, I should, as I have said, have very little difficulty in holding that that transmitted to the successive feuars, but did not transmit against personal representatives.

But in this case it appears to me that the question does not even arise, because it is absolutely excluded by the terms of the feu-contract itself.

For the obligation to build, whatever may be its effect, is not in terms imposed upon heirs, executors, or successors whatsoever, but solely upon the vassal holding the lands under the grant for the time being. The feuars do not, either in words or substance, undertake an obligation that they are to build houses, and to perform any one of the prestations which are to be found in that part of the deed. The subject is conveyed under certain conditions and obligations, which are declared to be real burdens affecting the pieces of ground thereby disposed, and one of these obligations is that dwelling-houses of a certain value shall be erected "by the second parties within two years upon both or either of the said two pieces of ground," and that "the said second parties shall maintain, uphold, and keep the said houses so to be erected in" good order and repair. Now, the second parties are simply the first feuars—that is to say, the three persons to whom the subject is conveyed in the feu-contract. There is no obligation undertaken or imposed upon anybody else. I am very far indeed from saying that a conveyance in these terms does not create a personal obligation enforceable against anybody who may take up the land under this grant. I think it is settled law—at all events since the case of *Hunter v. Boog*—that when land is leased out for onerous considerations on certain conditions, these conditions are imposed as obligations upon the feuar or vassal who accepts delivery of the land. They are obligations *ex contractu*, which he is bound to perform, because they are the conditions upon which the grant is made, and upon which he has accepted it. I think such obligations are binding upon him and enforceable against him in exactly the same way as if he had undertaken and bound himself to perform them in express terms. It appears to me to be of no consequence whether such obligations are expressed in a feu-charter or in a bilateral contract; or if in a bilateral contract, whether they are expressed in that part of the deed by which the superior conveys under certain express conditions, or in that part of it by which the feuar undertakes to perform certain prestations in return for the grant. It is of no consequence in what form the conditions are expressed. The feuar who takes the land under the superior's grant puts himself under the personal

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

obligation to perform the conditions of the grant. I think it equally clear in the present case that nobody could take the land from the first feuar as heir or disponee, and so become the vassal in his place, without subjecting himself to the same conditions and to the same extent as the original grantee, because by declaring that the conditions are to be real burdens the superior has taken the ordinary and perfectly effectual method of providing that they shall attach not only to the first vassal but to all heirs or singular successors who take the estate from him. But then these are obligations or conditions of the grant binding upon the vassal who for the time being holds the land in terms of the grant, and upon nobody else. Therefore, it appears to me to be quite out of the question to hold that they affect not only the grantee and his successors in the feu, but also the personal representatives of the deceased vassal who had no interest in the land.

I think it is of no consequence whether such representatives are also *mortis causa* disponees of the original grantee, who have declined to take benefit from his conveyance, or whether they are in the position of being personal representatives merely, who have no right under the grant.

As personal representatives they are in my opinion in no way liable to perform any conditions attaching solely to the vassals holding the land under the grant. I am therefore unable to agree with the Lord Ordinary.

His Lordship thinks that the defender ought not to be compelled to implement the obligation, because it would not be expedient to enforce specific implement. I think the true reason that she cannot be compelled to do so is that there is no obligation affecting her which could be enforced.

If that be so—if the defender is under no obligation to build, and cannot for that reason be compelled to do so—it follows as a matter of course that she is under no liability in damages. She cannot be subjected to damages for failing to perform an obligation which does not attach to her.

But the Lord Ordinary suggests a different ground—and it has been urged on us in argument—upon which he thinks the defender may be made liable, because he says that there was, no doubt, a personal obligation upon the late Kenneth Mackenzie, whom she represents, that he failed in breach of his contract to perform that obligation, that in consequence he became liable in damages to the superior, and that that liability transmits as a personal debt against the defender, as his representative; and he likens the case to that of a claim for arrears of feu-duty, which could undoubtedly be enforced against the personal representatives of a deceased vassal, although a claim for future feu-duties could attach only to the deceased vassal's successors in the feu. But arrears of feu-duty become debts of the debtor's representatives, not because they are under any continuous obligation to pay feu-duty, but because the debt has arisen against the deceased during his life, for which they, as his representatives, are liable.

As I have already indicated, I agree with the Lord Ordinary in thinking that there was a personal obligation binding upon Kenneth Mackenzie, and I do not see any reason to doubt—although I do not think it is absolutely necessary to decide the point—that that was an obligation which might be enforced by the ordinary legal remedies, either by an action for implement, or by an action to recover damages for breach of contract. It does not occur to me that the stipulation by which the superior declares that in the event of the obligation to build not being performed, the grant shall, in his own option, become null and void could be construed as excluding the ordinary legal remedies which would be

available to him in the event of failure to perform the obligation. I think that is a provision by which the superior secures to himself, in his option, an additional right beyond what the common law would have given him if it had not been expressed. A provision that he shall have a further and exceptional remedy does not appear to me to import that he is excluded from enforcing his obligation by the ordinary remedies that would be available to him at common law.

No. 32.
Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

But assuming that there was a good personal obligation affecting Kenneth Mackenzie, and that the superior might have recovered damages from him for his breach of contract during his life, then the question might arise whether a debt has been created against him which may now be enforced against his personal representative. I do not think it necessary to decide that question, because that is not the demand which the pursuer makes in this case. If there is any such liability, it is the liability of a representative for her ancestor's breach of contract; and that is not what the pursuer seeks to enforce in this case. The conclusion of the summons is for implement of an obligation attaching to the defender herself; and the conclusion for damages is a conclusion "that in the event of the defender failing or refusing to erect said dwelling-houses" and so on, the defender "should be decerned and ordained to make payment to the pursuer of £600" in name of damages. That is to say, there is an obligation now attaching to the defender; she is to be compelled to perform that; and if she does not perform it, then she is to be liable in damages in consequence of her breach of her own obligation. Now, it is quite impossible to make any use of that conclusion for the purpose of recovering from her damages, not for her own breach of the obligation at all, but for a previous breach of contract by the person whom she represents. Upon that ground I am of opinion that it is neither necessary nor proper to consider the question whether if there was a personal obligation affecting the deceased vassal, the defender, as his representative, is liable in damages for his failure. The conclusions of the action exclude any other demand except a demand that she should perform an obligation attaching to herself, or pay damages for her own breach. I am therefore of opinion that the Lord Ordinary's interlocutor must be recalled, and that the defender should be absolved from the conclusions of the action.

LORD ADAM.—The question in this case arises upon the construction of a feu-contract by which the superior conveys and disposes to the three partners of the Bank Coal Company, and to the survivors and survivor of them, and the heir of the last survivor, in trust for behoof of their said company, certain pieces of ground, to be holden "of and under the first parties and their successors for payment of the feu-duty and other prestations after mentioned," but under the burden of the whole conditions, reservations, and so on, which are declared to be real burdens. Then follows the particular condition in question.

There was first a provision that the vassal should build dwelling-houses of a certain annual value, and that he should maintain them, and if burned down should rebuild them; and then there follows this condition—not very happily expressed—that in the event of the feuars failing to implement their obligations, "these presents and all following thereon shall, in the option of the said first parties, become null and void." These are the three clauses of the feu-contract with which we have to deal. The husband of the defender, Mr Kenneth Mackenzie, came to be the last survivor of those mentioned in the contract, and he died in possession of the subjects. Now, I do not see any reason to doubt that

No. 32.

Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

Kenneth Mackenzie, the defender's husband, by accepting the feu and becoming vassal under this feu-contract, came under the conditions on which alone he was entitled to hold the subjects, viz., that he would erect dwelling-houses of a certain value. I should not doubt that in a feu-contract so expressed—where lands are given under the express condition of something being done, and these lands are accepted by the vassal under that condition—that out of that state of circumstances a personal obligation arises against the vassal to fulfil the condition during his tenancy of the feu. I think that the vassal's duty would have been better expressed if the feu-contract had in this particular case used words of direct obligation. But anybody accepting it under these conditions necessarily came under an obligation to fulfil them. That is my construction of this part of the deed.

The superior stipulated that in a certain event there should be an irritancy imposed, in his option. I concur with Lord Kinnear's observations on that matter. Of course we are familiar with an irritancy in respect of arrears of feu-duty for two years, but I do not think that there would have been any legal irritancy implied here for infringing this condition. But I quite agree with Lord Kinnear in his observations in this matter, that unless there be something in the deed to shew the contrary, where a superior stipulates for an irritancy of that sort, he is merely stipulating for an additional remedy, by the use of which he may enforce performance of the conditions of the contract, and that because he so stipulates for an additional remedy he does not, and the parties do not, mean that that should in any way interfere with the use and employment of the ordinary remedies which he has in such cases. I have no doubt that it might be stipulated that such irritancy should be the only remedy, but I find nothing to indicate such intention here. Therefore I think, although that clause of irritancy be there, the vassal who holds the feu is not relieved from the personal obligation to fulfil it, and I think he undertakes it by entering into and taking possession of the subjects.

Now, the facts being so, I should have thought that the defender's late husband, Kenneth Mackenzie, was, as the Lord Ordinary says, under a personal obligation to fulfil the conditions of this feu, and therefore that he was bound to build, and that he having failed in that obligation, the defender, as his trustee, is bound to fulfil that debt of his. But that is not the nature of this action at all, because, as Lord Kinnear has stated, it is an action to have her compelled to perform a personal obligation which is alleged to be incumbent upon herself, and for damages for failure to fulfil that personal obligation of hers. Now, that is just where I think the Lord Ordinary has gone wrong in this case. He "finds that the said personal obligation is now binding on the defender as his general representative." I do not think that it falls upon the defender as personal representative of the late Kenneth Mackenzie. I think that the obligation is transmissible and enforceable against nobody but the vassal himself. I agree with Lord Kinnear that the questions which arose in the cases of *Russell v. Aiton*, and the *Magistrates of Dundee v. Straton*, are not in this case, because from the very nature of the case it can only arise where a person becomes vassal in the feu, because these conditions are not imposed as separate obligations; they are only imposed as conditions of the acceptance and holding of the feu. Now if that be so—if a person never takes possession and never accepts the feu, and the defender has not—there is no condition which can raise an obligation against her. It is only in respect of the acceptance of the feu that the oblig-

tion arises. If the feu is never accepted, the obligation can never arise. In my view that is enough for the disposal of this action, because, as Lord Kinnear has pointed out, this action is founded upon a certain obligation the fulfilment of which is personal to the defender. If she is under no obligation to fulfil any stipulation, it is clear that she can be under no liability in damages for not fulfilling a condition which is not binding upon her at all; that is the state of this process.

No. 32.
Nov. 20, 1891.
Macrae v.
Mackenzie's
Trustee.

Upon these grounds I entirely concur in all that Lord Kinnear has said.

LORD M'LAREN.—I concur in Lord Kinnear's opinion, and I only wish to express one qualification which I think is implied in the opinions which have been given—I mean, when we say that an obligation of this kind if unfulfilled by the immediate grantee transmits against the next vassal, it is understood that we are speaking of an obligation which has some natural relation to the lands or the subjects of disposition. This is the character of the obligation in the present case. It is an obligation to put buildings on the lands. We know that there are decisions of this Court, and also of the House of Lords, where the subject has received very great consideration, to the effect that a continuing obligation having relation to lands, such as an obligation to relieve the other party of the payment of tithes or public burdens, will transmit against the heir in heritage, assuming that the relation of superior and feuar existed between the original contracting parties. But it is conceivable that obligations unconnected with the land or subject of conveyance may be undertaken in a feu-contract, and such obligations would not in general affect the heir in heritage. There are, of course, some obligations which would not be binding on anyone—I mean such as are annulled by the operation of the statute law. Of this nature are obligations to render personal services to the superior, and obligations restraining alienation without the consent of the superior, both of which are prohibited as to all future grants by the Act abolishing Ward Holdings, 20 Geo. II. c. 50. Another instance is the condition that deeds of transmission of the feu are to be prepared by the superior's agent—a condition which is made illegal by one of the sections of the Conveyancing Act. But setting aside these cases, it is evident that these are conditions which may be binding as matter of contract between the parties to the original feu-contract or charter although not relating to the subject-matter of the charter, and as to these the question might arise, whether the obligation, after the death of the original obligant, is to be performed by his heir or by his executors. Such cases of course are not very likely to arise, and I only wish to say that our decision in this case would not necessarily govern the case of the effect to be given in a question with the grantee's heirs to an obligation which is outside the proper scope of the feudal contract.

LORD PRESIDENT.—I agree in holding that the defender, who is not the vassal, is not bound to erect houses in terms of the clause in this feu-contract, and by consequence that she is not bound to pay damages if she does not do so. The conclusion of this action being solely to compel her to do one or other of these things, I think she is entitled to absolvitor.

We recall the interlocutor and assoilzie the defender.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

R. D. C. MARSHALL, W.S.—GRAY & HANDYSIDE, S.S.C.—Agents.

No. 33.

ARIZONA COPPER COMPANY, Appellants.—*Asher—Ure.*

Nov. 20, 1891.

SURVEYOR OF TAXES, Respondents.—*Lord-Adv. Pearson—A. J. Young.*

Arizona
Copper Co. v.
Surveyor of
Taxes.

Revenue—Income-Tax—Profits—Deduction—Bonus—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), Schedule D, First Case, Rules III. and IV. and sec. 159.—A company borrowed a large sum of money, and undertook, along with repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent thereon. *Held* that, in estimating the balance of profits and gains chargeable under Schedule D, the company were not entitled to deduct the amount of the bonus from the profits of the year in which it was paid.

Exchequer
Cause.

1st Division.

THE ARIZONA COPPER COMPANY, LIMITED, was formed and registered on 11th August 1882, and was reconstructed in 1884. On 4th December 1883 a company called the Arizona Trust and Mortgage Company, Limited, was formed and registered, as the prospectus bore, "primarily for the purpose of acquiring and holding the obligations of the Arizona Copper Company, Limited, and to provide the funds necessary to complete its works."

By agreement between the two companies, dated 8th and 11th December 1883, it was provided, *inter alia* (1) that the Mortgage Company should lend to the Copper Company the whole sum required for their purposes, not exceeding in all the sum of £360,000; (2) that the Copper Company should repay all such sums as were lent, on 15th May 1894, with an option to the Copper Company, upon giving six months' notice to the Mortgage Company, to pay a part or the whole of the advances made to them at 15th May 1889, and that on repayment of any capital sum the Copper Company should also pay to the Mortgage Company along therewith a bonus of 10 per cent on the amount repaid; and (3) that the Copper Company should pay interest at the rate of 10 per cent on the amount of the advances due by them.

Following upon this agreement the Mortgage Company lent the Copper Company sums amounting to £337,414, and the Copper Company repaid these sums under an agreement dated 2d and 4th June 1888, and along with repayment of the capital sum borrowed they paid the Mortgage Company the stipulated bonus of 10 per cent, which, less 7 per cent discount, amounted to £31,379, 11s. 9d.

In making their return for assessment to income-tax, under Schedule D* for the year 1889-90, based on the profits of the three preceding

* Rule Third of the First Case under Schedule (D) provides: "In estimating the balance of profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts, except bad debts proved to be such to the satisfaction of the Commissioners respectively; and

years, 1886-8, the Copper Company stated a sum of £27,462, 8s. 7d. as the amount of their profits for the purpose of assessment, and on that sum they were assessed and paid income-tax. In making that return the Copper Company had deducted from the profits of the year ending 30th September 1888, *inter alia*, the amount of the bonus of £31,379, 11s. 9d., but this and certain other deductions were disallowed by the Income-Tax Commissioners, and an additional assessment intimated. No. 33. Nov. 20, 1891. Arizona Copper Co. v. Surveyor of Taxes.

The Copper Company then appealed to the General Commissioners of Income-Tax. In support of their appeal they stated,—“The above sum of £31,379, 11s. 9d. was duly debited to profit and loss, as a charge on the business of the company, and it remained at the debit of that account until, in order to identify the larger sums so dealt with, and, if deemed expedient, spread them over longer than one year, the said suspense capital account was opened. The amount debited to that account was in due course charged against and paid out of the profits of the company.”

The General Commissioners refused to allow the deduction claimed for the amount of the bonus, and at the request of the Copper Company a case was stated for the opinion of the Court of Exchequer.

Argued for the company ;—The company’s right to deduct the amount of the bonus was not rested on the ground that such a deduction was among those specially authorised by the Income-Tax Act. The deductions there authorised were of payments out of profits, but the bonus was not in the sense of the Act a payment out of profits at all. It was part of the expense of carrying on the business of the company, without which no profits could be earned, and was to be deducted before the profits could be ascertained. The prohibitions contained in the statute against deductions out of profits had, therefore, no application. Assuming that these prohibitions did apply, there was none directed against deducting a payment of this kind, and, as the scheme of the Act was to enumerate all the deductions not allowed, the inference was that the deduction here claimed was one which might be made. In the cases of *Addie*¹ and the *Coltness Iron Company*² it had been held that coalowners were not entitled to deduct the expense of sinking new pits, and in *Forder v. Handyside*³ that an ironfounder was not entitled to deduct a sum set aside for depreciation of plant, the ground of judgment being that the payments in question were really payments to account of capital. These cases were accordingly distinct from the present, as the payment

for any average loss beyond the actual amount of loss after adjustment ; nor for any sum recoverable under an insurance or contract of indemnity.”

Rule 4th provides : “In estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains.”

Section 159 provides : “And be it enacted, that in the computation of the duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective Assessors or Commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment, to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments. . . .”

¹ *Addie v. Solicitor of Inland Revenue*, Feb. 16, 1875, 2 R. 431.

² *The Coltness Iron Co. v. Black*, April 7, 1881, 8 R. (H. L.) 67.

³ *Forder v. Handyside*, 1876, L. R., 1 Exch. Div. 233.

No. 33. In this case was not of that character. In *Watney & Co. v. Musgrave*¹ a brewer was not allowed to deduct the amount of premiums paid by him on the purchase of leases of public-houses, in respect that these were payments made outside his business. Here the payment was made in order to carry on the business of the company. Whether the bonus was to be looked upon as additional interest payable for the year immediately preceding repayment of the loan, or as a commission to a financial agent for getting the loan, it was in either case a payment quite distinct in character from interest paid to the debenture-holders of a company, which was the payment under consideration in the *Alexandria Water Company's* case.² There was one decision³ on the quality of a bonus, but it threw no light on the present question, the payment there being quite different in character from the payment in this case.

Nov. 20, 1891.
Arizona
Copper Co. v.
Surveyor of
Taxes.

Argued for the Surveyor of Taxes;—The sections in the Act dealing with deductions made no reference to gross or nett profits. A trader was therefore required to return for assessment everything in the nature of profits, subject only to the deductions allowed by the Act itself. The only allowable deduction from receipts other than those authorised by the Act was of legitimate working expenses, which had to be deducted before profits could be ascertained. The sum for which deduction was claimed here fell under neither category. In any view that might be taken of it, it was a payment made out of profits, and bearing express relation to capital. It therefore fell under the prohibition in Rule 3 of the First Case of Schedule D.⁴ It was not a commission, for there was no intermediary, but even if looked upon as a commission it would not be an allowable deduction.⁵ Any idea that the claim of the Crown could be resisted on the ground that the bonus was the payment of a debt was excluded by the decision in the *Mersey Docks* case. It was either an "annual payment" in the sense of Rule 4 of the First Case, and of section 159,⁶ or—and this appeared to be the most correct view—it was additional interest on borrowed capital, and so fell under the prohibitions contained in the same clauses.⁷ It much resembled in character the premiums, deduction of which was disallowed in *Watney & Company's* case.¹ So far as the Crown was concerned, it was a question *inter alios* whether or not the borrower was entitled to deduct the amount of the tax before paying the lender.

At advising,—

LORD PRESIDENT.—The Arizona Copper Company, Limited, borrowed from the Arizona Trust and Mortgage Company, Limited, moneys amounting to £337,414, for the purpose of completing their works. By the agreement between the two companies under which these loans were given, they were to be repaid on 15th May 1894; but the borrowers were entitled, upon giving six

¹ *Watney & Co. v. Musgrave*, 1880, L. R., 5 Exch. Div. 241.

² *Alexandria Water Co. v. Musgrave*, 1883, L. R., 11 Q. B. D. 174.

³ *Irving v. Houstoun*, July 27, 1803, 4 Pat. App. 521.

⁴ *Southern Cemetery Co. v. Surveyor of Taxes*, Nov. 29, 1889, 17 R. 154; *Mersey Docks and Harbour Board v. Lucas*, 1883, L. R., 8 App. Ca. 891; *Paddington Burial Board v. Commissioners of Inland Revenue*, 1884, L. R., 1 Q. B. D. 9.

⁵ *City of London Contract Corporation, Limited, v. Styles*, 1887, 2 Tax Cases 239.

⁶ *Last v. London Assurance Corporation, Limited*, 1885, L. R., 10 App. Ca. 438; *Gresham Life Assurance Society v. Styles*, 1890, L. R., 24 Q. B. 1500.

months' notice, to pay off the whole, or such portion as they thought fit, at 15th May 1889. On the repayment of any capital sum the borrowers undertook to pay to the lenders, along therewith, a bonus of 10 per cent upon the amount of the repayment.

No. 33.
Nov. 20, 1891.
Arizona
Copper Co. v.
Surveyor of
Taxes.

The option thus given was exercised, and the whole loan has been repaid before the stipulated term, along with £31,379, 11s. 9d. as the covenanted bonus. This sum, according to the statement of the appellants (the borrowing company), was in their books debited to profit and loss, as a charge on the business of the company; it remained at the debit of that account until, in order to identify the larger sums so dealt with, and, if deemed expedient, spread them over longer than one year, it was put to a suspense capital account; but the amount was in due course charged against and paid out of the profits of the company.

The question before the Court is, whether the Arizona Copper Company, the borrowers, are entitled to deduct this bonus in returning their profits under the Income-Tax Acts.

There cannot be said to be any complexity or ambiguity in the application of the money or in the source from which it was paid. It was paid in a lump payment as one of the considerations stipulated for a loan of capital employed in the adventure,—to wit, in the completion of the works,—the other consideration being interest at 10 per cent per annum, and it is in terms admitted in the case to have been paid out of the profits of the company.

Now, at this stage of the development of the law of the income-tax, it is not to the purpose to consider whether such a payment is a proper deduction from the point of view of a business concern, making up its own balance-sheet for its own purposes. The question is, whether such a payment out of profits is an authorised deduction in estimating the balance chargeable under Schedule D. It appears to me, as a sum paid in return for a loan of capital, to be entirely heterogeneous to those outlays the deduction of which is permitted as being necessarily incidental to the earning of profit; and I think to deduct it would be contrary to the prohibitions laid down in Schedule D and in the 159th section of the same Act.

LORD ADAM.—I confess I cannot see upon this case, and I do not think the case tells us, when the various sums of capital were repaid by the Copper Company to the Mortgage Company and when the 10 per cent bonus accresced and became due. I rather gather that the matter is one of adjustment in the Copper Company's books. But however that may be, I think the most favourable way to take the question for the Copper Company is to assume, as was assumed in the discussion, that this whole sum of £31,379, 11s. 9d. was paid within the year in which it is proposed to be assessed, although, I confess, I do not see that that appears upon the face of the case.

Now, if that be so, my opinion is with your Lordship, that this sum of £31,379, 11s. 9d., is simply a debt due by the Copper Company to the Mortgage Company. So far as I can see it is not a loss incurred in carrying on the business of the Copper Company in any way. If it were, it might or it might not be a proper sum to deduct before striking the balance of profit and gains, even in a question with the Crown. But it is not a loss; it is merely a debt incurred in carrying on the business of the company. I do not see, if we were to allow a deduction of this debt, on the ground that it was paid out of profits,

No. 33. where we should be able to stop. I find no authority in any of the taxing statutes for allowing such a deduction.

Nov. 20, 1891.
Arizona
Copper Co. v.
Surveyor of
Taxes.

Now, if the amount of this bonus be not, as I think it very clearly is not, a sum which ought to be deducted before striking the balance of profit and gains on which this company falls to be assessed, I think there is no question in this case, because if it is not to be deducted in order to ascertain the balance of profits and gains, then to be deducted it must fall under some of the clauses of the statute which allow deductions to be made. But there is no clause allowing such a deduction as this. Therefore I agree with your Lordship.

LORD M'LAREN.—I agree with your Lordship in the chair, and the only remark I would make is, that if this is not profit, then the amount of profit earned in a particular year must depend on the resolution of the company to pay off debt or not to pay off debt. Now, that seems to me to reduce the case contended for against the Crown to the absurd proposition that the company should be entitled to fix what they consider profit, and be assessed upon that sum.

LORD KINNEAR.—I am of the same opinion.

THE COURT affirmed the determination of the Commissioners.

DAVIDSON & SYME, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

No. 34. JOHN TURNBULL, Pursuer (Respondent).—*Comrie Thomson—John Wilson.*
JOHN OLIVER, Defender (Reclaimer).—*Jameson—Sym.*

Nov. 21, 1891.
Turnbull v.
Oliver.

Proof—Lease—Process—Jury Trial.—In an action of damages for wrongful sequestration at the instance of a tenant against his landlord the pursuer averred that the sequestration for non-payment of rent was in breach of an agreement to give an abatement from the rent stipulated in the written lease. The alleged agreement was not said to be instructed by any writing. *Held* that it was incompetent to prove it by parole, and (*following Law v. Gibson*, 13 S. 396) that an issue must be disallowed.

Reparation—Slander—Dishonourable conduct.—In a letter by a landlord to his tenant complaining of the failure of the latter to make immediate payment of a debt alleged to be due by him under a reference to an arbiter, the writer stated,—“I am surprised at your conduct, which you must see is very dishonourable.” *Held* that the letter was not actionable.

1ST DIVISION.
Lord Kin-
cairney.

JOHN TURNBULL brought this action for damages for wrongous sequestration and slander against John Oliver, solicitor in Hawick.

With reference to the claim for damages for wrongful sequestration, the pursuer made the following averments,—“By lease, dated 15th September 1876, the defender let to Thomas Turnbull,” the pursuer’s father, “the land of Burnflat for fifteen years from Candlemas 1876, at the yearly rent of £4 sterling for the first ten years of the said lease, and of £45 sterling for the remaining five years thereof. The lease was, however, of consent departed from in several respects, and, in particular, notwithstanding the terms of the lease, it was agreed between the parties that £40 per annum should be accepted during the last five years of the lease, and, in accordance with this agreement, £40 per annum was paid and accepted down till the last year. For that year, however, viz., the year from Candlemas 1890 to Candlemas 1891, the defender at first claimed at Lammas 1890 from the pursuer, as heir-at-law of his father, the sum of £22, 10s., being the half year’s rent at the rate of £45 per annum. In September 1890 the pursuer called on the defender at Hawick, and, as the result of the meeting

the defender then and there distinctly agreed to accept of the rent at the former rate of £40 per annum, to allow an abatement of 5 per cent on said amount, and it was specially agreed he was to accept payment of the rent for the year when the whole produce from the farm had been realised by the pursuer"; that it had not been so realised when, on 26th September, the defender, without any notice, presented a petition for sequestration for payment of £22, 10s. as the half year's rent due at Lammas 1890, which was followed, on 29th September, by sequestration of stock, crop, &c. at Burnflat; that these proceedings were in direct breach of the agreement, and were wrongful and oppressive.

No. 34.

Nov. 21, 1891.
Turnbull v. Oliver.

With reference to the pursuer's claim for damages for slander, the pursuer averred that on the termination of the lease in February 1891 the defender called upon the pursuer to put the farm fences into repair in terms of the lease, and it was ultimately agreed to refer the matter to the arbitration of Mr Hobkirk, farmer, Hawick. "He was to point out what repairs ought to be done by the outgoing tenant, and to state an equivalent in money, and the pursuer was to have the option of adopting either method. The arbiter estimated that it would require certain quantities of paling, stobs, wire, &c. to put the whole fences on the farm in order, and, with the labour, estimated the cost at the total sum of £5, 19s. 6d., and awarded that sum, but did not specify what repairs ought to be done by the tenant. He embraced the march fences as well as the divisional fences; and on 21st April defender wrote the pursuer with a note of what he claimed under the reference. On the same day the pursuer replied as follows:—'I have received your letter of to-day's date. I return Mr Hobkirk's letter. I have sent the award by Mr Hobkirk to Hawick to be advised on it; and am writing to-night for its return. I regret Mr Hobkirk did not follow out his instructions and state the repairs required; and in order that I may write you definitely would you please say how you purpose dealing with the repairs required on the boundary fences? You previously charged the adjoining proprietors with half of these.—Yours, &c. JOHN TURNBULL. The amount in the award is £5, 19s. 6d.'" On the 22d the defender wrote to the pursuer,—“Dear Sir,—Burnflat Fences—I have received yours of yesterday and am surprised at your conduct, which you must see is very dishonourable. We agreed to abide by the arbiter's decision. The arbiter having decided that you are to pay a sum of money in settlement, your duty is now to fulfil your obligation by sending me a cheque in payment as per note of yesterday. If I do not receive payment by return I shall immediately serve you with a summons.” And on 23d April 1891 he wrote another letter, viz.:—“Since writing you yesterday I have seen Mr Hobkirk, who informs me that he sent you a copy of his award, and that he has never heard from you on the subject since. Behaviour of this kind is simply scandalous. You have no right to trouble Mr Hobkirk any further in the matter, and if I do not receive payment by to-morrow I shall take legal proceedings without delay.”

The pursuer further averred,—“The said letters are of and concerning the pursuer, and they represented, and were intended to represent, that the pursuer was a man of dishonest and dishonourable character, who was unjustly endeavouring to evade payment of a debt due by him to the defender. The said representations were absolutely false and unfounded, and they were made by the defender falsely, calumniously, and maliciously, and without any cause whatever. The pursuer has reason to believe, and he avers that the defender has falsely, calumniously, and maliciously circulated statements regarding him to the foresaid effect, and that the pursuer is a dishonest and dishonourable man and behaved scandalously, in the

No. 34. neighbourhood of Hawick, with the result that the pursuer's reputation has been seriously injured. The pursuer is a native of Hawick and is well known there."
 Nov. 21, 1891. —
 Turnbull v. Oliver.

The defender pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action.

On 31st October 1891 the Lord Ordinary (Kincairney) allowed issues of wrongful sequestration and slander.*

The defender reclaimed, and argued;—No issue should be allowed upon either ground. (1) It was incompetent to prove the averment, regarding the abatement of rent, by parole. It was not alleged that the pursuer had any written evidence in support of such an agreement as the Lord Ordinary seemed to imply. Further, he had not moved for a diligence to recover documents to support the averment. The case of *Law*¹ was entirely in point—it was likewise a case of damages for wrongful sequestration for non-payment of rent. In that case there was much more speci-

* "OPINION.—I have come to the conclusion, although with considerable hesitation, that the issues as finally proposed should be allowed. The first issue is proposed to try the conclusion for damages for wrongous sequestration, and is admittedly expressed in the appropriate terms—*Watson v. McCulloch*, 1st July 1878, 5 R. 843. But the defender maintains that the record does not warrant any such issue. What the pursuer alleges is, that the landlord agreed to abate the rent and to allow time for payment of it, and that the sequestration was used for the full rent and before the lapse of the time allowed. It is not maintained that it was wrongous for any other reason. It is indeed averred that the stock sequestered was greatly in excess, but it was explicitly admitted at the debate that no more was meant by that averment than that it exceeded what was necessary to cover the abated rent, and it was conceded that there would have been no actionable excess had there been no abatement.

"The defender's objection was that it was incompetent to prove by parole the alleged agreement to abate the rent and to allow time for payment, and reference was made to *Gibb v. Winning*, 28th May 1829, 7 S. D. 677; *Law v. Gibsone*, 3d February 1835, 13 S. D. 396; *Kirkpatrick v. Allanshaw Coal Company*, 17th December 1880, 8 R. 327.

"I express no opinion on this argument at present, but it appears to me that it does not follow from it that the issue must be disallowed. The question may arise at the trial, or perhaps it may not arise. The pursuer does not admit that there is no written evidence of the alteration of the terms of the lease which he alleges. If he recovers such evidence, the question will not arise at all. If he fails to recover it, then the defender's plea will arise, and if it be sound, and I indicate no opinion to the contrary, then the result will be that the pursuer will lose this issue. But I incline to think, having regard to the averments on record, that it is safest to allow the case to go to trial without any prejudgment of this point.

"The pursuer desired to delete the word 'dishonest' in the second proposed issue, and did not desire to innuendo the word 'dishonourable,' used in the first letter, as meaning 'dishonest.' He held that it was actionable without an innuendo to characterise a man's conduct as dishonourable.

"The case of *Macrae v. Sutherland*, 9th February 1889, 16 R. 476, is a judgment to the effect that it is actionable to represent that a man's character is dishonourable, and it appears to me to follow that it is equally actionable to accuse a man of dishonourable conduct. It is true that considerable doubt is thrown on this point by the opinion of Lord McLaren in *Archer v. Ritchie*, 19th March 1891, 18 R. 719; but I think I am bound to follow the judgment in the case of *Macrae*; and I confess that it appears to me that the epithet 'dishonourable' is almost, if not altogether, equivalent to 'dishonest,' and is in ordinary language equally expressive of moral turpitude."

¹ *Law v. Gibsone*, Feb. 3, 1835, 13 S. 396; cf. also *Kirkpatrick v. Allanshaw Coal Co.*, Dec. 17, 1880, 8 R. 327.

scation in regard to the verbal agreement for abatement than there was here, and yet proof was not allowed. (2) It was not libellous to say in the course of a dispute that a particular act was dishonourable or scandalous where there was no misrepresentation of the facts.¹ Two persons disputing with one another had a right of fair comment on one another's conduct.² In certain cases an issue of dishonourable conduct had been allowed, but this was always where an innuendo to that effect had been put upon the language used to a third party regarding the pursuer.³ The present case was very different. "Dishonourable" was not synonymous with "dishonest."

No. 34.

Nov. 21, 1891.
Turnbull v. Oliver.

Argued for the respondent;—(1) The averment that the terms of the written lease had been altered by a parole agreement were relevant to be admitted to probation, and the issue ought to be allowed.⁴ (2) The defender was charged with dishonourable conduct, and the allegation was, that not only was the charge made in a letter to the pursuer, but that the statements were thrown broadcast over the neighbourhood.

LORD PRESIDENT.—The first ground upon which this action is laid, and to which the first issue relates, is that the defender carried out a sequestration of the pursuer's effects wrongfully. The alleged wrong is that the proceedings in question were in direct breach of an agreement with the pursuer—that instead of the full half year's rent of £22, 10s. payable under a lease, the defender had agreed to accept £20. When one looks at the averment as to the agreement, it is plain upon the statement of it that it is a mere parole agreement, and the position of the pursuer, who asks the issue, is that, having alleged an agreement of this nature without any averment that it is in writing, he does not produce any writing in support of it nor ask a diligence for recovery of documents to instruct it. Accordingly, I think the Court is bound to deal with it upon the footing *de non apparentibus et non existentibus eadem est ratio*.

The question is, should an issue be allowed in these circumstances? I think the case of *Law v. Gibsons* is directly in point, for while the other cases cited by the Lord Ordinary, in which an averment of a verbal abatement of rent below that contained in the written lease was made, were not cases of actions of damages for wrongful sequestration, the case of *Law* was. Where, as here, the enforcing of a claim of abatement of rent payable under a lease depends upon an allegation of a bare verbal promise or agreement, I do not think that parole testimony is competent to cut down the written instrument. Accordingly, it appears to me that the proper course in dealing with the first branch of this case is to disallow the first issue.

The second ground of action is based upon two letters written by the defender to the pursuer himself, regarding a transaction which arose upon the termination of the lease. When one looks at the first of these letters, it is manifest that what the defender is there complaining of is, that the pursuer had not forthwith sent him a cheque in payment of the amount for which he was found liable by an arbiter's decision. The ground of action is founded upon the use of the word "dishonourable," but it is important to observe that there are prefixed to

¹ *Archer v. Ritchie*, March 19, 1891, 18 R. 719, Lord M'Laren, p. 727.

² *Watson v. Duncan*, Feb. 4, 1890, 17 R. 404.

³ *Macrae v. Sutherland*, Feb. 9, 1889, 16 R. 476; *Blasquez v. Lothians Racing Club*, June 29, 1889, 16 R. 893; *Drew v. Mackenzie & Co.*, Feb. 28, 1862, 24 D. 649, 34 Scot. Jur. 320.

⁴ *Wark v. Bargaddie Coal Co.*, March 15, 1859, 3 Macq. (H. L.) 467.

No. 34.
Nov. 21, 1891.
Turnbull v.
Oliver.

the words "very dishonourable" the words "which you must see." I think the terms of the letter itself enable one to judge with complete confidence of the meaning attached to that word by the writer. The word is used by the defender by way of remonstrance against the action of the pursuer, and an appeal is made to the pursuer's sense of honour. I presume that the pursuer would not have it supposed that his sense of honour was not punctilious and acute, and the question being whether the pursuer did not consider it inconsistent with his sense of honour not to send the cheque in question immediately, I do not think that the language used is sufficient to found an action of damages for slander. The word "dishonourable" when applied to an act of omission (and not as in the case of *Macrae* to a man's character) does not appear to me to necessarily convey any specific charge of turpitude. As Lord Adam has said, the sense of honour varies in different professions, and when an appeal is made to the sense of honour of an individual regarding an act or omission, it cannot be said to involve an attack upon his moral character. It is, of course, not to be supposed that any general rule is now laid down that the word "dishonourable" when applied to conduct may not be actionable, for this must depend on whether circumstances are or are not averred which will support an innuendo. In the present case I think the action is untenable, and that the second issue must also be disallowed.

LORD ADAM concurred.

LORD M'LAREN.—I agree with your Lordships in regard to both issues.

I desire to add only an observation regarding the proposed issue of slander, because the Lord Ordinary has made reference to some remarks which are to be found in my opinion in the case of *Archer*. I there said, with the concurrence of my colleagues, that I thought we ought not to allow the pursuer to take an issue putting the question whether he had been accused of dishonourable conduct. We thought that the word "dishonourable" as applied to character was too indefinite to be put in issue, and that it would need an innuendo to explain it. But I did not say, and do not now say, that the word "dishonourable" may not be used in such a way as to give rise to an action of damages for libel, *e.g.*, where in a letter to a third party the writer characterises as dishonourable the general conduct or behaviour in matters of business of the pursuer with the view of injuring him in the estimation of his fellow men. But where two persons stand to one another in the relations of debtor and creditor,—the one disputing liability and the other seeking to enforce it,—the one party is well entitled to express to the other his opinion of the conduct of the other in the matter in controversy; and even if the language which he uses be intemperate, yet, if it does not amount to anything more than an expression of opinion on facts which are not in dispute, it will not found an action. Mere vituperative epithets are not enough to found an action of damages. Such I conceive to be the character of the letter in the present case, and in the circumstances I am of opinion that the issue must be disallowed.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the defender's first plea in law, and assoilzied him from the conclusion of the summons.

JOHN ELDER, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 35.

DAVID CAMPBELL, Appellant.—*Sol.-Gen. Murray—Craigie.*
MAGISTRATES OF EDINBURGH, Respondents.—*Comrie Thomson—Boyd.*

Nov. 24, 1891.
Campbell v.
Magistrates of
Edinburgh.

Police—Paving private street—Lands and heritages “abutting” on street—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. c. cxxxii.), sec. 130—Edinburgh Municipal and Police (Amendment) Act, 1891 (54 and 55 Vict. c. cxxvi.) sec. 33.—The proprietor of an upper flat of a tenement and of a plot of garden ground fronting A Street on the west, and bounded by B Street on the north, objected to a notice under the Edinburgh Municipal and Police Acts, 1879 and 1891, calling on him to pave and causeway B Street, as owner “of lands and heritages fronting or abutting on the same.” The only access to the flat was from A Street, but the conveyance also included a *pro indiviso* right to the *solum* on which the tenement was built. Objection repelled.

Police—Notices to pave or causeway a street—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. c. cxxxii.)—Edinburgh Municipal and Police (Amendment) Act, 1891 (54 and 55 Vict. c. cxxvi.).—Notices to pave or causeway a street under the provisions of the Edinburgh Municipal and Police Acts held to be insufficient in respect that they did not sufficiently specify the nature of the work required to be done.

DAVID CAMPBELL, S.S.C., was proprietor of subjects at 23 Lady Menzies Place, Edinburgh, consisting of the northmost upper half-flat of the northmost tenement in the street, and of a plot of garden ground in front of the tenement, bounded on the west by Lady Menzies Place, and on the north by Rossie Place, a private street. His house was entered by an outside stair from Lady Menzies Place, common to him and to the proprietor of the southmost upper half-flat. There was no entry from Rossie Place. His title-deeds gave him a *pro indiviso* share of the ground or area on which the dwelling-house was built, along with the proprietor of the dwelling-house below him. He and the other three proprietors of the tenement were all equally interested in the maintenance of the north wall of the tenement. 1ST DIVISION.

On 21st October 1891, the following notice from the Magistrates of Edinburgh was served upon Campbell:—“Notice regarding foot-pavements of Rossie Place, 21st October 1891.—Edinburgh Roads Department.—Notice is hereby given to owners of lands and heritages fronting or abutting on the private street of Rossie Place, that the Magistrates and Council of the city of Edinburgh call upon them to free the foot-pavements or footpaths of said street from obstructions, and to properly level, make up, construct, pave, and complete the same to the reasonable satisfaction of the Magistrates and Council within one month from and after the 22d day of October 1891; and in case this notice is not complied with within the time specified, the Magistrates and Council shall themselves, on the expiry of said period, cause the said foot-pavements or footpaths of the said private street, or part thereof, to be freed from obstruction, and to be properly levelled, made up, constructed, paved, and completed in such way and manner and with such materials as the Magistrates and Council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be charged as a debt against such owner or owners in default; all in terms of section 130 of the Edinburgh Municipal and Police Act, 1879,* and section 33 of the Edinburgh Muni-

* The Edinburgh Municipal and Police Act, 1879, sec. 130, enacted,—“The owners of all houses and buildings or of gardens and grounds, whether houses or buildings are erected on the same or not, which are adjoining to or fronting any street or court, shall, where foot-pavements or footpaths shall be deemed requisite, cause the same, to the extent of their respective houses and buildings,

No. 35.

Nov. 24, 1891.

Campbell v.

Magistrates of

Edinburgh.

cipal and Police (Amendment) Act, 1891.* Given under my hand at Edinburgh the 21st day of October 1891. WM. SKINNER, Town-Clerk."

A similar notice was served upon him in regard to the causewaying of the carriageway of Rossie Place.

Campbell appealed to the Court of Session under the 62d section of the Edinburgh Municipal and Police (Amendment) Act, 1891,† maintaining that he was not bound to free and construct the carriageway of Rossie Place, or to make up the foot-pavements as required by the notices, in respect, *inter alia*, "(1) that he is not the owner of lands and heritages fronting or abutting on Rossie Place, and that he is not the owner of houses and heritages adjoining or fronting said street, in the sense of the Acts under which said notices are issued; (3) that the said notices, dated 21st October 1891, are not sufficiently specific in their terms, and that the time allowed for the execution of the work mentioned in them is too short."

The Magistrates lodged answers in which they maintained, *inter alia*, that the appellant was the owner of lands and heritages fronting or abutting on Rossie Place, and that the notices were expressed in terms of the statutes, and sufficiently indicated the nature of the operations required to be executed on Rossie Place.

Argued for the appellant;—(1) He could not be said to be the owner of buildings abutting upon Rossie Place. His house was in Lady Menzies Place, and was entered from that street alone. Before a house could be

to be well and sufficiently formed and paved or surfaced in such manner and way and of such width as the Magistrates and Council may direct."

* The Edinburgh Municipal and Police (Amendment) Act, 1891, sec. 33, enacted,—“Where in any private street or court, houses or permanent buildings have been erected on one-half or more of the ground fronting or abutting on the same, or where such ground has been otherwise than temporarily enclosed and laid out to at least the said extent, and where such street or court is not, together with the foot-pavements or footpaths thereof, made up, constructed, causewayed, paved and in a complete and efficient state of repair, to the reasonable satisfaction of the Magistrates and Council, the Magistrates and Council may, if they think fit, by notice, call upon the owners of the lands and heritages fronting or abutting on such street or court to free the same, and any foot-pavements or footpaths thereof, from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same to the reasonable satisfaction of the Magistrates and Council, within a time to be specified in such notice, and in case such notice is not complied with within the time so specified therein, the Magistrates and Council may themselves, at any time thereafter, cause any such street or court, or part thereof, and any foot-pavements or footpaths of the same, to be freed from obstruction, and to be properly levelled, made up, constructed, causewayed, paved, and channelled, and completed in such way and manner, and with such materials as the Magistrates and Council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be recoverable as a debt from the owner or owners in default.”

† The Edinburgh Municipal and Police (Amendment) Act, 1891, sec. 62 enacted,—“Any person aggrieved by any order, deliverance, notice, or requisition pronounced under section 33, &c. . . . may appeal, by way of summary application, to either Division of the Court of Session . . . which application shall be presented within fourteen days after the date of the intimation of any such order, deliverance, notice, or requisition, and any such appeal shall extend to any act to be done or suffered, or any costs, or the liability therefor to be incurred or received under any of such sections, and the Division of the said Court to which the application shall have been made . . . shall hear parties and determine the matter of the appeal, with or without expenses. . . .”

No. 35.

Nov. 24, 1891.
Campbell v.
Magistrates of
Edinburgh.

said to abut upon a street, it must have physical access to that street.¹ It was no answer that the appellant had an interest in the maintenance of the gable wall, nor that he had a *pro indiviso* right to the ground on which the house was built, so long as he did not own any ground abutting on the level of the street. It would be an injustice to hold that he was bound to pave and causeway a street from which he could take no benefit. The terms of the notices did not include the garden ground, even if it could be said to abut upon the street. (2) The requirement of the 33d section of the Act of 1891 was that the street should be paved and causewayed "to the reasonable satisfaction" of the Magistrates. The Magistrates were bound to state more specifically than they did in the notices what they required the appellant to do. It would then be for him to consider whether he would do the work himself or allow the Magistrates to undertake it. If no such specification were given, it would be impossible for the appellant to take any benefit from the right of appeal given to him by the 62d section of the Act of 1891. The appeal was given on the question of the reasonableness of the Magistrates' demand, but he could not judge of this from the notices he had received, because these merely echoed the terms of the statute.

Argued for the respondents ;—(1) It was clear that the property abutted on Rossie Street. If the house did not, at anyrate the plot of garden ground did. (2) In so far as the notice fell under the 130th section of the Act of 1879, it was not appealable, as no right of appeal was conferred except under the 1891 Act. As regarded the want of specification, the respondents referred to the foot-note which was appended to such notices, shewing the willingness of the Magistrates to give any particulars which were required of them.*

Lord President.—The two questions on which our judgment is asked in this case are (1) whether the appellant is owner in the sense of the Act of lands and heritages abutting upon Rossie Place ; and (2) if so, whether the notices which have been issued by the Magistrates are sufficient intimation to the appellant of the requirements of the Magistrates.

As regards the first question, I cannot say that I entertain any doubt. The appellant is an owner of lands and heritages in the sense of the Act ; the plot or garden which belongs to the appellant and adjoins his house in every sense of the term "abuts" on Rossie Place ; and, further, as the appellant is a *pro indiviso* proprietor of the *solum* on which his house is built, he is an owner of lands and heritages abutting on the street in question, although his interest is a limited interest. Accordingly, I think that the Magistrates have stated a sufficient case upon this point upon record, and that the appellant's contention is untenable.

The second question, regarding the sufficiency of the notice, appears to me to be in a very different position. The Magistrates have acted upon the theory that all that they have to do is to serve notices, which amount to nothing more than a reminder to the proprietor of the terms of a section of the Act of Parliament. The notice tells him that the street must be properly levelled, made up, constructed, paved and completed, but as to the way or manner in which the proprietor is to set to work, the notice is absolutely silent. We have to con-

¹ Magistrates of Leith v. Gibb, Feb. 3, 1882, 9 R. 627.

* "NOTE.—Mr Proudfoot, city road surveyor, will give information to any owner who may apply to him at his office, City Chambers, as to what repairs are proper and necessary."

No. 35.

Nov. 24, 1891.
Campbell v.
Magistrates of
Edinburgh.

sider, having regard to the alternative provisions contained in the Act for paving or causewaying the streets, whether that was an adequate requisition or notice. It is to be observed that the statute contemplates that the proprietor shall be apprised of what the Magistrates call upon him to do at his own hands, and that failing his doing this himself, the Magistrates may do it themselves. I take it that, according to the statutory provision, a proprietor is entitled first of all to know specifically what he is required to do, in order that he may consider whether he can conveniently undertake the work at his own hand, or whether he will allow the second alternative of the section to come into play, under which the Magistrates do it at his expense. There might be circumstances under which the proprietor would prefer to execute the work himself, and a great deal must necessarily depend upon the nature and quality of the work he was called upon to perform. Accordingly, I think the Magistrates are bound to give, not minute details of the work to be done, but an indication of it sufficiently specific to enable the proprietor to take advantage of the provisions of the statute, and to judge between the alternatives which are offered to him.

We have further to bear in mind the right of appeal which is given by the 62d section of the Act of 1891. It has been argued to us by Mr Thomson that a mere general notice from the Magistrates in the terms of that now before us is enough in the first instance, and that thereafter conferences may take place between the proprietor and the Magistrates in regard to the nature and character of the works which he is required to execute. But then, all this while, the time for appealing is running from the date of the general notice, while the proprietor has only acquired the means of judging whether he ought to appeal when he has seen the burgh surveyor or his plans. Now, I cannot sympathise with a view which would saddle a private citizen with the burden and trouble of such negotiations when there need be no occasion for them. I think the simple plan is for the Magistrates to make up their minds in the first instance, before they send out their notice, what it is reasonable to ask and to state what they require. I do not think that we are making an undue demand upon the Magistrates in laying down that their notice, which is the statutory communication of their requirements, and from the date of which the time for appealing runs, must contain further information, and must state specifically what the proprietor is called upon to do. This does not imply that the notice requires to enter into minute specification, for this is not necessary to apprise the proprietor of what he is interested to know, where the matter in hand is the construction of a carriageway or the making up of a footpath.

I am clearly of opinion that this notice is bad, and that the Court should sustain the appeal.

LORD M'LAREN.—I am of the same opinion on both points. In the first place, I think that the statute can only be construed to include all the properties into which a tenement is divided. It would be most inconvenient were a proprietor's duty to depend upon a matter of convenience, whether the proprietor of a flat had also a *pro indiviso* interest in the basement or not. The obligation imposed by the statute applies to all who have a substantial heritable interest in any stratum of a building situated in a street and not separated from it by any other intervening property. Secondly, it is necessary if any appeal can be brought, that the notice must specify generally the kind of pavement which the Magistrates desire. There may be individual circumstances which

make it very important for the ratepayer to decide which course to pursue. No. 35.
 Very often a builder or contractor in house property would prefer to do the Nov. 24, 1891.
 work himself, and he must know how the Magistrates wish it to be done. It Campbell v.
 would be most inconvenient if all the proprietors in a long street were to come Magistrates of
 and wrangle with the City Surveyor as to the way in which the street should Edinburgh.
 be paved. They would be far more likely to agree to a proposition sent them
 in the notice by the Magistrates. I am of opinion therefore that the notice is
 insufficient, because it does not specify the kind of pavement which the Magis-
 trates require.

LORD KINNEAR.—I agree upon both points, and have nothing to add.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—"Sustain the appeal:
 Find that the notices, dated 21st October 1891, are not sufficiently
 specific in their terms, and that the appellant is not bound to
 carry into effect the work under said notices, and decern: Find
 the appellant entitled to expenses," &c.

ROBERT STEWART, S.S.C.—WM. WHITE-MILLAR, S.S.C.—Agents.

JOHN RENWICK, Complainer (Respondent).—*R. V. Campbell.*
 STAMFORD, SPALDING, AND BOSTON BANKING COMPANY, LIMITED,
 Respondents (Reclaimers).—*Lees—R. L. Orr.*

No. 36.

Bill—Suspension of charge—Caution.—Circumstances in which (*rev. judgment*
 of Lord Low, Ordinary) the Court *refused* to allow suspension of a charge upon
 a bill without caution.

Nov. 24, 1891.
 Renwick v.
 Stamford,
 Spalding,
 and Boston
 Banking Co.,
 Limited.

On 5th October 1891, John Renwick, builder, Glasgow, was charged
 at the instance of the Stamford, Spalding, and Boston Banking Company,
 Limited, to make payment, as acceptor, of a bill for £248, 18s. drawn by
 Robert Bertram & Company, of which the Banking Company were the
 holders. The bill, which was dated 2d April 1891, became due on 5th
 July 1891.

Bill-Chamber.
 1st Division.
 Lord Low.

Renwick brought a suspension of the charge in which he averred that,
 requiring some accommodation in his business, he had been "induced by
 a person named Charles Engelhard, of whom he had accidentally heard,
 to entrust him with the four acceptances after mentioned. In order that
 the said Charles Engelhard might get these acceptances discounted and
 remit to the complainer the proceeds, the said Charles Engelhard wrote
 to the complainer with the proposal on 2d April last, conform to letter
 produced. The inducements held out by the said Charles Engelhard were
 false and fraudulent. They were part of a scheme and of a system of
 fraud concocted and carried on by him and others, whereby the com-
 plainer's acceptances were to be obtained on the assurance and agreement
 that they would be discounted at certain fixed charges, and the proceeds
 remitted in due course, and that they would not be issued or parted with
 at all unless upon such discount and remittance, the real intent being not
 to discount nor to remit as aforesaid, but to use the acceptances as a means
 of extorting money from the complainer without any value received by
 him." (Stat. 2) "Under the influence of this fraud, the complainer on
 7th April last sent to the said Charles Engelhard four three months'
 acceptances, drawn up by Engelhard blank on the drawer's name, viz.:—
 . . . " one of these being the bill now in question. (Stat. 3) "Engel-

No. 36. hard never sent to the complainer any remittance, nor any money or other valuable consideration whatever for these acceptances."

Nov. 24, 1891.
Renwick v.
Stamford,
Spalding,
and Boston
Banking Co.,
Limited.

The complainer further averred that after repeated letters to Engelhard, who had in the meantime got the bills drawn by Messrs Robert Bertram, he, on 2d May 1891, obtained an interim injunction from the English Courts against Engelhard and Bertram & Company, parting with or negotiating the bills. This injunction was afterwards repeated.*

The complainer further averred;—(Stat. 5) "On 7th May last Engelhard still had all the four bills in his possession, and they had not, by that date, been passed to any third party, although they were by that time said to have been signed by the nominal drawers. Engelhard on the said date, in pursuance of his said fraudulent scheme for extorting money, then offered to give up all the four bills to the complainer on payment of £25. The complainer's solicitors replied, on 8th May last, refusing to make any payment, and intimating the further proceedings in the injunction. Despite these proceedings, Engelhard still attempted to pass the bills to third parties, in pursuance of his fraudulent scheme, Ultimately the complainer got back three of the said bills, and the fourth, being fraudulently retained, is now the subject of the present charge. It was indorsed and was received by the indorsees after notice of the pending Chancery proceedings, and with intent to evade the said injunctions and orders of Court." (Stat. 6) "On 7th July last the bill now in question, and which was then overdue, the last day of grace thereon being 5th July last, was in the hands of a firm call Boehmer & Hertz, of London. They professed to be indorsees of another firm, called Feldman & Woolf, of London, who were pretended indorsees of the alleged drawers, Robert Bertram & Company, also of London. None of the said parties were known to the complainer. They are friends and associates of Engelhard. The complainer was by letter, on 7th July last, herewith produced, called on to pay the £248, 18s. now in question, to Boehmer & Hertz, as the last pretended indorsees, and his solicitor's reply is produced and is referred to."† (Stat. 7) "The chargers and respondents now assert themselves to be holders of the said bill. If they are holders in their own right, they

* The complainer produced copies of the injunctions by the High Court of Justice, Chancery Division, viz.:—(1) Interim orders, dated 2d and 8th May 1891, restraining Engelhard and Robert Bertram & Company from parting with or negotiating the said bills, and (2) an order dated 25th May ordaining the same persons to deposit the bills in Court.

† Ralph Raphael to "George Renwick," dated London, 7th July 1891.—"Sir,—I am instructed by Messrs Boehmer & Hertz to apply to you for payment of the sum of £248, 18s., the amount of a dishonoured bill of exchange dated the 2d April 1891, payable three months after date, drawn by Messrs Robert Bertram & Company upon and accepted by yourself, and indorsed by Messrs Feldman & Woolf to my clients Messrs Boehmer & Hertz, and I have to inform you that unless the same, together with 6s. 8d., my costs, are paid to me by return of post, I shall have no alternative but to take proceedings without further notice." The letter in reply, dated 8th July, by Messrs Taylor & Foulis, writers, Glasgow, the complainer's agents, was similar to that subsequently sent to the bank on the following day, quoted *infra*.

The bill was in the following terms:—"£248, 18s. 0d. London, April 2 1891. Three months after date pay to our order the sum of two hundred and forty-eight pounds and eighteen shillings value received.

"ROBT. BERTRAM & COMPANY.

"To Mr John Renwick, 16 Kew Gardens, Kelvinside, Glasgow.

"Accepted, payable at the Clydesdale Bank, London.

JOHN RENWICK.

"Endorsed Robt. Bertram & Company, Feldman & Woolf, O. F. Feldman, Boehmer & Hertz, Anglo-Saxon Condensed Milk Company, & E. Boehmer."

acquired the said bill without value after it was overdue, and with notice that it had been obtained, issued, and negotiated by fraud. They are believed not to be holders in their own right, but to be merely giving their name as collecting agents to and for Boehmer & Hertz. The complainer, on the chargers' first demand, in July last, for payment, denied liability, and indicated the fraud which had been perpetrated on him. No more was heard of the matter for three months, until the respondents, on 5th October last, gave the complainer the charge now sought to be suspended."

No. 36.

Nov. 24, 1891.

Renwick v.

Stamford,

Spalding,

* and Boston

Banking Co.,

Limited.

The respondents answered that the bill was endorsed by Boehmer & Hertz, and delivered to them by a partner of that firm in the ordinary course of business, on 25th May 1891, during its currency, and that they paid full value for it. They stated that they had no notice or knowledge of the Chancery injunctions or of any defect in the title of the prior holders.

The complainer pleaded, *inter alia*;—(5) At common law and under the 30th section of the Bills of Exchange Act, 1882, the bill having been effected by fraud, and having been the subject of legal proceedings before the chargers acquired the same, the burden of proving value given in good faith is upon the chargers, and the note should be passed without caution or consignment.

The Lord Ordinary (Low), on 31st October 1891, passed the note without caution.

The respondents reclaimed, and argued that the note ought not to be passed without caution.¹

LORD PRESIDENT.—On this record the complainer certainly makes strong and up to a certain point plausible averments as to the circumstances under which Engelhard came into possession of the bill in question, and his subsequent use of it. If the present question had arisen between the complainer and him, very different considerations would have come into play.

But we must concentrate our attention upon the position of the holders of the bill, who are the present reclaimers. The question is, whether the complainer is

* Taylor & Foulis, writers, Glasgow, to the Stamford, Spalding, and Boston Banking Company, Limited, dated 9th July 1891:—"Dear Sirs,—Mr John Renwick here has handed us your memorandum of yesterday, and we have to explain that the bill referred to is the subject of legal proceedings. No value was given for it, and no action either in law or equity can be taken upon it against our client. The holders of the bill had better be careful of the use they put it to, as any attempt to enforce payment will involve serious responsibility. We refer you to Messrs Morten, Cutler, & Company, 99 Newgate Street, London, E.C., our correspondents, who have charge of this business." The Banking Company to Messrs Morten, Cutler, & Company, dated Northampton, 10th July 1891:—"Dear Sirs,—The bill we hold accepted by John Renwick is for £248, 18s., dated 2d April 1891, at three months' date, due 5th July 1891. It is drawn by Robert Bertram & Company, and bears the following endorsements:—Robert Bertram & Company, Feldman & Woolf, Boehmer & Hertz, and Anglo-Saxon Condensed Milk Company, to whose credit it was placed on 25th May 1891. The bill was received by us from our clients in the ordinary course of business, and as we have given value for it, we shall expect it to be paid, and if we are unable to obtain payment we shall be compelled to place the matter in our solicitor's hand."

¹ *Reclaimers' Authorities.*—Simpson v. Brown, June 9, 1888, 15 R. 716; Mackay's Practice, ii. 192; Simpson v. Taylor, Nov. 4, 1874, 2 R. 75. *Respondents' Authority.*—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 29 and 30.

No. 36.

Nov. 24, 1891.
Renwick v.
Stamford,
Spalding,
and Boston
Banking Co.,
Limited.

to be allowed to go into a litigation with the reclaimers, a bank who came into possession of the bill in the ordinary course of business, without first finding caution. We are not entitled to assume anything against the bank beyond the admitted statements on record, or such other statements as can be instantly verified. There is nothing, I think, upon record to derogate from the position of the bank to be considered holders of this bill in due course. The 30th section of the Bills of Exchange Act does not in terms apply, because in the present case it is neither "admitted nor proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud." The bank makes no admission which at all touches that question, and I do not think that the section can be cited as in terms applicable to the present question, or as furnishing more than instructive suggestion upon the question of discretion which we have to decide at a stage antecedent to proof.

Upon the whole, I think we should be founding a dangerous precedent if we were to allow the complainer to proceed further in this litigation unless he first finds caution.

LORD M'LAREN.—It appears to me that there is one, and only one, circumstance which induces hesitation as to altering the interlocutor of the Lord Ordinary, and that is that the banking company have not clearly explained why they have commenced proceedings against the parties whose names are on the bill by an action against the acceptor, after he had explained to them the circumstances in which he came to put his name to the bill. One would like to hear that the Banking Company had endeavoured first to recover payment from those who are directly liable to them on the bill. But in considering the question of security, which depends entirely on presumption, or on the *prima facie* case made by the parties, we expect always the utmost candour from a complainer who asks to have diligence suspended without finding caution, and especially that he should confine himself to the real point of his case, and not make averments difficult of proof and improbable on the face of them. If the complainer in this case had come here averring merely that the bank was using diligence against him oppressively and asking that they should not be allowed to proceed, I should have been more inclined to accept the Lord Ordinary's view. But here the complainer in his averments seeks to identify the Banking Company with the fraud which he says was committed by other parties to the bill, making statements which are apparently not founded on information, and of which there is no corroboration. I think accordingly that we must follow the ordinary rule, and that the complainer can only be allowed to proceed on finding caution.

LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT accordingly recalled the Lord Ordinary's interlocutor and remitted to his Lordship to pass the note on caution or confirmation.

KEITH R. MAITLAND, W.S.—WINCHESTER & NICOLSON, S.S.C.—Agents.

CHARLES YULE, Complainer (Reclaimer).—*Comrie Thomson—Salvesen.*
 GEORGE RUSSELL ALEXANDER AND HIS CURATOR BONIS, Defenders
 (Respondents).—*M'Kechnie—Dean-Leslie.*

No. 37.

Nov. 25, 1891.
 Yule v. Alex-
 ander.

Judicial Factor—Curator bonis—Title to charge upon a warrant in a heritable bond.—The debtor in a heritable bond was taken bound to repay the loan to the lender, his executors and assignees whomsoever. The lender was an insane person to whom a curator bonis had been appointed by the Court. In a charge, proceeding upon the warrant in the bond, and bearing to be at the instance of the ward, the debtor was charged to make payment to the curator bonis.

In a suspension the debtor pleaded that the charge was wrongous as bearing to proceed at the instance of an incapax. The Court *repelled* the plea, holding that the curator was entitled to use the ward's name.

On 26th April 1888 Charles Yule borrowed, over certain heritable sub-^{1st Division.}
 jects belonging to him at Fauldhouse, Linlithgow, the sum of £500 from ^{Ld. Wellwood.}
 Mr Clayton Alexander, then curator bonis of Mr George Russell Alex-
 ander, his father. The obligation in the bond was to repay the sum bor-
 rowed "to the said George Russell Alexander (the ward), his executors and
 assignees whomsoever." The clause in the extract authorising execution
 was,— "And the said Lords grant warrant for all lawful execution hereon."

Mr M'Meeken was appointed by the Court of Session curator bonis to
 Mr Alexander, on Mr Clayton Alexander resigning office, in January
 1890. The debtor having failed to pay the interest on the bond, he was
 charged, on 10th October 1890, on a warrant proceeding upon an extract
 of the registered bond, "at the instance of George Russell Alexander,"
 to make payment of £400, the principal sum then due, with interest, "to
 James M'Meeken, accountant, Glasgow, curator bonis to the said George
 Russell Alexander."

Yule brought a suspension of the charge on various grounds, alleging,
inter alia, that "the said George Russell Alexander never authorised such
 proceedings. In fact, he is not in a condition to give instructions regarding
 his affairs, or to receive payment of said sum, or give a discharge therefor."

He pleaded, *inter alia*;—(2) The charge under suspension, bearing to
 proceed at the instance of and for payment to a person who is not capable
 of giving instructions or authority thereanent, is wrongous, and should be
 suspended, as craved.

The ward and his curator pleaded, *inter alia*;—The statements of the
 complainer are irrelevant.

The Lord Ordinary (Wellwood), on 15th January 1891, repelled the
 complainer's second plea,* and allowed proof upon other parts of the case.

* "OPINION.—The complainer's counsel addressed to me a subtle argument
 in support of the complainer's second plea in law, which is founded on the
 allegation that the charge sought to be suspended proceeds at the instance of the
 ward, George Russell Alexander, and not of the respondent, his curator bonis.
 I am not prepared to sustain that plea. The obligation in the bond, which was
 granted when the ward was under curatory, is to repay the sum borrowed 'to
 the said George Russell Alexander (the ward), his executors and assignees
 whomsoever.' Thus the creditor in the bond is the ward. The granter of the
 bond consents to registration for preservation and execution, and the registered
 deed is therefore equivalent to a decree in favour of the ward. The warrant
 authorising execution, which is inserted in terms of 40 and 41 Vict. c. 40,
 simply runs,— 'And the said Lords grant warrant for all lawful execution
 hereon.' Now, it is true that the charge bears to be given by virtue of the bond
 and warrant thereon, 'at the instance of George Russell Alexander'; but then
 it charges the debtor to make payment to the respondent, curator bonis to the
 said George Russell Alexander. Now, it may be that it would have been more

No. 37.

Nov. 25, 1891.
Yule v. Alexander.

After judgment upon the concluded proof the complainer reclaimed, and argued;—The charge here ought to have proceeded at the instance of the curator bonis, who alone had a title to give it.¹ On the face of the charge itself, the ward was entirely divested of his estate, and he could not therefore be *in titulo* to give a charge, even with the concurrence of his curator bonis.²

The respondent argued;—It had been held that special powers to discharge a bond were not required by a curator bonis.³ A curator bonis was in the position of a commissioner or factor, and was entitled to instruct that diligence be used in the name of his ward.

LORD PRESIDENT.—This question is of a technical quality, but is sufficiently important. It proceeds upon the terms of the charge, which is the subject of the present suspension. The charge bears to be at the instance of the ward, but the debtor is called upon to make payment to Mr M'Meeken, the charger's curator bonis. It is admitted that it would have been competent for the curator to have stated his own instance, and with that difference to have proceeded with the charge as at present, and it is contended that the use of the ward's name vitiates the charge.

The position of a curator bonis is not that he has transferred to him the estate of the ward, nor is the ward divested of that estate. The more accurate statement is that made by Mr Bell (Bell's Prin. sec. 2121), viz., that the ward's management of his estate is superseded in favour of the curator. Accordingly, it would undoubtedly be incompetent for a person who had a curator bonis to charge for payment to himself, as that would be an act of management. On the other hand, because the ward is not divested, it follows that he is the creditor, and the title is in him. Accordingly, the curator has a right to make use of the title in the ward and of his name in managing his affairs, and, among other things, in charging for his debts. In theory, therefore, and principle the objection now made does not appear to me to be a valid objection to the charge, which shews on its face that, demanding payment in the name of the ward, the curator requires it to be made to himself. The point is a somewhat fine one, but I think the charge is good.

LORD ADAM.—I agree with your Lordship that this point turns on the question whether or not the ward is divested of his estate by the appointment of the curator bonis. In this case the ward's estate has not been sequestrated. If that had been done I do not know, and it is not necessary to consider, what effect it would have had on the present question, but the estate is still vested in the ward. It appears to me that the curator is appointed to supersede the ward in the management of his estate, as it is put in the passage quoted by your Lordship from Mr Bell, and the charge here seems to

correct to have stated at the outset of the charge that it was given at the instance of the curator bonis, but I think it sufficiently appears from the charge that it was given with the concurrence of the curator bonis, who was to receive the money and discharge the debtor. The debt is a debt due to the ward, and the decree is a decree in favour of the ward, and the position of the curator bonis in recovering the debt is simply that of commissioner or factor enforcing his ward's rights. I therefore think that this very technical objection, although specious, is not well founded, and should be repelled."

¹ Scott, Feb. 21, 1856, 18 D. 624, 28 Scot. Jur. 274.

² Hislop v. M'Ritchie's Trustees, June 23, 1881, 8 R. (H. L.) 95.

³ Wills, June 20, 1879, 6 R. 1096.

me to proceed on the authority of the curator, though in form at the instance of the ward. That I think is quite clear on the face of the charge from the fact that it demands that payment shall be made to the curator, and I think it is sufficient for the disposal of the case.

No. 37.

Nov. 25, 1891.
Yule v. Alexander.

LORD M'LAREN.—I agree with your Lordship that the authority and right of a curator bonis is correctly defined by Mr Bell, when he says that a curator is appointed to supersede the ward in the management of his affairs. The appointment of a curator does not imply that the ward is divested of his estate, or deprived of his civil rights, except in so far as is inconsistent with the institorial power given to the curator. When therefore an act, such as giving a charge, is done by the ward with the consent of the curator, it does not appear to me that the recognition of a right in the ward to act with the consent of the curator is in any way inconsistent with the view that the curator is the sole administrator of the ward's estate. It must be kept in view that these appointments are made on *prima facie* evidence (usually medical certificates) pointing to permanent or temporary incapacity on the part of the ward. The proceedings are not of a contentious nature, because everything that is done is supposed to be for the benefit of the ward, and he is not to be put under disability except in so far as necessary for the protection of his estate. When it is desired to have a person declared incapable of doing any legal act, *e.g.*, making a testament, a different form of proceeding is necessary. Therefore, while I do not doubt that in most cases the more convenient course is for a curator bonis to act in his own name, I am not prepared to say that an act done by the ward with his consent is incompetent or invalid.

LORD KINNEAR.—I am of the same opinion. The point is highly technical; but in the execution of diligence technical rules must be strictly observed, and if this objection were well founded we should be bound to give effect to it however unsubstantial the point may be. But I agree with your Lordship, for the reasons that have been stated, that it is not well founded, because, although the ward is superseded in the management of his estate, the estate is not transferred to the curator, and the ward still remains vested in the rights of creditor in the bond. But since he is superseded in the management of his estate a charge in his own name for payment to himself would be bad, not upon any technical but on this very substantial ground, that the purpose and effect of the appointment of a curator is to disable the ward from determining for himself questions of management such as whether a bond should be called up or not. That became a question for the curator, irrespective of the ward's wishes, who was bound to act upon his own responsibility, and could derive no additional authority from the consent or concurrence of his ward. The ward, therefore, cannot charge for payment, because he has no power to grant a valid discharge. But I think that this charge discloses that it is not a charge at the instance of the ward at all, but at the instance of the curator using the ward's name, that the charge is at the ward's instance in form only, and that the curator is shewn to be the real charger by his demanding payment to be made to himself.

THE COURT adhered.

THOMAS M'NAUGHT, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 38.

Nov. 25, 1891.
Dalglish's
Trustees v.
Crum.

ROBERT LOCKHART DALGLISH AND OTHERS (Dalglish's Trustees),
First Parties.—*Kirkpatrick*.

MISS AGNES MARGARET CRUM AND CURATOR, Second Parties.—
D.-F. Balfour—Dundas.

ROBERT DUNDAS AND OTHERS (Dalglish's Residuary Legatees),
Third Parties.—*Lord-Adv. Pearson—Dickson*.

Succession—Revocation—Codicil—Re-execution of settlement.—A lady left (1) a trust-disposition and settlement, partly signed by her and also executed notarially of date 8th March; (2) a codicil executed notarially on 14th March; and (3) a trust-disposition and settlement executed on 9th April in the ordinary way, all in the year 1890. (1) and (3) were both universal settlements, and were practically identical. There was no express revocation of prior settlements in (3). The codicil bequeathed a legacy to a person to whom a legacy was bequeathed in the first trust-disposition, and again in identical terms in the second trust-disposition, the codicil bearing that its provision was "in addition to the provisions in my trust-disposition and settlement in favour of the" legatee.

In a special case brought to determine whether the codicil was or was not recalled by the second trust-disposition, it was stated that the first trust-disposition of the 8th of March was executed notarially, because from bodily weakness the testator had not been able to complete the execution of it in her own hand; that her man of business had explained to her that, if she recovered strength, "it might be better to have the deed re-executed and signed by herself"; that accordingly, she having recovered, it was so "re-extended and re-executed," this deed being the trust-disposition of 9th April; and that the notary who prepared and executed the codicil was not the same person who prepared the two trust-dispositions and took charge of their execution.

Held that the codicil was not recalled, the trust-disposition of 9th April being merely a re-attestation of the will of 8th March.

2D DIVISION.

MISS JANE DALGLISH, of Dunrowan, died on 27th April 1890, at the age of eighty-three. She left personal estate amounting to about £13,000.

A special case was presented to the Court to determine a question arising under her testamentary arrangements, the parties to it being (first) her testamentary trustees; (second) a niece to whom a legacy had been left; and (third) her residuary legatees.

The following statement was made by the parties as to the testamentary writings of Miss Dalglish, viz.:—"In March 1890, Mr John Roberts, S.S.C., Miss Dalglish's law-agent, prepared a trust-disposition and settlement for execution by her, in terms of instructions which Miss Dalglish had previously given to him. On the 8th of March, Mr Roberts waited on her to have the trust-disposition and settlement signed, and by her instructions appended thereto a writing leaving legacies to two servants in the shape of a codicil. The deed was then read over to Miss Dalglish, she approved thereof, and desired to sign the same. From bodily weakness, however, she was unable to subscribe the same satisfactorily, and after several ineffectual attempts, the deed was again read over to her in presence of two witnesses, and was, at her request, subscribed by Mr Roberts notarially on her behalf. Mr Roberts explained to Miss Dalglish that it might be better, if she got stronger, to have the deed re-executed and signed by herself with her own signature, and arranged that, in the event of her recovery, she would send for him for that purpose. Accordingly the deed was re-extended and re-executed, with the differences that the deed as re-extended contained in its body the legacies to servants contained in the writing appended to the deed as executed on the 8th March 1890, and that it was executed by the testatrix herself in common form. In all other respects the two deeds were in identical terms. On 9th April

1890, Mr Roberts was telegraphed for, and went to Helensburgh, and the re-extended deed was read over and subscribed by Miss Dalglish." No. 38.

It appeared from an examination of the deed of 8th March, which was produced in Court, that it had been signed by the testator herself on several of its pages, but in an illegible fashion, and from this circumstance Mr Roberts' doubts as to its validity, and his recommendation to have it re-executed, proceeded. Nov. 25, 1891.
Dalglish's
Trustees v.
Crum.

The following clause occurred in each of the said deeds of 8th March and 9th April. ". . . (Fourth) . . . To Agnes Margaret Crum the sum of £600 sterling."

The case proceeded to state,—“After 8th March 1890, Miss Dalglish expressed a strong desire to make an additional provision for Agnes Margaret Crum, and to regulate the distribution of her trinkets and jewellery. Accordingly, on 9th March 1890, being a Sunday, when Mr Roberts could not be sent for, Miss Dalglish had a codicil prepared and signed notarially for her by Mr Miller, writer in Glasgow, and notary-public, who resided in Helensburgh.” Helensburgh was not far from Miss Dalglish's house. It is not necessary to refer further to this codicil.

Finally it was stated,—“On the 14th March 1890, Miss Dalglish again sent for Mr Miller, and had a second codicil prepared and signed for her in like manner by him. Miss Dalglish thereby, ‘in addition to the provisions in my trust-disposition and settlement in favour of the said Agnes Margaret Crum,’ made a provision of £500 in her favour.”

The question put to the Court was,—“Is Agnes Margaret Crum entitled to the legacy or provision of £500 bequeathed to her by the codicil executed on 14th March 1890, in addition to the legacy of £600 bequeathed to her under the said trust-dispositions and settlements?”

Argued for the second parties;—The Court was entitled, besides knowing the terms of the deeds, to know in what circumstances they were executed.¹ Hence the Court might look at the statement in the special case to help it in determining the question raised as to the meaning of the deeds. Now, revocation was not to be implied; all the writings must be read together, so far as that was possible.² Again, there was authority in England, if not in Scotland, which would justify the Court in upholding both codicil and settlement. It had been held that where a testator had merely “republished” his settlement, codicils appended to the earlier will, so “republished,” would stand.³ It was true that in all these cases the two wills were on the same paper, but that was merely evidence that one was a re-execution of the other, which was here admitted in the case. The question for the Court must be,—what was the *intuitus* of the second deed? Was it revocation? Surely not. If the second deed was the real deed, there was no revocation of the first, it simply became inoperative in so far as the second repeated it, but its *annexum*, the codicil, would stand. On the other hand, if the re-execution did not affect the first deed, there was no more possibility of debate about the matter. An argument was also submitted on the question of the revocation of a special bequest by a subsequent general settlement.⁴

¹ Forlong v. Taylor's Executors, 1838, 3 Sh. and Macl., Lord Chancellor, at p. 210.

² Grant v. Stoddart, Feb. 27, 1849, 11 D. 860, 21 Scot. Jur. 241, see Lord Moncreiff's opinion, *rev.* H. of L., June 28, 1852, 1 Macq. 163, 24 Scot. Jur. 555; Sibbald's Trustees v. Greig, Jan. 13, 1871, 9 Macph. 399, 43 Scot. Jur. 150.

³ Wade v. Nazer, 1847, 1 Robertson's Eccl. Reps. 627; Green v. Tribe, 1878, 9 Ch. Div. 231; *In bonis* Rawlins, 1879, 48 L. J., P. and D. 64, per Lord Hannen.

⁴ Cases referred to.—Campbell, 1743, 1 Pat. App. 343; Walker's Executor v.

No. 38. Argued for the third parties;—It could not be said, whatever words were used in the case as stated, that the second deed was a mere re-execution of the first, for it incorporated what had been a codicil to the first, viz., the provisions in favour of servants. This was therefore *Sibbald's* case,¹ and the Court must determine which of the deeds should stand. The first deed was necessarily recalled by the second, for both were general settlements, and the codicils were intended to be swept away, for one of them, viz., that in favour of the servants, which it was desired to keep in force, was repeated in the second settlement. The facts here did not let in the principle of the English cases, which were all cases in which the re-execution was on the same paper, and obviously was a re-execution. That could not be said here.

Nov. 25, 1891.
Dalglish's
Trustees v.
Crum.

LORD JUSTICE-CLERK.—The question in this case arises in connection with the testamentary arrangements of the late Miss Jane Dalglish. On the 8th March 1890 Miss Dalglish endeavoured to execute a settlement, which had been prepared for her by her agent, with her own hand, but from bodily weakness she was unable to complete the signing of the deed, and the signatures were, as we see from looking at them, so unsatisfactory that her agent, Mr Roberts, thought it would not be satisfactory to leave the deed in that state, and accordingly he executed the deed notariaily.

The only peculiarity of this deed is this,—It appears that when Mr Roberts arrived with the deed prepared for signature, Miss Dalglish desired that something should be added to its provisions. What she desired was added in a codicil and executed in the same way as the main settlement. Mr Roberts also expressed the view that it would be desirable, if strength returned, that Miss Dalglish should re-execute the deed in the ordinary way. Miss Dalglish did recover strength sufficiently to execute the deed, and on 9th April she signed a settlement identical with that of 8th March, with this difference only, that there was inserted in the body of it what had been contained in the codicil of 8th March.

Between 8th March and 9th April Miss Dalglish desired to make some other alterations on her settlement. Mr Roberts not being able to come, she sent for Mr Miller, a writer who lived near her, and executed another codicil. This occurred on 9th March, and another codicil was executed on 14th March.

On 9th April, as I have said, Miss Dalglish was sufficiently recovered to execute the deed herself. Mr Roberts was telegraphed for, he came, and Miss Dalglish signed the deed. Mr Roberts knew nothing of the two codicils which had been executed in the meantime, and therefore, of course, took no notice of them in the settlement.

The question now is whether the will, which is dated 9th April, is to be held to cancel the codicil of 14th March.

It is necessary to the disposal of that question that we should consider carefully what was done. This special case puts it as a re-extending and re-execution of the deed of 8th March. That seems to make it practically the deed of 8th March, although of course it could only be the date when it actually was signed.

Being a mere re-execution or re-attestation, we are, I think, in a position to

Walker, June 19, 1878, 5 R. 965; Kenmore's Trustees, May 18, 1869, 7 Macph. 771, 41 Scot. Jur. 399; Thomson v. Lyell, Nov. 18, 1836, 15 S. 32.

¹ See *supra*, note 2.

hold that it did not cancel the codicils. The expression of the will of Miss Dalglish on the 8th March was repeated on the 9th April, and as a mere repetition it had no effect as a cancellation of the codicils. They are not affected by it.

No. 38.
Nov. 25, 1891.
Dalglish's
Trustees v.
Crum.

This question would be a very difficult one but for the authorities that have been cited to us. I was much impressed with the case of *Wade*. The testator in that case drew up a will with his own hand and signed it, and then added codicils. Subsequently he was advised that it was of importance that there should be certain words of style in the will. Accordingly he re-executed the will, at a date of course subsequent to the codicils. It was held that a mere re-execution or re-attestation of the will had not the effect of wiping out codicils subsequent to the original will. It is consistent with the meaning and intention of the testator that his testamentary arrangements should remain as these are expressed in the original will and the codicils.

I am therefore of opinion that the question must be answered in the affirmative.

LORD YOUNG.—I am of the same opinion, and I do not know that I can usefully add anything. What appeared to myself, and I think to all of us, to be the real difficulty in the case was whether we could, and how we should, reach a judicial conclusion as to the state of facts here; for none of us doubted that, if we were judicially satisfied that the deed of 9th April is simply a re-attestation of the deed of 8th March, it would not have any effect in recalling the intermediate codicil. Our difficulty lay in reaching the fact that the deed of 9th April was only a re-attestation or re-execution of the deed of 8th March.

Having overcome that difficulty—which I think we can quite safely and satisfactorily do on the language of the case stated—I have no hesitation in acting on the principle of the case of *Wade*. That principle was very distinctly expressed by Lord Hannen, in a subsequent case, when he was President of the Probate Court. The principle is that a mere re-attestation of a deed, though that re-attestation be subsequent to a codicil, will have no effect in recalling that codicil. Indeed it is an inaccurate use of language to speak of a re-attested will as a new will. The will remains the same, though evidenced by writing on a new piece of paper. The will of 9th April is the very will of 8th March. That being so, we should act unjustly if we imputed to the testator any intention of recalling the codicil. If she had no such intention, we should do manifest injustice if we held that it was recalled.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT answered the question in the affirmative.

IRONS, ROBERTS, & CO., For First and Third Parties—BELL & BANNERMAN, W.S.,
For Second Parties—Agents.

No. 39.

THE LORD ADVOCATE, Pursuer (Respondent).—*Lord-Adv. Pearson—H. Johnston—Dickson.*

Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

THE TRUSTEES OF THE CLYDE NAVIGATION, Defendants (Reclaimers).—*D.-F. Balfour—Asher—Ure.*

Crown—Property—Trust for public—Sea below low-water mark—Sea water intra fauces terræ—Three mile limit—Territorial waters.—The Crown has a right in the water and the *solum* of sea lochs *intra fauces terræ* below low-water mark such as will entitle it to prevent any person from using them for purposes other than the recognised public uses, and that without any allegation of injury, actual or prospective, to these public uses.

The rule applied to prevent the Clyde Navigation Trustees from depositing dredgings from the Clyde in Loch Long.

Opinions that the right of the Crown to the *solum* of sea lochs *intra fauces terre* is a proprietary right, and not a mere trust for public uses.

Opinions (per Lord Young and Lord Kyllachy) that the Crown has also a proprietary right in the *solum* of the sea from low-water mark as far as the three mile limit, upon the open coast.

2D DIVISION.
Ld. Kyllachy.

THE TRUSTEES OF THE CLYDE NAVIGATION, in pursuance of their statutory duties and powers, were in use to dredge large quantities of material from the bed of the Clyde to make and maintain the navigable channel of that river. The material so dredged consisted of earth, gravel, stones, mud, and sewage. For some years this was deposited on the banks of the river near where it was taken out, but for convenience and economy's sake, the dredgings having come to amount to several hundred thousand tons per annum, the trustees fell upon the plan of carrying the dredgings to Loch Long, a sea loch running twenty-four miles up from the Firth of Clyde, and nowhere more than two miles broad, and depositing them at a place where the water was about thirty-five fathoms deep.

This had gone on for many years, when in 1891, the Lord-Advocate, for the Crown, raised an action against the trustees for declarator "that the defenders are not entitled to deposit or place earth, gravel, stones, mud, soil, or other material, dug, cut, dredged, or otherwise removed from the banks or bed of the River Clyde, as defined by the said Clyde Navigation Consolidation Act, 1858, in any part of the narrow seas of our kingdom of Scotland, and in particular in Loch Long, being part thereof, and extending from Arrochar on the north to a straight line drawn from Strone Point, in the county of Argyll, on the west, to Baron's Point, in the county of Dumbarton, on the east." A conclusion for interdict, to correspond with this declarator, followed.

In his condescendence the Lord Advocate merely set out the constitution of the Clyde Trust, and the fact that they were disposing of their dredgings as stated. He averred as to his own title,—“The narrow seas of that part of Her Majesty's dominions known as the kingdom of Scotland, and the *solum* or bed thereof below low-water mark, belong to Her Majesty *jure coronæ*, subject to the public rights of navigation and fishing. The salt water loch or arm of the Firth of Clyde known as Loch Long is part of the said narrow seas.” He made no averment of damage or nuisance of any kind.

He pleaded;—(1) The narrow seas surrounding the kingdom of Scotland, and the bed and *solum* thereof, belonging to and being vested in the Crown, subject to the public rights of navigation and fishing, and Loch Long as defined in the summons being part of said narrow seas, the pursuer is entitled to decree as concluded for. (2) The defenders having no right, either by statute or at common law, to deposit their dredging in the narrow seas, and particularly in Loch Long, or on the bed or *solum*

thereof, their doing so without permission is illegal, and the pursuer is No. 39.
entitled to interdict as concluded for.

The defenders did not deny the facts alleged against them. They stated, however, that investigations had been made by the Admiralty and by skilled persons on behalf of the Government to ascertain what effect the defenders' operations had had upon the soundings of the loch or the purity of its waters, and that the result had been to shew that the soundings were unaltered and the purity of the water unaffected. They averred as matter of fact that the dredgings never reached the bottom. They further averred that the action was not taken in vindication of any public interest, and was inimical to the important public interests committed to the defenders; that the Crown were not really acting in the public interest, but to further the private interests of persons living on Loch Long, who had guaranteed the expenses of the Crown in this action.

Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

The Crown admitted that there was no obstruction to navigation, and admitted further the alleged guarantee.

The defenders pleaded;—(1) No title to sue. (4) In respect that the defenders' operations do not in any way interfere with the rights of the Crown, the defenders are entitled to absolvitor.*

The Lord Ordinary (Kyllachy), on 13th June 1891, pronounced this interlocutor:—"Finds and declares that the defenders are not entitled to deposit or place earth, gravel, stones, mud, soil, or other material dug, cut, dredged, or otherwise removed from the banks or bed of the River Clyde, as defined by the Clyde Navigation Consolidation Act, 1858, in Loch Long, being part of the narrow seas of the kingdom of Scotland, extending from Arrochar in the north to a straight line drawn from Strone Point, in the county of Argyll, in the west, to Baron's Point, in the county of Dumbarton, on the east, and decerns: Reserves meantime the question of interdict, and continues the cause," &c.*

* "OPINION.— . . . The action takes the form of a declarator and interdict at the instance of the Lord Advocate as representing the department, and the decree asked extends not merely to Loch Long but generally to what are termed 'the narrow seas of the kingdom of Scotland.' There is not, however, any allegation of any deposit elsewhere than in Loch Long; and I am not prepared, and indeed have not been asked, to pronounce a judgment applicable to other places. If I were, I should require some further definition of the expression 'the narrow seas.' It is an expression which, in the literature of this subject, is used in different senses. It is sometimes used to denote the sea within cannon-shot of the shore, together with the estuaries, bays, &c., within the *fauces terre*—*The Queen v. Keyn*, L. R., 2 Exch. Div. 109-110, 119-174, *et passim*. But it is also used in another and wider sense, viz., as comprising the whole seas and channels around Great Britain, and between Great Britain and other countries on the continent of Europe.

"I propose therefore to deal only with the case actually before me, viz., the alleged invasion by the defenders of the Crown's alleged proprietary rights in the land-locked loch, creek, or bay known as Loch Long. Upon that question I have come to the conclusion—and I am bound to say, without difficulty—that the Crown is entitled to my judgment.

"It is quite true, as the defenders have anxiously urged, that the action is based entirely upon the proprietary right of the Crown, or, if the expression is preferred, of the State. There is no averment of injury, actual or anticipated, either to fishing or navigation, nor is there any averment of nuisance or of injury to the foreshore. Whatever may be the fact as to those matters, and whatever may be the motives of the Crown in asserting its alleged rights, the action is based on trespass, and on trespass alone.

"On the other hand, however, it has to be noted that the defenders rest ex-

No. 39.

Nov. 25, 1891.

Lord Advocate v. Clyde Navigation Trustees.

The defenders reclaimed, and argued ;—The Crown's right must be put as high as a proprietary right, for there was no averment of any interfer-

clusively on the alleged absence of any title on the part of the Crown to interfere with their operations. They do not assert that they themselves have under their statutes or by municipal law any title to turn this inland loch into what is known in Scotland as a 'free toom.' Their statutory powers do not extend below Port-Glasgow, nor does our municipal law recognise the right to deposit rubbish as among the rights which the Queen's subjects possess in the seas and navigable rivers within the realm. The only such public rights known to the law are navigation and fishing. The defenders' case therefore is and must be this—not that they are exercising any right which is a burden on the Crown's right, and which the Crown, as trustees for its subjects, is bound to recognise, but that the Crown's right, not only in the seas around the coast, but also in the estuaries, bays, and sea lochs within the territory, is confined to a mere protectorate for the purposes of fishing and navigation, so that, except where the interest of fishing and navigation are concerned the Crown has no higher or better title to the water and bed of this inland loch than the defenders themselves. In short, the defenders' case is that—apart from fishing and navigation—Loch Long is just as free as the centre of the Atlantic, and that therefore not only all British subjects, but also all foreigners, may make such use as they please of its water and of its *solum*, provided only they do no injury, or no injury which can be proved, to the interests of fishing and navigation.

"I am bound to say that, so far as I can discover, this proposition is entirely novel, and is altogether opposed to every authority on the subject. It is true that there has been some controversy—turning, however, largely upon words—as to the exact nature of the Crown's right in what I may call the external sea, and particularly that portion of it which international law recognises as territorial and within the realm. But there has never, so far as I know, been any suggestion by any writer or by any Judge that inland lochs, bays, or estuaries within the *fauces terre*, are in any different position from navigable rivers. Nor has it ever, so far as I know, been doubted that, subject to such rights of navigation and fishing as the municipal law recognises, the *solum* of such lochs, bays, and estuaries belongs to the Crown. There may have been questions as to the Crown's right to exclude foreigners from the external sea within three miles of the shore, as to the jurisdiction of the Queen's Courts over foreigners within the three mile limit, and generally as to the nature of the Crown's right to the sea and the bed of the sea within that limit. But the most extreme advocates of public or rather international rights have always, I think, distinguished between the external sea and land-locked waters within the *fauces terre*. In the latter it has, so far as I know, been always recognised that the Crown has not merely a territorial but a proprietary right,—a right differing from the Crown's right to the land of the kingdom only in this, that being burdened with certain public uses, viz., navigation and fishing, the right of property is to a large extent *extra commercium*, or, in other words, within the *regalia majora*—Kent's Com. i. pp. 27-30 (edition of 1884); Wheaton's International Law, c. 4, sec. 10, pp. 188-190; Hale, *De Jure Maris* (as reprinted in Moore on the 'Sea and Seashore'), pp. 353, 377, 381, 384, 399, 401.

"I do not think that all this could be better illustrated than by a perusal of the judgments of the English Judges in the recent case of the '*Franconia*.'—*The Queen v. Keyn*, *supra*. The question there was as to the criminal jurisdiction of the English Courts over foreigners sailing in foreign ships within three miles of the English coast; and although the decision went ultimately upon a special ground, the question was largely canvassed whether, within the three mile limit the right of the Crown was proprietary, or was a mere protectorate for the purposes of fishing and navigation. I shall have to refer presently to some of the opinions which were there expressed, but in the meantime the important fact is that even those Judges who held views opposed to the Crown's claim, drew a careful distinction between the external sea to which the question applied, and estuaries, bays, and inland waters, as to which it was common ground that they

ence with navigation, fishing, or any other public use, nor was it said that the defenders were creating a nuisance. Now, the Crown had no proprie-

No. 39.

formed part of the counties into which they ran, and were within the jurisdiction of the Courts of common law. I may refer on this subject specially to the judgments of Sir Robert Phillimore and Chief-Justice Cockburn—*The Queen v. Trustees*.
Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

Keyn, L. R. Exch. Div. ii, pp. 71 and 162.

"I confess, therefore, that it seems to me that the particular case with which I have to deal is entirely outside the sphere of the controversy to which the defenders appeal. In other words, I can find no authority for the defenders' argument; and, apart from authority, I should think it tolerably clear, in point of principle, that a sea loch, or land-locked bay, running up from the Firth of Clyde into the centre of Argyllshire was, for all practical purposes, part of that county, subject to the jurisdiction of its Sheriff, and differing from the fresh-water lochs within it only as being navigable, and so subject to the public uses of navigation and fishing.

"It follows that the Crown are entitled to my judgment on the only question which is properly before me; but as the larger question, that, viz., as to the nature of the Crown's right within what has been called the 'narrow seas,' has been made the subject of argument, it may perhaps be right that I should indicate the opinion which I have formed on that subject.

"(1) I hold it to be now acknowledged as matter of international law that the territory of Great Britain does not extend to the narrow seas surrounding the kingdom in the older and wider sense of that expression. That is to say, the ancient claims of the kings of England to the whole seas and channels between England and other countries on the Continent cannot now be maintained. This I do not understand to be in controversy.

"(2) I hold it to be still an open question whether the territory of the kingdom extends, *e.g.*, to those seas and channels along the coast which are outside the *fauces terræ*, and more than three miles from the shore, but which are situated between the mainland and islands forming part of the kingdom, such as *e.g.* the island of Arran and the Hebrides. This question may possibly come to be material between the present parties in the event of the defenders seeking another place of deposit; but in the meantime it is hardly a question of practical interest.

"(3) The more practical question, and that on which alone I heard argument, was with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, viz., the strip or area of sea within cannon shot, or three miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing?

"I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is therefore to a large extent *extra commercium*; but none the less is it, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property.

"Such I consider is the result of all the best authorities—Scotch, English, and foreign.

"It is the doctrine of Craig, Stair, Erskine, and Bell—(Craig, i. 13, p. 140; Stair, ii. 1, 2; ii. 1, 5; Ersk. ii. 1, 6; ii. 6, 13; Bell, 639). It is the doctrine of Seldon and Hale, of Grotius and Vattel—(Grotius, ii. 2, 13; Vattel, i. 23, Puffendorf, iv. 2, 6; see also authorities cited by Lindley, J., L. R. 2 Exch. Div. p. 90-91; Hale, *De Jure Maris*, 358, 367 (Moore); Hall's Essay, 667, 671 (Moore);—and it has been affirmed on many occasions by high judicial authorities both in Scotland and England. It has also received practical effect in various judgments with respect, *inter alia*, to minerals under the sea, mussel-beds and oyster-beds, *maritima incrementa*, and flotsam and jetsam—(*Smith v. Officers of State*, 8 D.

No. 39.

Nov. 25, 1891.
Lord Advocate v. Clyde
Navigation
Trustees.

tary right. [LORD RUTHERFURD CLARK.—Is the *solum* of Loch Long part of the United Kingdom?—It was. [LORD RUTHERFURD CLARK.—Then, according to your argument, there is a part of the United Kingdom not given out to anyone which does not belong to the Crown?—Yes, the reason being that its physical conditions did not allow a right of property to exist. There was no such distinction as the Lord Ordinary thought there was between sea-water *intra fauces terræ*, and on the open sea-coast. Nor could there be, for there was in both cases alike an impossibility of continuous *dominium* or possession. Rights of jurisdiction might be much larger on land-locked seas than on the open coast, but that again was based on fact. You could shut up an intruder in such a loch, or you could prevent him entering. The narrow seas were as

722; *Gammell v. Lord Advocate*, 3 Macq. 419; *Duchess of Sutherland v. Watson*, 6 Macph. 199; *Gann v. Whitstable Fishers*, 11 C. B., N. S., 337, 13 C. B., N. S., 353, 11 H. L. 192; *The Queen v. Duke of Cornwall*, see L. R., 2 Exch. Div. 156; 21 and 22 Vict. c. 109).

“Altogether, it is, I think, too late now to dispute a proposition so long recognised and so well established, and in saying so I hope I am not treating with disrespect certain *dicta* of eminent Judges to which the defenders referred. For I think it will be found that, for the purposes of the present question, the distinctions which these *dicta* involve are hardly material. It may be, for example, that the Crown’s right in the sea within the three mile limit is not merely burdened with certain public uses, but that altogether it is a right which is properly described as a trust for the British public. It may therefore be not merely to certain effects, but altogether, *extra commercium*, and so not properly to be described as ‘patrimonial.’ But whether held in trust or not, it is none the less, so far as I can see, a proprietary right—that is to say, it is a right of property, and not a mere protectorate for the limited purpose of fishing and navigation. And if the right is a right of property either in the Crown or in the State, of which the Crown is the Executive, I do not think that any of the learned Judges referred to will be found to dispute that it includes a right to prevent acts of trespass like those of the defenders—acts which, as I have said, are not in pursuance of any private or public right, and of which the only justification alleged is that the Crown is not prepared to take the burden of proving that they are injurious.

“I do not think it necessary to do more than notice the defenders’ averment, introduced by way of amendment at the close of the discussion, to the effect that ‘the defenders have not deposited any material on the *solum* of Loch Long. The dredgings which are discharged from their barges do not, in fact, reach the bottom of the loch.’ I am, I suppose, bound to assume that this statement is made seriously, and that the defenders are serious in their demand to be allowed a proof of it. If, therefore, I thought it relevant I should have felt bound to have allowed such proof; but I do not think it relevant. For, assuming that in some unexplained manner the law of gravitation is suspended or counteracted in this part of the Firth of Clyde, I do not for my part see that it makes any difference whether the defenders’ deposits reach the bottom of Loch Long or are carried out to the Firth of Clyde, or are carried out to sea. The Crown, if proprietor of the *solum*, must also in my opinion be proprietor of the water above it; and, at all events, must have a sufficient proprietary interest in the water to have a good title to prevent acts of trespass like those in question. It certainly does not appear to me that the Crown is bound, in a question with persons who have no title of any kind, to enter into a proof as to whether the unauthorised deposits in question appreciably or injuriously affect the *solum*. It must be assumed that the Crown advisers have good reasons for their interference; and they are not, in my opinion, bound to discuss those reasons in a Court of law.

“I shall therefore grant the declarator concluded for, except with respect to the narrow seas, but I shall reserve in the meantime the question of interdict.”

common as the high seas as regards their uses, for the one was as inexhaustible as the other. In truth, no distinction could be taken between the open coast and such a loch as regarded property. Property in the *solum* was not in the least necessary for the full enjoyment of the rights for which Government were, by tacit international agreement, allowed to exercise their protectorate.¹ Look at the measure of the right as regarded extent. It was measured by a cannon shot, an excellent way of measuring jurisdiction, but not appropriate to property. Again, unless the line beyond which there was no property were fixed at low-water mark, where was it to be drawn? Why at three miles? But unless some natural limit was taken, and good sense could recognise none but the shore, very awkward international complications would certainly arise. Now, as regarded authority, the "*Franconia*" case decided nothing as to property, for the point there was jurisdiction, and there were *dicta* on both sides. Stair² did, no doubt, say that the ocean in the narrow seas "may become proper," but that was on the view that it might be appropriated by "bounds and meaths," which, it was submitted, was impossible. The passages quoted by the Lord Ordinary from Erskine and Bell did not affirm property, but only a trust for certain public uses, a trust which the Crown did not say was infringed by the defenders. So, too, the cases cited by the Lord Ordinary did not affirm anything more than rights of fishing³ and free navigation.⁴ Any further doctrine was *obiter* merely. The doctrine of the Crown's right being a mere trust was supported by *obiter dicta* quite as weighty.⁵ The point was not decided in *Officers of State v. Smith*.⁶

Argued for the pursuer;—The Lord Ordinary's judgment was sound, and was borne out by the cases to which he had referred. The same controversy between a protectorate on the one hand and property on the other had been raised as to the foreshore, but it had been shewn there,—and the same reasoning would apply here,—that it was fallacious to attempt to separate a trust right entirely from a right of property. The right in the one case as in the other was a right of property *extra commercium* to a certain extent, *i.e.*, although it might be alienated, the trust for the public would still be imposed on it.⁷ The "*Franconia*" case was no doubt a case of jurisdiction, but the opinion of Cockburn, C. J., pointed out very clearly the distinction between the high seas and estuaries or lochs, a distinction which was all important here. To the other authorities there fell to be added the weight of Lord Stowell's opinion in the case of the *Twee Gebroeders*,⁸ in which his Lordship held that portions of the sea might be prescribed for.

At advising,—

LORD JUSTICE-CLERK.—The pursuer in this case is the Sovereign acting

No. 39.

Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

¹ Bell's Prins., sec. 640.

² Stair, ii. 1, 2; ii. 1, 5.

³ Commissioners of Woods and Forests v. Gammell, March 28, 1859, 21 D. 4, 31 Scot. Jur. 431, 3 Macq. 419; Duchess of Sutherland v. Watson, Jan. 10, 1868, 6 Macph. 199, 40 Scot. Jur. 119.

⁴ Agnew v. Lord Advocate, 11 Macph. 309, 45 Scot. Jur. 214; Gann v. Whistable Fishers, as cited by Lord Ordinary.

⁵ *E.g.*, per Lord Fullerton in Lord Advocate v. Clyde Trustees, Jan. 23, 1849, 11 D. 391, 21 Scot. Jur. 110, in H. L., March 12, 1852, 1 Macq. 46, 24 Scot. Jur. 379, Paters. Ap. 6.

⁶ Officers of State v. Smith, March 11, 1846, 8 D. 711, 18 Scot. Jur. 364, in H. L. July 13, 1849, 6 Bell, 487, 21 Scot. Jur. 534.

⁷ Agnew, as cited; Smith's case, per Lord Wensleydale in the House of Lords; Duchess of Sutherland, *ut cit.*—see Lord Neaves, 6 Macph. 213.

⁸ 1801, 3 Rob.'s Adm. Reps., p. 336.

No. 39.
Nov. 25, 1891.
Lord Advocate v. Clyde
Navigation
Trustees.

through the properly appointed Department, and the purpose of the action is to interdict the defenders, who are the statutory commissioners in charge of the Clyde Navigation, from throwing large quantities of solid matter into the waters of Loch Long. The basis of the case for the Crown is that the place at which it is alleged that these masses of matter are thrown into the sea forms part of the realm, and that the Department, which is authorised to act for the Crown in matters relating to such part of the realm, is entitled to prevent any person, who has not received lawful authority to do so, from depositing anything upon the *solum*. The contention of the Crown is that it is not necessary to aver that any damage is being done by the acts of the defenders, but that the Crown, holding Loch Long as part of the realm, has a title to prevent any interference with it, if no legal right can be shewn to justify such interference and to exclude the original right in the Crown to the loch.

The defenders, on the other hand, state no defence in the nature of a claim of right to do what they are doing, based upon any grant, express or implied, in their favour obtained from the Crown, or conferred by parliamentary authority, such as will supply them with an answer, as on the ground of right conferred, to the contention of the Crown. Their only plea upon the merits of the case is that, as their operations do not in any way interfere with the rights of the Crown, they are entitled to absolvitor. Claiming no special right in themselves, their defence is that the Crown has no right which they are infringing.

It would appear from the Lord Ordinary's opinion that there was an elaborate discussion before him upon the rights of the realm to the *solum* of the sea below low-water mark upon the open sea-coast, and there was a considerable amount of argument and a citation of numerous authorities upon the same subject in the debate before us.

In the view I take of this case, it is quite unnecessary for us to consider any such matter as the Crown's right to the *solum* of the sea within the three mile limit from the coast, where that coast faces the open sea. The considerations of law applicable to the three mile limit could only be of consequence in this case if the *solum* of Loch Long could be held to be in the same position as the *solum* of the sea below low-water mark. I understand that the defenders maintain that there is no difference. Their argument is that, as the sea comes up Loch Long, the *solum* of the loch is in exactly the same position as regards the rights of the Sovereign to the property as the *solum* below the sea on the coast within the three mile limit. They maintain that, if they can shew that the realm has no right of property within that three mile limit, then it can have no right of property in the *solum* of Loch Long.

Whether the Crown has or has not a right of property *ex adverso* of the coast does not, in my opinion, affect the question which is before us. It is, of course, clear that, if the *solum* on the coast is the property of the Crown, *fortiori* the *solum* of a narrow land-locked arm of the sea, not two miles broad at any point, must be in the Crown also. But the converse would by no means necessarily hold, that, if the *solum* on the coast is not in the Crown, then the *solum* of a narrow estuary is not part of the realm, but is a "no-man's land" like the bed of the Atlantic Ocean. On the contrary, it appears to me that the considerations which might apply to the *solum* opposite to the sea-coast would not apply to the other at all. Let it be assumed to be settled law that there is no right of property below low-water mark on the sea-coast—an assumption

which, in my opinion, is not sound—the question whether the *solum* of a strip of land-locked water such as Loch Long belonged to the realm would by no means be closed by such settlement of the law in relation to the *solum* on the sea-coast. I therefore prefer to consider the case quite apart from questions regarding the *solum* within the three mile limit. If it be plain that Loch Long is part of the realm, without its being necessary to rely upon any law relating to the three mile limit, then all considerations in regard to the three mile limit are unnecessary to the case.

No. 39.

Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

The first question is this—is Loch Long part of the realm? This is a question the answer to which can be given without any proof. There is no more need for proof on that question than there would be in a case relating to the City of Edinburgh to establish that that city is part of the British realm. The geographical position is known. It is a narrow estuary running inland from the Firth of Clyde, enclosed by Scottish land except at its narrow outlet to the Firth of Clyde.

That such a place should not belong to the country which practically encloses it and shuts it off from the ocean except at its outlet, but should be as free to all the world to do anything with it as a part of the open sea, is, in my opinion, not only not in accordance with law, but contrary to all accepted ideas as to the occupation and ownership of a country by the chief power of the nation which actually possesses it. I hold it to be quite settled law that such an estuary as Loch Long is as much a part of the property of the realm as the counties within the embrace of which it may lie, that the chief Courts of the country have the same jurisdiction over it as they have over the immediately neighbouring locality, and that no other Courts than those of this country have any jurisdiction over it whatever. In short, I hold it to be part and parcel of the country. The common consent of nations recognises the sole right of each nation in its own estuaries, such as that of Loch Long, to the exclusion of all intrusion on the part of other nations, unless permitted by treaty following on conquest or by pacific international agreement for common benefit.

In opposition to this view it is maintained for the defenders that, whatever may be the territorial right of the State in such an estuary, it is not a proprietary right, and that therefore the Crown cannot exercise the same right to prevent trespass which can be exercised by an ordinary proprietor of a part of the *solum* of the country. Their case is that the right of the State is one of mere protectorate, for the purposes of navigation, fishing, and the like, but that in all other respects the State has no right to interfere with anything done in Loch Long, whether by a British subject, or by a Frenchman, German, American, or any other foreigner, unless in the execution of its duty of protectorate of public uses such as I have stated.

I can find no authority for any such proposition, which is certainly startling as well as novel. It appears to amount to this, that the Crown is limited, as regards localities such as Loch Long, to a duty of police, while all the world can use the loch at pleasure as long as it cannot be shewn that damage is actually being done to those interests for which the protectorate exists. The defenders practically maintain that, unless the Crown in its police capacity undertakes to prove that what is being done is in fact injurious to the uses to which the community has right, independent of property, it cannot succeed in preventing what would be a palpable act of trespass if done on any property above high-water mark, and this even although the person or body committing

No. 39.

Nov. 25, 1891.
 Lord Advocate v. Clyde
 Navigation
 Trustees.

the act have no right whatever greater than that possessed by any individual citizen, or even by a foreigner. It seems strange that, if such a view of the law be sound, it should not long ere this have been so established as to be found formulated in our authoritative law treatises and confirmed by decisions. But I can find no trace of any such law. On the contrary, whatever questions may be raised as regards the *solum* within the three mile limit, all the authorities concur in giving the proprietary right in estuaries to the Crown. It is true, of course, that the powers of proprietary right are modified by certain public uses which the community are entitled to enjoy, but these are restrictions solely in the interest of the whole public, and in no way impinge upon the rights of the Crown to deal with members of the public who go outside the public uses which are admitted to be a restriction on the full exercise of proprietary rights, and commit trespasses, which have no connection with these public uses, unless, indeed, it be to infringe them and to endanger them.

I hold on the authorities that the right of the Crown in Loch Long and its *solum* is a right of property, and that the Crown is entitled to stop any intruder from coming to Loch Long, and there throwing large quantities of solid matter into the loch. Having that right, I further hold that it is not a relevant defence on the part of those admittedly so casting solid matter into the loch to aver that they are doing no harm. They are doing that which they have no right by statutory or customary law or by contract to do, and I am unable to see how the Crown can be prevented from interdicting the trespass. This is on the view of property which I hold to be very clear, but I should hold the same as regards the Crown's right even if that right was one of property in trust only for the recognised public uses of such a place. Even in that view the Crown would, in this matter, be in no different position from that of many public bodies who hold property expressly for the public use, the conditions of their trust preventing the sale or alienation of the property, but who, nevertheless, are entitled to exercise all the rights of proprietors to prevent those having no title from interfering with it in any other way than in the reasonable exercise of such admitted public rights of use. It is certain that what the Clyde Trustees have been doing does not fall within any of the public uses, subject to which the Crown holds Loch Long, and I can see nothing to prevent the proper authority acting for the Crown from interfering to stop any persons from doing in Loch Long acts which they can shew no title to do, and which on any other property would amount to a trespass if done without title.

I am therefore very clearly of opinion that the title of the Crown to ask for declarator and interdict against these proceedings is beyond all question, and that, accordingly, the Court should adhere to the interlocutor of the Lord Ordinary, and, if it prove to be necessary, grant interdict against the defendants.

LORD YOUNG.—I greatly regret—we all regret—everybody must regret—that this question should have been raised, and I cannot help thinking that it might have been avoided. The Clyde Trustees have a public duty to perform, not only to the harbour of Glasgow, but through that to the whole community. They must, until some useful method is discovered for the employment of the dredgings which they take from the bed of the river, have some place to put them, or cease to take them out. It seems to be contemplated in the Clyde Statutes that they should place the dredgings on the banks, but it is quite intelligible that that plan is too expensive to be encountered if it can be avoided.

I cannot doubt that there is some place within measurable distance where these dredgings may be thrown out into the sea without detriment to the public interests. I cannot help thinking that on a conference between these two public authorities, the Clyde Trustees and the Crown, an arrangement might have been arrived at without raising any legal question. Unfortunately, however, the legal question is raised; the Clyde Trustees claim right to deposit their dredgings in Loch Long, the Crown asserting that they have no such right.

No. 39.

Nov. 25, 1891.
 Lord Advocate v. Clyde Navigation Trustees.

The question having arisen, we have to determine it, and it is, whether there is a legal title of property to Loch Long in the Crown. My opinion is, and, I confess, without doubt or hesitation, that Loch Long is part of the territory of Scotland. Any part of it that is not in Argyllshire is in Dumbartonshire. It is the property of the Crown, if it is part of the territory of Scotland, as it certainly is. The use of it, of course, is subject to such limitations as nature puts upon it. It can only be used as property so far as that is consistent with the fact that it is constantly covered with salt water to a great depth. But it is the property of the Crown *jure coronæ*. On that I have no doubt.

The Crown must use the property in the public interest. But that is not a matter for us. If the department of Government which is charged with the administration of the Crown's duties in this matter uses this property in a manner detrimental to the public interest, or fails to use it in the interest of the public, there is a remedy, but it is not to be found here. The Government must be called to account, and it can be most sharply and effectually called to account elsewhere. It is said that they are using their right in a way that is inimical to the public interests committed to the defenders, and it is said they have taken a guarantee from private individuals for their expenses. The Crown admit they have taken such a guarantee, and I shall only say I am surprised that, acting, as they say they are, in the public interest, they should have condescended to do so. But I am bound to assume, even although I thought the contrary to be the case, that the Crown is using this Crown property consistently with the public interest, and is forbidding all uses of it that are inconsistent with the public interest. I think it is the absolute legal right of the Crown authorities to prevent a use of the *solum* which is inconsistent with their view of the public interest.

That would be sufficient for the decision of the case. But we had much discussion and citation of authority on the question of the three mile limit. But that authority is pertinent only if the property there is in the same position as in Loch Long. Otherwise it is not. I have no objection to indicate my own view, it is only my individual view, that the Crown has a right of property within the three mile limit. What about the building of piers and jetties? Is it doubtful that piers so built are built on Scottish land, on ground vested in the Crown, and applicable to any purpose which it will serve? There are many such piers. I cannot distinguish between that part of the three mile limit on which these piers are built, the part adjacent to low-water mark, and that part which lies further out.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I think it unnecessary to express any opinion in this case on the question which was argued before us as to the extent and character of

No. 39. Nov. 25, 1891.
Lord Advocate v. Clyde Navigation Trustees.

the Crown's right to the *solum* underlying external seas within what is known as the three mile limit. That question does not and cannot arise in reference to the *solum* of Loch Long, which forms no part of the external seas surrounding the United Kingdom, but is an inland arm of the sea, or Firth of Clyde, entirely within the United Kingdom. Being within the territory of the United Kingdom, the *solum* of Loch Long must either be vested in the Crown or in a subject proprietor deriving right from the Crown. It is not suggested, however, that the *solum* of Loch Long is or has ever been vested in any subject of the Crown, and therefore it follows that it is still vested in the Crown.

To what extent and effect it is vested in the Crown is a different question. It was maintained for the defenders that the right of the Crown in the *solum* of such a loch (as in the foreshore, or the *solum* of a tidal navigable river) is not proprietary, but merely a right in trust for the public for certain public uses. On this question there is a considerable difference of opinion. For my own part, I agree with those who think that the right of the Crown is a proprietary right, burdened with rights in favour of the public, no doubt, but still a proprietary right.

But it is not necessary to maintain that view for the decision of the present case. Assume that the only right which the Crown has is a trust right for public benefit. The title of the Crown to the *solum* of Loch Long is the only title to that *solum* which exists, and in respect of that title is in a position to resist any attempt to invade the rights which the trust title confers. A trustee vested in lands for trust purposes has a good and sufficient title to prevent any stranger from squatting thereon, or from interfering in any way with the lands to which he has no title whatever.

Now, this appears to me to be the position of parties in the present case. The Crown has, and alone has, a title to the *solum* of Loch Long; the defenders have no title to it whatever. The defenders have, therefore, no right to use the *solum* of Loch Long, and the Crown has the right and title to prevent them using it if they try to do so.

The defenders, however, maintain that the Crown cannot interfere with the proceedings complained of, except it shews that these proceedings are injurious to the special public uses in trust for which the Crown holds. I think this argument cannot be sustained. It is the duty of a trustee to prevent any unwarranted invasion of the trust subjects, and he is, in my opinion, entitled to interdict any such invasion on the ground, admitted or proved, that he is the vested holder of the subjects and that the invader has no title to them whatever. He is under no necessity to state or to prove that the invasion of his right, threatened or actual, is or will be injurious.

I agree substantially with the views expressed by the Lord Ordinary, and I am of opinion that his interlocutor should be affirmed.

THE COURT adhered.

DONALD BEITH, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

MRS CAROLINE JANE WILLIAMSON OR IMRIE, Pursuer (Respondent).—

No. 40.

*Cosens.*JAMES WILLIAM IMRIE, Defender (Reclaimer).—*Younger.*Nov. 26, 1891.
Imrie v. Imrie.

Husband and Wife—Constitution of Marriage—Proof.—Where a man and woman had mutually exchanged written declarations acknowledging each other to be husband and wife, in a declarator of marriage by the woman against the man, which was founded upon the declarations, *held* that the pursuer was bound to prove the circumstances in which the writings had been exchanged and that they were consistent with the matrimonial intention expressed in the writings.

Circumstances in which it was held that the declarations had been exchanged with the intention of constituting marriage, and that the contract of marriage was thereby proved.

CAROLINE JANE WILLIAMSON OR IMRIE, residing at York, brought an ^{1st Division.} action against James William Imrie, residing in Glasgow, concluding, ^{Ld. Stormonth.} *inter alia*, for declarator that in May 1889 she and the defender were lawfully married to each other at Glasgow. ^{Darling.}

The pursuer averred;—(Cond. 2) "In October 1888 the pursuer went to Glasgow to pay a visit to the defender's parents at 17 Florence Place, Mrs Imrie, the defender's mother, being the pursuer's aunt. . . . An engagement to marry was soon afterwards entered into between them. On the strength of this engagement, and after many and ardent solicitations on the part of the defender, and renewed promises by him to marry her, the pursuer, in May 1889, consented to surrender her person to him, and carnal connection took place between them at the house in Florence Place. . . ." (Cond. 3) "Within a few days after the said promise and copula the defender proposed that the pursuer and he should formally acknowledge each other in writing to be husband and wife. Of this proposal the pursuer approved, and holograph documents in the following terms were exchanged between the parties, viz.:—'I acknowledge Caroline Jane Williamson as my lawful wife. (Sd.) JAMES WILLIAM IMRIE. *Witness*, Jessie Scott Stewart; *Witness*, Henry Murphy, 8th May 1889. I acknowledge James William Imrie as my lawful husband. (Sd.) CAROLINE JANE WILLIAMSON. *Witness*, Jessie Scott Stewart; *Witness*, Henry Murphy. . . .' On the faith of these declarations the pursuer allowed the defender to cohabit with her, and they acted towards each other as husband and wife."

In answer to cond. 2 the defender admitted that carnal intercourse had taken place between him and the pursuer during this visit, and explained,—“After this intercourse had continued for some time the defender promised to marry the pursuer when he had reached the age of twenty-five years, but this engagement was afterwards broken off by mutual consent as hereinafter mentioned.”

The defender's answer to cond. 3 was;—“(Ans. 3) Denied. Explained that on or about the date mentioned, the defender being ill of an attack of pleurisy, and it being doubtful whether he would recover, the pursuer proposed that the defender should sign a document which would, in the event of his death, enable her to claim an insurance which she informed him existed upon his life. The defender, being willing to assist her, did sign a document for that purpose, as did also the pursuer. There was no intention on the part of either of the parties that these documents should constitute a marriage between them, or have any effect during the lifetime of the parties, nor were they ever regarded or treated by the parties as having any such effect. The terms of the documents are not admitted. They were not holograph. They were not signed in the presence of witnesses. About the month of July following there was some disagreement between the parties, and the alleged acknowledgments were destroyed,

No. 40. the pursuer tearing up the document in her possession in the defender's presence. The parties also returned each other's letters. The pursuer declared to the defender that she wished him to understand she was to have nothing further to do with him, and released him from any promise of marriage he had ever made to her."

Nov. 26, 1891.
Imrie v. Imrie.

The pursuer pleaded ;—(2) Marriage between the pursuer and the defender having been duly constituted *per verba de presenti*, and by acknowledgment, declarator ought to be pronounced to that effect.

The following digest of the evidence is taken from the note to the interlocutor of the Lord Ordinary (Stormonth Darling) :—"The facts are that in October 1888 the pursuer, who is a first cousin of the defender, came from York to Glasgow on a visit to the defender's father and mother. The pursuer, who had been a hospital nurse in London, was then not less than twenty-five years of age, and probably as much as twenty-eight. The defender was in his twentieth year, in delicate health, and employed in his father's business as a tailor. Very soon a courtship sprang up between them, which resulted in a promise of marriage, and during the pursuer's visit, which lasted till the end of May 1889, they had repeated acts of connection. The first of these acts, according to the defender, took place in the month of December, and, according to the pursuer, on the 1st of May. The pursuer says that they became engaged on 25th November, and the defender says not till the middle of March. I do not think it is of much consequence to decide which of them is speaking the truth, for both admit that connection took place before the 8th of May, and both admit that the engagement to marry was qualified by the stipulation that the marriage was not to take place for several years. The importance of the 8th of May is that on that day they exchanged writings acknowledging each other to be husband and wife. These acknowledgments bore to be attested by two witnesses; but it appears from the proof that these persons were not witnesses in any proper sense of the term, for they neither saw the parties sign nor heard them make any acknowledgment either of their signatures or of the fact that they were husband and wife. The writings are not now in existence. The defender says that the pursuer tore up hers in the course of a quarrel which they had towards the end of July 1889, and that he destroyed his immediately afterwards. The pursuer, on the other hand, denies that she ever destroyed her document, and alleges that it was taken out of her box by some member of defender's family. But the defender admits the terms of the documents, and he explained the circumstances under which he prepared and got them signed.*

"About the end of May the pursuer left the house of the defender's father, and took employment as a nurse at Gartnavel Asylum. She remained either there or at similar work in the country till the end of September, when she went to visit a maiden aunt at Port-Bannatyne. Her pregnancy having then become apparent, and her intimacy with the defender having been discovered, she returned to Glasgow in November and was at once sent home by the defender's parents to her mother at York, where she was delivered of a child on 2d March 1890. From th

* The defender deponed,—“There was no intention at that time on my part that that should constitute a marriage. The whole thing was done on the 8th of May. When pursuer made the proposal that I should do something to keep the insurance money for her, I suggested that it might just be as well to get married before the registrar, and I was quite willing to do so. The pursuer, however, said that she would not hear of that on any consideration, and said that when she was to be married she would go to church. I kept one of the documents and the pursuer kept the other.”

time when the pursuer left the house of the defender's father, in May 1889, till she left Port-Bannatyne, in November of that year, a correspondence was kept up between her and the defender, in which he habitually addressed her in such terms as 'My own dear wife,' and subscribed himself as 'Your loving husband,' while she addressed him as 'My dear' or 'My darling husband,' and signed herself 'Your loving wife.'

No. 40.
Nov. 26, 1891.
Imrie v. Imrie.

"In the month of July he presented her with a wedding ring, which she sometimes wore, and on one occasion, if not oftener, she introduced him to a friend as her husband, and he did not in any way repudiate the description."

The Lord Ordinary on 11th July 1891 gave decree in terms of the conclusions of the summons.*

* "OPINION.—. . . It is firmly settled in the law of Scotland that marriage may be constituted by the deliberate interchange of consent *de presenti*, that the consent may be evidenced by written acknowledgments, and that these need not be either holograph or tested. It is also settled that parole evidence is competent to shew that the consent so interchanged, though in form present and deliberate, was not truly understood or intended by the parties to make marriage, and that if such evidence is forthcoming there is no marriage. But I take it that such evidence must shew an intention on both sides inconsistent with the natural meaning of the words used, and that a mere mental reservation on one side will not be sufficient—(see the opinion of Lord Justice-Clerk Inglis at p. 1045-6 in *Fleming v. Corbet*, 21 D. 1034). I also think that where an explanation is made by one of the parties and denied by the other of a purpose other than marriage as existing in the minds of both, it must be scanned very closely to see whether it is a rational explanation, and whether it is borne out by their conduct both before and after the granting of the documents.

"Now, the explanation made by the defender is that the pursuer suggested the granting of the documents in order to give her a claim, in the event of his death, to an insurance of £100 which was supposed to exist on his life, and that he agreed to become a party to the documents for that purpose and no other. In point of fact there was no insurance on his life except one for some £15 or £20 taken out by his parents when he was a child, and to which, I apprehend, he personally had no right. He does not even say that he wished the pursuer to have the rights of his widow, whatever these might be, but only that he thought the production of the documents, in the event of his death, might induce his parents to pay her a sum of money rather than have any disclosure.

"I cannot say that this explanation strikes me as probable or even rational.

"But I think it is displaced by the conduct of the defender himself. In the first place, he admits that, both before and after the documents were granted, he was willing to marry the pursuer before the registrar, and he says that he proposed this course to her and she declined. She denies that he made any such proposition, but the important thing is that he was prepared in his own mind to go through a ceremony of marriage, and if so, it is difficult to understand why, being situated as he was, he should not have been willing to accomplish the same object by an easier, more secret, and less formal method. Then, if his object was only what he now says it was, I cannot account for his constantly addressing her in letters as his wife, his permitting her to describe him to others as her husband, and his presenting her with a plain gold ring. All these circumstances seem to me consistent with the acknowledgments having meant what they professed to mean, and what she says they meant, and inconsistent with the meaning which he ascribes to them.

"Thus far I have considered the case as if the documents were still in existence. But it was strenuously and ably maintained by Mr Younger that the destruction of them left the pursuer entirely at the mercy of the defender, and that his admission of their terms could only be taken subject to the qualification that they were not intended to make marriage. I cannot assent to that proposition. The moment the defender admits their terms, I think the Court is bound to inquire, not only by his own evidence and his own writ, but by

No. 40. The defender reclaimed, and argued ;—The interchange of the documents might be a good foundation for the pursuer's case, but they were far from being sufficient to substantiate it. Previous cases and *dicta* came to this, that however explicit the terms of the documents were, the pursuer must prove by direct evidence that the intention of the parties when they exchanged the writings was to constitute a marriage.¹ At any-rate, she must prove that she was actually made to believe that marriage was intended, whether the defender had a mental reservation or not.² This *onus* the pursuer had failed to discharge, and accordingly the documents were worthless to constitute marriage.³

Nov. 26, 1891.
Imrie v. Imrie.

The respondent's argument sufficiently appears from the opinions of the Judges.⁴

LORD PRESIDENT.—The case has been argued to us on the assumption that the pursuer's averment in cond. 3 is well founded, to this extent at least, that on 8th May 1889 documents were interchanged between the pursuer and defender in the terms set out on record, these terms being completely explicit,—“I acknowledge Caroline Jane Williamson as my lawful wife.” “I acknowledge James William Imrie as my lawful husband.” I say the case was argued

other evidence as well, whether they were seriously meant. It is clear that if they were sufficient to signify consent *de presenti*, the marriage so constituted could not be undone by the mere destruction of the documents. The act of destroying them can only be important as throwing light on the intention with which they were granted. Even if they were destroyed, as the defender says they were, in the course of a sudden quarrel, it would not go far to shew that they were regarded by the parties as insignificant. It would rather seem to me to indicate the contrary. But I am by no means satisfied that the defender's statement on this head ought to be accepted. His candour in admitting the terms of the documents disposed me on the whole to believe him, and I am sorry to add that the pursuer's admission of the untruthfulness of some of the statements in her letters very seriously shakes her credibility. But it is remarkable that the correspondence about the time when the alleged destruction of the documents took place, while it contains evidence of the parties having had a quarrel, does not indicate any serious change in their relations, and in particular, the defender continues, after that, to call the pursuer his wife, exactly as he had been doing all along. On the whole, I think it is more probable that the destruction of the documents took place about the time of the rupture, consequent on the discovery by the defender's parents of the pursuer's pregnancy, and that the pursuer was not herself a party to it.

“I do not forget that the defender was much younger than the pursuer, and, indeed, little more than a boy when he granted his acknowledgment, and that his circumstances at the time were such as to make marriage in the highest degree imprudent. But he was undoubtedly at the time attached to the pursuer, they were in the same rank of life, and nearly related, and marriage was the best reparation for the wrong which he had done her (with however little resistance on her part, and it was, I fear, but little) in obtaining possession of her person. On the whole, it seems to me that the pursuer is entitled to the declarator which she asks.”

¹ Lockyer v. Sinclair, March 3, 1846, 8 D. 582, L. J.-C. Hope, p. 595, 18 Scot. Jur. 290; Fleming v. Corbet, June 24, 1859, 21 D. 1034, L. J.-C. Inglis, p. 1043, 31 Scot. Jur. 562.

² Robertson v. Steuart, Feb. 27, 1874, 1 R. 532, Lord Deas, p. 639.

³ Anderson v. Fullerton, Nov. 13, 1795, Hume, 365.

⁴ *Authorities cited*.—M'Kie v. Ferguson, Aug. 2, 1781, Hume's Decisions, 358; Forster v. Forster, June 11, 1872, 10 Macph. (H. L.) 68; Maloy v. M'Adam, Jan. 9, 1885, 12 R. 431; Leslie v. Leslie, March 16, 1860, 22 D. 993, 32 Scot. Jur. 423; Fraser on Husband and Wife, i. 317; M'Alister v. Dun, May 2, 1759, 2 Pat. Apps. 29.

on that assumption, because on record the defender gives a general denial to the averments in cond. 3, and further says,—“The terms of the documents are not admitted,” but in her evidence the pursuer swears to the terms of the documents as being those set out in cond. 3, and there is no attempt made to impugn her evidence on that point. Accordingly, we must take it that on 8th May 1889 documents in these terms were exchanged between the parties.

No. 40.
Nov. 26, 1891.
Imrie v. Imrie.

Mr Younger has quite rightly said that it is not sufficient for the pursuer to table these documents, and upon that to demand the judgment of the Court, but that it is for the pursuer to explain by evidence what were the circumstances in which they were exchanged, so as to shew that they were given with the *animus* which the writings themselves express. I do not think that the *dicta* quoted by the reclaimer's counsel go so far as to shew that, however explicit the documents may be in their terms, the Court will require direct evidence of the intention of the parties in exchanging them, other than evidence shewing that the circumstances were consistent with or corroborative of the expression of matrimonial intention contained in the documents. We have to examine the circumstances of the case, not merely to see whether they support the pursuer's story, but also to see whether the competing theory advanced by the defender to account for the exchange of the documents can be sustained. If the pursuer can shew that at the time when these documents were exchanged the parties were minded to enter into marriage, the burden of proof will, I think, to a large extent be discharged, while, on the other hand, if the counter explanations offered by the defender appear to be of too flimsy and unsubstantial a nature, that will again lead directly to the result that the opposite theory must be accepted, namely, that these documents were intended to attest a marriage between the parties.

On examining the evidence I find no difficulty in ascertaining the state of mind of the defender, whose interest is now to challenge these documents as documents evidencing a marriage. He says,—“When pursuer made the proposal that I should do something to keep the insurance money for her I suggested that it might be just as well to get married before the registrar, and I was quite willing to do so.” His theory in the present controversy is that the pursuer proposed the exchange of these documents, not as expressing matrimonial consent, but in order to give her a right over some insurance money, the existence of (which, he says, had not been known to him until he heard of it from her. I shall have immediately to say that I consider that too flimsy and unsubstantial an explanation of what took place, but at present my desire is to point out that the way in which he met the pursuer's proposal, whatever it was, was by suggesting that they should go to the registrar and get married. Then the Lord Ordinary, this being a critical matter, put some questions to the defender upon it, and we therefore may be quite sure that, taking his answers to the questions of the Lord Ordinary along with his previous answers, which were given to his own counsel, this is his deliberate account of what took place. In answer to the Lord Ordinary he says,—“I asked the pursuer twice to go with me and be married before a registrar. I said that we should do so rather than sign these documents,” and a little further on he says,—“I was perfectly willing on the 8th of May 1889 to marry the pursuer outright if she would go before a registrar, but not unless she did so.” Accordingly, the difference which he represents to have existed between what the pursuer requested and what he was himself willing to do was as to the mode of constituting marriage,

No. 40. his counter proposal being that they should not enter into the occult and clandestine form of marriage suggested by the pursuer, but be, as he calls it, Nov. 26, 1891. "married outright" before the registrar. It is therefore proved that when these Imrie v. Imrie. documents were exchanged the defender was matrimonially inclined, and minded to instant marriage.

The counter theory advanced by the defender I have described as flimsy and unsubstantial. It is said that the pursuer had found out that the defender was "insured" in a burial society, and communicated this fact to him, and proposed that he should give her a writing professing to be a declaration of marriage in order to enable her to secure the insurance money. The defender says that he had not known of this insurance until he heard of it from the pursuer. I am bound to say, especially when the counter proposal of the defender that they should be married outright is borne in mind, that I am quite unable to accept the view that the proposal made by the pursuer, and so met by the defender, was not a proposal for marriage, but for a simulation of marriage, in order to achieve such an exceedingly small and shadowy result.

The facts with regard to the exchange of the writings are not matter of controversy. It is true that they were not signed in presence of the witnesses, also that they were signed by the witnesses *ex post facto*, and on a representation that they were not to attest any solemn act. The conclusion I draw from the fact that names of witnesses were added is, that the parties desired to give an appearance of importance and authenticity to the writings they were exchanging.

Again, when we look at the surrounding facts, I cannot say that I find anything which renders the exchange of documents, such as these bear to be, improbable, either having regard to the circumstances or the apparent character of the two parties. There is no doubt that the woman had good ground for desiring marriage, having yielded her person before that date. Whether the illicit connection began early in the history of the parties' acquaintance is not a conceded point; I have not made up my mind when it began; but both parties are agreed that it began before the exchange of documents, and the position of parties makes it not unlikely that the pursuer should make, and that the defender should accept, a proposal of marriage.

The sequel seems not so important to the case of the pursuer as to that of the defender. I could understand the defender producing proof of a series of facts shewing that the transaction had not been entered into for the purpose of marriage, and that the letter had not been treated seriously by the pursuer, but I have failed to discover such facts. The first pointed out for this purpose is the pursuer's relations with Hamley. These certainly put the pursuer in an unfavourable position, for either her letters or her evidence are untrue. My conjecture is that Hamley came to Scotland and carried on a flirtation with her, but I cannot say that that shakes in my mind the evidence as to the quality of the transaction of 8th May. It is said also that the pursuer's attempts to bring about abortion (of which there is some cogent though not conclusive evidence) were not the conduct of a woman who considered herself married. But we must bear in mind that, even assuming that the pursuer and the defender looked upon themselves as married people, her position was an ambiguous and in some ways a precarious one, and if in certain matters her conduct was not that of an exemplary wife, I do not think that that leads to a conclusion adverse to the import of the documents exchanged between the parties. It is said that the fact that the document given to the pursuer is not extant now, and the fact, which we are

No. 40.

Nov. 26, 1891.

Imrie v. Imrie.

asked to accept, that it was torn up by her, bear strongly against it being looked on by her as the charter of her position as a married woman. Taking the defender's own account of the circumstances in which it was destroyed, I cannot say that it proves to my mind that the document was not given to the pursuer for the purpose of constituting a marriage, but in order to secure her right to the insurance money. The defender says,—“We quarrelled very bitterly at that time, and there had been a good deal of nagging on both sides. The feeling got worse and worse, and ultimately the pursuer flew out of my room into her own, and came back flourishing the document in my face. She then tore it in two, and said that that finished it for good and all.” What was it that was finished for good and all? Her claim for the insurance money? The other view appears to me much more likely that (however futile such a proceeding was) she tore in pieces in anger what was the symbol and proof of her marriage. As to whether the defender's account is the true explanation of the disappearance of the document or not is not very clear. There is, I think, much to be said for the Lord Ordinary's view, that the destruction of the document probably took place much later, and that the pursuer herself was not a party to it. Although this matter is not put sharply to Mrs and Miss Imrie, I cannot say that it is unlikely that, in the course of their rummaging the pursuer's box, the document may have gone amissing. It is said, however, that the pursuer damaged her case by not at once demanding the letter when she found she had lost it. But I am not at all sure that, in acting in the way that she did, it may not have been to the advantage of the position in which she ultimately stands, because the letters written by both Mr and Mrs Imrie shew keen hostility, and it may have been worldly wisdom on the pursuer's part not to mention that a document of such importance was, in her belief, in the hands of her enemies. Be that as it may, however, the fact does not seem to me to be of sufficient importance to affect the result of the case.

No doubt your Lordships have, like myself, scrutinised the case for the pursuer with vigilance and scepticism. It is our duty to prevent the decree of the Court going out on the words of such documents merely without submitting to a searching scrutiny the conduct of the parties. But having brought the keenest scrutiny I can to bear upon the case, I am unable to resist the conclusion at which the Lord Ordinary has arrived.

LORD ADAM.—The pursuer's case is rested entirely on the two documents set forth in cond. 3, and it is not disputed that, if the documents were delivered with the object of constituting a marriage between the parties, their terms are sufficient for that purpose. I, however, agree with what your Lordship said, and I think it is in accordance with the cases quoted to us, that it is not sufficient proof of the constitution of the marriage for the pursuer merely to present to the Court documents bearing to contain the consent *de presenti* of the parties to marriage. We are entitled to know the circumstances in which the documents were exchanged, how they were looked upon by the parties subsequently, and in fact the whole facts and circumstances bearing on the purpose with which they were exchanged.

The proof has now been led, and I do not know that we are to deal with the evidence on any other principle than is usual in other cases. We must say, taking the whole facts of the case into consideration, whether the documents in question were exchanged by the parties for the purpose of constituting a marriage.

No. 40.

Nov. 26, 1891. *my own part I cannot say that I believe everything that the pursuer or defender*
Imrie v. Imrie. says, but there are facts and circumstances which are of more weight than their evidence, and it is a consideration of these that has led the Lord Ordinary to the conclusion at which he has arrived.

With regard to the intention with which these documents were exchanged, and the relations of the parties prior to the 8th of May, as bearing on the question of intention, it does not seem to me to be improbable, whether the parties began to have connection with one another in December 1888 or May 1889, that they should have desired to regulate the manner in which they were living. They undoubtedly desired to avoid an open marriage, but still they may have desired to carry on their connection in a more moral way than previously. There is nothing improbable in this being the motive of the parties in desiring marriage.

It is important to look at the way in which parties acted towards one another after they had exchanged these documents, and what weighs most with me is the correspondence. When it is found that after 8th May 1889 the defender always wrote to the pursuer,—except in the case of one letter which I shall immediately notice,—as his wife, and signed himself as her husband, and continued doing so for a long period, and that the pursuer acted in a similar way, I think the inference to be drawn is that, when they exchanged the documents, they acted with the intention which the documents themselves expressed. No doubt Mr Younger has tried to rebut this inference by pointing out that in January 1889 the pursuer had given the defender a Christmas or New Year card addressed to her husband, and we are asked to say that this circumstance gives the key to the use of the terms husband and wife in the later correspondence between the parties. I am not prepared to accept that suggestion as rebutting the inference to be drawn from the manner in which the parties corresponded with one another after the exchange of the documents. Then again Mr Younger tries to weaken the inference to be derived from the correspondence, by pointing out that the parties in one instance dropped the style of correspondence which they had assumed, and reverted to the use of their own names, though still writing in very affectionate terms. That is some slight indication that the parties did not look upon themselves as married people, but it is not enough, in my opinion, to destroy the inference to be derived from the whole correspondence, and the legal conclusion to be drawn from it is, I think, that the parties looked upon each other as husband and wife.

Another fact bearing in the same direction is that the pursuer had a marriage ring given her by the defender. No doubt the defender himself had not enough money to buy the ring, and borrowed money from the pursuer for that purpose, but that seems to me to make the fact bear rather more strongly in favour of the view that the parties looked upon each other as husband and wife, because, what the pursuer wanted was not that the defender should buy her a ring, but that she should have a marriage ring, and she was willing to provide the necessary funds.

Then again the mere fact that the pursuer on some occasions said that the defender was her husband may not have great weight unless it is consistent with the other facts in the case, but it must be kept in mind that she made these statements in the defender's presence, and that he did not repudiate them.

All these things being taken into consideration, I think it is proved as matter of fact that after the 8th of May the parties acted towards one another upon the footing that the documents had been interchanged by them for the

purpose of constituting a marriage. I do not, therefore, see why they should not receive their natural effect. If the conduct of the parties had been inconsistent with the idea that they had exchanged these documents for the purpose of constituting a marriage, then, on the authority of *Lockyer v. Sinclair* and the other cases quoted to us, I would have held that they could not receive effect. No. 40.
Nov. 26, 1891.
Imrie v. Imrie.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT adhered.

A. LAURIE KENNAWAY, W.S.—A. STEWART GRAY, W.S.—Agents.

REVEREND GEORGE S. SMITH AND OTHERS (Kirk-Session of Prestonpans), No. 41.

Petitioners.—*Sol.-Gen. Murray—N. J. D. Kennedy.*

SCHOOL BOARD OF PRESTONPANS (Respondents).—*Dickson—*

C. K. Mackenzie.

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

Trust—Charity—Administration—Nobile officium—Church.—Certain funds—the proceeds of a sale of work, contributed by the ladies of a parish church for the purpose of providing an infant school in room of one then discontinued owing to the Disruption—were afterwards held in trust by the kirk-session, and not being sufficient for the intended purpose, part of the revenue was applied in clothing and paying the school fees of the young children of poor deserving persons. The fund having increased, and having been claimed by the school board, who proposed to devote it to educational purposes, a petition was presented to the Court by the kirk-session for authority to apply it towards the erection of a hall to be used as a Sunday school and for congregational purposes in connection with the parish church. The Court, after a remit, rejected a scheme for paying the annual revenue to the school board, to be applied in increasing the efficiency of the teaching staff, on the ground that such an application of the fund would virtually be in relief of the education rates, and approved of the scheme of the petitioners as being more nearly in accordance with the original purpose for which the fund was established.

IN September 1845, Lady Harriet Grant Suttie, of Prestongrange, 1st Division, aided by other ladies, also members of the congregation of the Parish Church of Prestonpans, held a sale of work to raise funds to provide an infant school in room of one then recently discontinued owing to the secession of a part of the congregation in 1843, which had prior to that date been maintained by the kirk-session in premises held on lease. The net proceeds of the sale amounted only to £96, 15s. 2d. As this sum was too small to build or maintain the school desired, it was handed over to the Rev. John Struthers, LL.D., then minister of the parish, in order that it might be held and accumulated, and it remained in his trust, on deposit-receipt in his name, as minister of the parish, until September 1865. In February 1865, the fund had increased to £162, 13s. 8d., by accumulation of interest. Sir George Grant Suttie, the husband of Lady Harriet, then addressed the following letter to Dr Struthers:—"Dear Sir,—
... The object of the contributors being to support an infant school, and there being now three female teachers for young children in the parish, it appears to me that the object of the contributors will now be best attained by applying the proceeds of the fund annually to pay the school fees, or otherwise assist the young children of poor but deserving persons, and I will be well pleased to hear that you and your kirk-session will undertake this duty." The Kirk-session ultimately accepted the trust and made such payments as they considered judicious out of revenue towards the fees or clothing of the young children of poor deserving per-

No. 41.

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

sons. In 1891 the revenue had come to exceed what was required for that purpose, and by judicious investment the fund had grown to about £475. The School Board of Prestonpans having demanded that the Kirk-session should pay over the fund to them, the Kirk-session presented an application to the Court in which they asked the Court "to authorise the petitioners to apply the said fund towards the erection of Sunday school premises in connection with the church of the parish of Prestonpans; or to settle a scheme for the application of the said fund, and appoint the petitioners to hold and administer the same, under said scheme."

They stated;—" (7) The said fund has never had any connection with the parish school, or the income of any teachers thereof, or the promotion in such school of any branch of education. It was originally raised by members of the congregation of the parish church for purposes distinct from any connection with the parish school, viz., the benefit of young children, particularly of the poorer class, and has always been so applied. The particular mode originally contemplated, of benefiting that class by the erection of an infant school, was never carried out, and was abandoned in 1865, on account of that need being sufficiently provided for otherwise. Since 1873 an infant school has been established and maintained in the parish under the provisions of the Education Act of 1872. Further, education is now free in all the branches usually taught to young children. (8) The petitioners consider that in these altered circumstances said fund may most usefully and in accordance with the general object intended by the original contributors be applied towards building Sunday school premises in connection with the parish church. The number of children in attendance at the Sunday school is large, and the want of accommodation is seriously felt by the petitioners. The petitioners could readily secure a suitable site for the erection of Sunday school premises, and are prepared, if the fund should not be sufficient to meet the whole cost, to raise the balance themselves."

The School Board lodged answers in which they asked that the fund should be transferred to them as the educational authority of the parish: that it should be expended in paying off a debt upon the school premises, and in securing a more efficient staff in the infant department of the school.

On 20th June 1891 the Court made a remit to Mr George Gillespie, advocate, "to prepare a scheme for the administration and disposal of the fund in the hands of the petitioners, as nearly as may be in accordance with the original purpose for which the fund was established."

Mr Gillespie, after hearing all parties interested, prepared the following scheme, which he reported to the Court,—"(1) The fund referred to . . . shall continue to be held by the minister of the said parish in all time coming as trustee, under the provisions and with the powers of the Trust Acts, 1861 to 1891, the annual interest of the fund to be applied by him, after payment of any necessary expenses, as hereinafter provided. (2) The minister shall pay annually, at the close of the school financial year, the whole interest as aforesaid to the clerk of the School Board of Prestonpans, to be applied by the said board in increasing the efficiency of the teaching staff, either in respect of number, or of the training and attainments of one or more of the teachers, above what shall be at the time required of the said board by the provisions of the Education Code for Scotland. The minister shall only make payment as aforesaid on the production of a certificate from the Scotch Education Department, or from Her Majesty's inspector of schools for the district, that the condition above specified has been complied with. (3) Failing the production of such a certificate in any year, the minister shall apply the interest falling

due that year in supplying clothing to poor children attending the infant department or the lower standards in any public or State-aided school in Prestonpans." *

No. 41.

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

* Mr Gillespie stated in his report :—" Various suggestions were made to me for the application of the money. The minister and Lady Susan Grant Suttie, who in a sense represents Lady Harriet Suttie, the principal founder of the charity, pressed strongly that the scheme suggested in the petition, viz, the erection of Sunday school premises in connection with the parish church, should be sanctioned. They explained that their plan was to build a church hall, to be used for Sunday school purposes, for other congregational purposes, and for a library, if funds could be raised to establish and carry it on. The building for these purposes would cost at least £1000, but the petitioners offered to undertake to raise the balance. At present the Sunday school is held in the church, which is not convenient for the purpose. They pleaded that this was a church fund, and that in devoting it to the purposes of a Sunday school they would not be deviating from the original purpose for which the fund was established, since education in an infant school, at the time when the fund was established, would not go much beyond instruction in the Bible and catechism. I report these contentions for the consideration of your Lordships; but I have to report that in my opinion this proposal is not sufficiently close to the original purpose to warrant your Lordships in sanctioning it, at least in the face of the other proposals which are made. The fund, as I take it, was established for general educational purposes, and for behoof of the whole parish, and its administration, so far as it has gone, has been on these lines. There is no trace of a limitation to Sunday school purposes, and I think that the suggestion that infant education forty years ago was limited to religious instruction is fanciful. It is said that the fact of the fund being left with the minister is proof that it was not intended for secular education. I do not assent to this; the minister had at that time a great deal to do with educational matters, and his own actions refute this assertion. The grants of clothing that have been made from time to time in accordance with Sir George Grant Suttie's directions have been made to enable children to attend the ordinary schools in the parish. To build or assist in building a hall for congregational purposes would be a departure from the original purposes, as I think, in two respects. It would not serve educational purposes, and instead of benefiting the parish generally, it would be confined mainly, if not altogether, to members of one congregation.

"The second suggestion made by the petitioners to me, which does not appear in the petition, is that the minister should be directed to apply the interest of the fund in supplying the younger children of widows or poor families with clothing, to enable them to attend school with regularity in winter weather. This is an excellent suggestion, and it is recommended by the consideration that in the parish of Prestonpans, where there are many fishermen and many colliers, cases frequently occur where widows are left in very poor circumstances with families to feed and clothe. But there is provision already in the parish for this purpose. The governors of Schaw's Bequest have power to apply part of their revenue for this purpose, and have done so, but have never yet spent on this purpose the full sum they are entitled to spend on it. . . .

"The School Board, i.e. the majority of the School Board, suggest that the money should be spent in paying off *pro tanto* debt incurred by them in improving and extending their school premises. These extensions and improvements were incurred particularly with a view to obtaining better accommodation for the infant department, which is taught as a separate department. They plead that the money, if spent in this way, would be applied to the exact purpose contemplated by those who contributed it, for it would go to supply an infant school. The Board borrowed a sum of £800 to pay for the extensions I have spoken of, and they complain of the burden of the rates, the school rate being at present 7d. per pound, which must immediately be increased to 9d. in consequence of this outlay.

"I rather think, however, that it may be taken that the object which the

No. 41.

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

Prior to the consideration of the report by the Court, Lady Susan Grant Suttie lodged a minute, in which she stated, *inter alia*, that, as the representative of Lady Harriet, she desired that the fund should be devoted to the object suggested in the petition,—the erection of a hall in connection with the parish church,—to which could be added a library, both religious and secular, for the benefit of the children.

contributors had in view, and the object which your Lordships will be disposed to sanction, must be one that will provide for the younger children in the parish some advantage which is not otherwise within their reach. The Board are bound to provide adequate school accommodation, and they have done no more. This fund would, therefore, in a sense be thrown away if it was applied to relieve the ratepayers of the obligation which the law puts on them.

"The last suggestion which is made, and it too comes from the majority of the School Board, is that the fund should be applied to secure a more efficient staff in the infant department than is at present maintained there. At present they employ a headmistress at £65, and three pupil teachers at £20, £17, 10s., and £12, 10s. a-year respectively, for an average attendance of 166 children. They say that for a salary of £30 to £35 they could secure, in place of the pupil teacher at £20, an ex-pupil teacher,—i.e., a teacher who has had full training as a pupil teacher,—and that this would much strengthen the infant department. They are under no obligation, according to the educational code, to do more than they are doing. I think that this suggestion is one of which the Court may approve, as being good in itself and closely akin to the original purposes for which the fund was collected. I have drawn up a short scheme to give effect to it, using general terms, so as to give the School Board some latitude of action in the event of any change of circumstances.

"It should be in the knowledge of your Lordships . . . that the parish of Prestonpans is exceptionally well provided with educational funds, devoted to higher branches of education, from Schaw's and Stiell's foundations. Part of these foundations is restricted to Prestonpans, and Prestonpans children are eligible to compete for the whole of them. Under the provisions of the 85th section of the Local Government Act of 1889 (52 and 53 Vict. c. 50), the sums available for general educational purposes in the parish will be increased, since till recently the endowments have been to some extent used in payment of fees. No arrangement has as yet, however, been sanctioned by the Education Department for the permanent application of the funds set free, in consequence of the abolition of fees.

"One point remains for consideration. The School Board claim that the fund should be transferred to them as the educational authority of the parish. This contention comes to this, that the minister has no title to hold and administer the fund, and never had such a title, but merely held the fund as a treasurer or banker bound to pay it over to the proper owner, beneficiary, or trustee when he should appear. I cannot take that view. I think, looking to what is known of the history of the fund and the actings of the parties, that the minister holds this fund as a trustee for educational purposes. The Court can, to a certain extent, substitute kindred purposes for original trust purposes, and it can supply new machinery for trusts where the old has become unworkable or unsuitable to the times. But I humbly think the Court has no power to transfer the title to trust property from one individual to another, or from one public body to another, to substitute, e.g., school boards for kirk-sessions or town-councils in the administration of educational funds. That is a matter for legislation.

"Even if the Court had the power, I venture to think that it would not be desirable to transfer the fund if your Lordships should approve of the scheme have suggested. It is well to have some guarantee for the performance of the duty which the scheme lays on the board, and some summary method of keeping the board alive to its duty.

"I think the minister, and not the session, should be recognised as the trustee of the fund. That seems to me to be the true position of matters at present."

No. 41.

Argued for the petitioners;—The scheme to be approved by the Court must as nearly as possible, considering the requirements of the time, consist with the original intention with which the fund had been established.¹ Indeed, the interlocutor making the remit quite supported this view. But the scheme proposed by the reporter in the present case perverted the original objects of the founders. It deprived the minister and kirk-session of the control of the fund, and gave the spending of it to the School Board, who were not the proper recipients of a charitable bequest. The extra salary which it was proposed to give to the teaching staff ought to be met out of the rates. The scheme proposed by the petitioners of erecting Sunday school premises was much nearer the original intention of the contributors to the fund.

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

Argued for the respondents;—The School Board had power under the 47th section of the Education Act, 1872, to administer a bequest of this kind. There was no limitation of the fund to religious purposes originally, only to educational purposes, and all persons in the parish were interested. The proposal of the Kirk-session involved the application of the money to a church purpose of a denominational character. It might be that the petitioners were entitled to have the administration of the fund, but the purposes to which it should be applied ought to be general educational purposes.² The scheme suggested by the reporter ought to be approved.

LORD PRESIDENT.—The remit made to Mr Gillespie by the interlocutor of 20th June last was “to prepare a scheme for the administration and disposal of the fund as nearly as may be in accordance with the original purpose for which the fund was established.” It appears to me that that interlocutor lays down very clearly the law which we have now to administer, and that our duty is to decide in favour of that scheme which is most nearly in accordance with the original purpose for which the fund was established.

What that original purpose was there is fortunately no room for doubt.

The history of the case is briefly but adequately given in the second head of the petitioners’ statement. Thence I gather the following facts. Prior to the Disruption an infant school was maintained by the kirk-session of the parish. One of the effects of the Disruption was to bring that arrangement to an end; and accordingly in 1845, there being a surcease of this school, a sale of work was held with the view of raising funds “to provide an infant school in room of one then recently discontinued, and which had prior to that date been maintained by the kirk-session.” The movement was carried out by the members of the congregation of the parish church of Prestonpans; and, when the bazaar had been held, the money thereby raised was handed over to the minister of the parish. The essential and vital feature of the fund is that it takes origin in the desire of the members of the parish church to provide an infant school for the Established Church. That was “the original purpose for which the fund was established.” It was afterwards found that the fund which had been collected was insufficient to provide a school. It was accordingly handed to the minister of the parish, with whom it was left to accumulate until 1865, when a provisional arrangement was proposed by the promoters of the school scheme, and came into operation, because of the temporary failure of the original plan owing to the insufficiency of the money. The provisional arrangement is instructive,

¹ Burnet’s Trustees, Nov. 17, 1876, 4 R. 127; Tudor on Charities, 136 and 146; Burnett v. St Andrew’s Church, Brechin, June 12, 1888, 15 R. 723.

² McDougall, June 29, 1878, 5 R. 1014.

No. 41. as shewing what the object of the promoters was. We find it described in a letter from Sir George Grant Suttie to Dr Struthers in that year, in which he says,—“The object of the contribution being to support an infant school, and there being now three female teachers for young children in the parish, it appears to me that the object of the contributors will now be best attained by applying the proceeds of the fund annually to pay the school fees, or otherwise assist the young children of poor but deserving persons,” and it is important to notice that he adds in conclusion that he will be well pleased to hear “that you and your kirk-session will undertake this duty.”

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

Another stage has now been reached which has led to the present application being made. The fund has accumulated, and accordingly the original purpose is now, so far as money is concerned, free to take shape. But, on the other hand, there has arisen a board school, and free education has now been established in the parish. Accordingly we have to deal with an altered condition of things, and to consider which scheme most nearly reproduces the original purpose, with the necessary modifications which those changes necessitate.

The proposals of the School Board seem to me to lose sight of nearly every one of the essential features of the purposes for which the fund was established. Indeed, I might say of every one, were it not that Mr Dickson says that his clients are willing to give special attention to the wants of the infant department, by securing for it a more efficient teaching staff. But that is only one out of several features of the original purpose, and I cannot think that it is coming at all near to the original purpose to do what the ratepayers themselves can do, viz., to increase the efficiency of the teaching staff. That is a matter which lies within the ambit of the duties of the School Board. To say that “they are under no obligation, according to the educational code, to do more than they are doing,” is a very partial statement of their position. The code merely states the minimum which the Scotch Education Department require before a school is allowed to share in the grant of imperial money; but it, of course, does not limit the powers of the Board in dealing with local rates, if they and their constituents should desire such increased efficiency.

I have said that I do not think that the original purpose of the fund is kept sufficiently in view in the scheme of the School Board. No doubt, Mr Gillespie in his report proposes that the minister of the parish shall formally hold the fund, and that he shall accordingly have a title and interest to see that the School Board is doing its duty with the money which he pays over to them. But that appears to me to be a shadowy substitute for the administration and control of the fund by the minister and kirk-session, which we see was designed for them by the founders of this fund. And the substance of the School Board's proposal is that this fund shall be applied in supplement of, or rather, I might say, *pro tanto* in substitute for, the rates. I think this quite inadmissible.

Another scheme suggested, but only suggested, is that the income might be applied in supplying clothing to poor children attending the infant department. I think that might have been a very desirable object had it not been for the fact that the reporter and the School Board are clear that it is already sufficiently met by Schaw's Endowment, part of the revenue of which may be applied to that purpose. Accordingly, I think we may leave it out of view.

It appears to me that the proposal of the Kirk-session most adequately meets the original purpose of the fund; and although latterly a somewhat critical attention seems to have been directed towards the objects upon which the fund is to

be bestowed, no scheme has been suggested in competition except these which I have already been compelled to reject. The proposal of the Kirk-session appears to me to be generally in conformity with the original purpose of the fund. They propose, as did the founders, to build a school; it is to be an infant school, as was the founders' intention; it is to be in connection with the parish church, and managed by the kirk-session, which was an essential element of the founders' wishes; and they desire that there shall be no further limitation upon the admission of all children in the parish. The only variance in the scheme from the original purpose is, that it will be only education of a certain kind which will be given, and that upon Sunday; but, on the other hand, this variance is due simply to the supervening changes which have taken away the need for what is omitted. Nor is it to be left out of view that when the fund was originally started in 1845, Bible education must have bulked very largely in the mind of the founders, and, accordingly, comparing the present scheme with that of 1845, I cannot say that it differs from it except in degree. I have thus indicated that I do not regard the proposal of the Kirk-session as completely meeting the original purpose of the founders; but my judgment is in favour of that proposal, because, to revert to the words of your Lordships' interlocutor, it is, of those submitted to us, the one most "nearly in accordance with the original purpose for which the fund was established."

If your Lordships take the same view, I think our course will be to remit the matter again to Mr Gillespie to prepare a scheme upon the lines which I have indicated.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"

Find that of the schemes suggested for the application of the fund in question, the proposal that it should be applied towards the building of a church hall to be used for Sunday school purposes as well as for congregational purposes and a library, is most nearly in accordance with the original purposes for which the fund was established; and therefore authorise the petitioners to apply the said fund accordingly; and remit to Mr Gillespie to adjust the details of a scheme in accordance therewith, regard being had to the undertaking of the petitioners to raise the balance of the money required for the building of the hall, and of the other terms of said proposal, and decern."

MACPHERSON & MACKAY, W.S.—MELVILLE & LINDSAY, W.S.—Agents.

DUFF & COMPANY, Pursuers (Respondents).—*Comrie Thomson—
M'Lennan.*

No. 42.

THE IRON AND STEEL FENCING AND BUILDINGS COMPANY, Defenders
(Reclaimers).—*Ure—J. Clark.*

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

Reparation—Breach of contract—Damages—Loss of Profits.—A manufacturing company in this country entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignment of huts sent in pursuance of this contract was sold by the merchants at a profit, but subsequent consignments were rejected by them as being disconform to contract.

In an action by the merchants against the manufacturers for damages, it was

No. 42.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

1ST DIVISION.
Lord Low.

proved that the pursuers were justified in their rejection of the huts. The Court, in assessing the damages due by the defenders for their breach of contract, held that the pursuers were entitled to payment of a reasonable allowance for loss of profits, the ordinary rule whereby damage is assessed at the difference between the contract price and the market price when the breach of contract is ascertained being, in the circumstances, inapplicable.

IN the year 1889 the Iron and Steel Fencing and Buildings Company, Limited, Glasgow, who held certain patents for the construction of iron and steel buildings, which could be erected without the use of bolts or rivets, entered into a contract for sale to Duff & Company, merchants, Cape Town, of a portable iron hut of a particular make, to be called the "Pioneer" hut.

Under the contract Duff & Company were to buy the huts from the Buildings Company, and make what profit they could by reselling them in South Africa, and it was further agreed that Duff & Company should have a monopoly of the sale of the "Pioneer" hut in South Africa, as long as they ordered ten huts per fortnight.

In pursuance of the contract fifty-eight huts were shipped by the Buildings Company to Duff & Company in the months of August and September 1889, in three separate consignments, and these were sold or disposed of by Duff & Company in South Africa. Five further consignments, containing 112 huts in all, were sent in the months of October and November. Of these four huts were resold, and the remaining 108 were, after some correspondence between the parties, rejected by Duff & Company on 27th February 1890, as being disconform to contract.

In June 1890 this action was raised by Duff & Company, against the Iron and Steel Fencing and Buildings Company. The pursuers concluded for payment (1) of £1783, 16s. 2d., being the price paid by them to the defenders for the rejected huts, together with interest thereon, and certain expenditure which they alleged had been made by them in connection with the huts; and (2) of £1000 in name of damages.

They pleaded;—(2) The defenders having, in breach of the express representations and warranties condescended on, and also in breach of their implied warranty as manufacturers of and dealers in the articles ordered from them by the pursuers, supplied to the pursuers as purchasing agents, and for the express purpose of resale to others, articles disconform to contract and unmerchantable in quality and condition, the pursuers are entitled to reject the said articles, and to be repaid the price thereof and other disbursements, as condescended on. (3) The pursuer having suffered loss and damage in consequence of the defenders' breach of the special contract entered into with them as condescended on and entitled to reparation therefor in terms of the second conclusion of the summons.

A proof was allowed. The result of the evidence was to satisfy the Court that the rejected huts were defectively constructed, and were injured by insufficient packing, so as to be disconform to contract, and that the pursuers were entitled to reject them.

With regard to the amount for which the pursuers were entitled to decree under the first conclusion of the summons, it appeared that the amount actually paid by them to the defenders as the price of the rejected huts was £1368, 18s. 6d., and that the interest on that sum amounted to £38, 5s. 11d., being a total of £1407, 4s. 5d. With reference to the remaining heads of claim under the first conclusion of the summons, it appeared that the pursuers had incurred (1) expense amounting to £111, 9s. 1d. in connection with the rejected huts for delivery at storage, and other outlays of the kind; and (2) that a sum of £215, 2s. 8

had been spent by them in advertising the "Pioneer" hut, and pushing its sale, and in other expenditure of a like nature. No. 42.

With regard to the claim of damages for loss of profits, it appeared that the cost of each hut to the pursuers at Cape Town or Port Elizabeth was £21, 11s. 7d., and that of the huts contained in the first three consignments forty had been sold to a Mr Ross, for resale in Johannesburg, at a profit of £7, 2s. 6d. per hut, and six to other persons at a profit of £11, 10s. per hut. As to the prospect of these profits continuing, there was evidence to the effect that trade in South Africa was depressed at the time the rejected huts would have been put on the market, and several witnesses deponed that the huts had proved uncomfortably hot for the climate of South Africa. Mr Duff also admitted that money for articles sold "up country" was often difficult of collection, and that in fixing the price of the huts he had calculated on bad debts.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

On 10th January 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Sustains the pursuers' second and third pleas in law: Repels the defences, and decerns against the defenders, under the first conclusion of the summons, for payment to the pursuers of the sum of £1518, 13s. 6d. sterling, with interest on the sum of £1480, 7s. 2d. thereof, as concluded for; and under the second conclusion thereof, for payment of the sum of £500, with interest on the said sum of £500, at the rate of five per cent per annum, from the date hereof till payment," &c.*

* "OPINION.—(After coming to the conclusion on the evidence that the defenders had committed a breach of contract entitling the pursuers to reject the huts and intimating that decree would be given for £1407, 4s. 5d., being the price of the huts paid for and rejected, together with £38, 5s. 11d. of interest on that price, his Lordship continued)—The remainder of the sum first concluded for consists of the sum of £326, 11s. 9d., as detailed in Nos. 11 and 12 of process. A considerable number of the items there set forth consist of advertising the 'Pioneer' hut, of journeys made for the purpose of getting orders, and expenditure of a like nature, which was undertaken in view of the business which Mr Duff hoped to establish, and the whole of which cannot be charged as expenditure made in connection with the rejected huts alone. It is impossible to split up such expenditure, and say how much is applicable to the rejected huts, and how much must be held to be recouped by the profits made upon the huts actually sold. I have therefore struck out all such items from Nos. 11 and 12 of process, and that reduces the sum of £326, 11s. 9d. to £111, 9s. 1d., which I hold to be the sum actually expended in connection with the rejected huts, and which, when added to the sum of £1407, 4s. 5d., already brought out, gives a sum of £1518, 13s. 6d., for which I shall give decree, under the first conclusion of the summons.

"In regard to the conclusion for damages, I am of opinion that the pursuers are entitled to an allowance for such expenses as advertising and travelling, which, although, for the reasons stated, I have not allowed under the first conclusion, were incurred in view of the contract being fulfilled, and have in part been rendered unremunerative by the breach of the contract. Further, the pursuers are entitled to something in respect of the time expended by themselves and their workmen upon the rejected huts.

"The pursuers, however, further claim damages for loss of the profit which they would have made if the contract had been fulfilled, and this raises a question of some difficulty.

"The ordinary rule in the case of a breach of contract to deliver goods which may be obtained in the market is, that the damage consists of the difference between the contract price and the price at which the buyer has or might have supplied himself in the market—the time at which the market price is to be ascertained varying according to circumstances. In the present case it is impossible to have recourse to any such test, because there was no market in which

No. 42.

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Dec. 1, 1891.

Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

the huts could be purchased, as the defenders alone made them, and the peculiar method of construction was protected by patents.

“In such a case, the general rule in England (which has also, I think, been recognised in this country) is, that the damages should be such as may fairly and reasonably be considered either to arise naturally (*i.e.*, according to the usual course of things) from the breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time when they made the contract, as the probable result of the breach of it—(*Hadley v. Baxendale*, 9 Exchequer, 341). That rule seems to me to allow of a reasonable sum being given for loss of profit in the present case. The defenders knew that the huts could not be obtained elsewhere; that the pursuers purchased them with a view of reselling them at a profit in Africa; and, therefore, both parties must have contemplated that a loss of these profits would result from a breach of the contract. This view is, I think, consistent with authority both in England and Scotland. In the English case of *Grébert-Borgnis v. Nugent*, L. R., 15 Q. B. D., p. 85, the plaintiff contracted with the defendants to supply them with skins of a certain shape and description, which he could not obtain in the open market. The defendants knew that the plaintiff had made, or was making, a contract to supply skins to a French customer, substantially the same as those which he ordered from them. On a breach of the contract, the defendants were held bound to pay to the plaintiff not only the profit which he would have made upon the French contract, but also the damages which had been awarded against him in the French Courts for breach of his contract in that country. In the case of *Borries v. Hutcheson*, 18 C. B. (N.S.), p. 445, loss of profits was in somewhat similar circumstances awarded.

“Turning to the Scotch authorities, the case of *Watt v. Mitchell*, 1 D., p. 1157, also seems to me to support the view which I have indicated. In that case the contract was to ship hemp in Russia for Scotland on a certain day and at a certain price. The contract was broken, and about a year and a-half thereafter the purchaser raised an action for implement of the contract and for damages, and the question ultimately came to be as to the principle upon which damages fell to be assessed. The price of hemp in the home market rose continuously for some years after the date of the contract. The defenders tendered the difference between the contract price and that at the time when delivery should have been given, while the pursuer contended that he was entitled to the difference between the contract price and the highest price which hemp attained between the date of the breach of contract and the verdict finding that the contract had been broken, which was not obtained until three years afterwards. The Court rejected both of these extremes, and fixed the damage at the difference between the contract price and the price eight months after the time when delivery ought to have been made. Now, what the Court truly did in that case was to allow a reasonable sum for the profit which the purchaser would have made if he had received the hemp and sold it in the ordinary course of trade. Lord Medwyn, who gave the leading opinion of the Court, considered the question whether there is any principle ‘in our law for claiming as damage the profit which might have been made by a sale of the article in a rising market’; and, after referring to Lord Stair’s dictum, and to the Roman law, he says,—‘Now, this does seem to indicate that in estimating damage we are entitled to look at the use the one party intended to make of it’ (the article sold), ‘and which the other might presume was intended. It is upon this principle that the seller is only bound to repair the loss which relates to the thing itself, and which results directly from it—not consequential damage. . . . And if the article were purchased by a dealer in it, with a view to be resold for profit, and this was in the contemplation of both parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery.’

“The judgment in *Watt v. Mitchell* was referred to in the House of Lords in *Dunlop v. Higgins* (6 Bell’s App., p. 193), as settling the law of Scotland on

ing damages for loss of profits. What he had done was equivalent to giving the pursuers the profits without the risk of speculation. The rule for the assessment of damages for loss of profits resulting from breach of contract was that only such damage should be allowed as might reasonably be supposed to have been in the contemplation of both parties, at the time the contract was made, as the probable result of the breach of it.¹ The cases subsequent to *Hadley v. Baxendale* established that a buyer was not entitled to an allowance for loss of profits, unless he either tabled a subcontract for resale of the goods at a profit, and proved that this subcontract had been known to the sellers,² or to an allowance for loss of market, unless the goods had been specially ordered for sale at a particular season or market.³ The Court was not entitled to assume that the goods would have been resold at a profit. They were practically new to the market, and the evidence shewed that the huts had been found unsuited to the climate of South Africa, and that trade in that country was much depressed when the rejected huts would have been put on the market. The present case was on this ground distinguishable from the case of *Watt v. Mitchell & Company*,⁴ where the subject of contract was a well-known commodity, namely, hemp. Assuming that the pursuers were entitled to an allowance for loss of profits, they could not receive interest as well. Further, the Lord Ordinary was wrong in allowing £150 for expense incurred in pushing the sale of the huts. The pursuers had already received under the first conclusion all that they were entitled to for expenses incurred in connection with the rejected huts.

No. 42.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

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"I am therefore of opinion that the pursuers are entitled to a reasonable sum for the loss of profits which they would have made, and, indeed, I see no other way in which the loss which they have sustained through the breach of contract can be estimated.

"The amount which should be awarded for loss of profits is a jury question, which must be determined upon consideration of the whole circumstances of the case. Now, I find that of the huts in the earlier consignments which were disposed of, forty were sold to Mr Ross, at a profit of £7, 2s. 6d., and six were sold in Cape Town, at a profit of £11, 10s. These, however, were first put upon the market, and the purchase of them must be looked upon as to some extent an experiment; and if the huts had turned out not to be so suitable for the purpose for which they were required as expected, the price of these first sold would not have been maintained. And one of the pursuers' own witnesses says that the huts were found to be intolerably hot. Further, Mr Duff says that money for articles sold 'up country' is often difficult of collection, and that in fixing the price of the huts he calculated upon bad debts. But bad debts would reduce the average profit. It is also admitted that about the time when the rejected huts would have been put upon the market, trade and enterprise in South Africa had become somewhat depressed. Taking all these matters into consideration, I have come to the conclusion that a fair sum for loss of profits is £350 0 0

"And I allow in respect of the other items of damage to which

I have referred 150 0 0

"Making the total sum for which I shall give decree under

the second conclusion of the summons £500 0 0"

¹ *Hadley v. Baxendale*, 1854, 9 Exch. 341.

² *Thol v. Henderson*, 1881, L. R., 8 Q. B. D. 457; *Grébert-Borgnis v. Nugent*, 1885, L. R., 15 Q. B. D. 85; *Hammond v. Bussey*, 1887, L. R., 20 Q. B. D. 79.

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No. 42.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

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"Turning to the Scotch authorities, the case of *Watt v. Mitchell*, 1 D., p. 1157, also seems to me to support the view which I have indicated. In that case the contract was to ship hemp in Russia for Scotland on a certain day and at a certain price. The contract was broken, and about a year and a-half thereafter the purchaser raised an action for implement of the contract and for damages, and the question ultimately came to be as to the principle upon which damages fell to be assessed. The price of hemp in the home market rose continuously for some years after the date of the contract. The defenders tendered the difference between the contract price and that at the time when delivery should have been given, while the pursuer contended that he was entitled to the difference between the contract price and the highest price which hemp attained between the date of the breach of contract and the verdict finding that the contract had been broken, which was not obtained until three years afterwards. The Court rejected both of these extremes, and fixed the damage at the difference between the contract price and the price eight months after the time when delivery ought to have been made. Now, what the Court truly did in that case was to allow a reasonable sum for the profit which the purchaser would have made if he had received the hemp and sold it in the ordinary course of trade. Lord Medwyn, who gave the leading opinion of the Court, considered the question whether there is any principle 'in our law for claiming as damage the profit which might have been made by a sale of the article in a rising market'; and, after referring to Lord Stair's dictum, and to the Roman law, he says,—'Now, this does seem to indicate that in estimating damage we are entitled to look at the use the one party intended to make of it' (the article sold), 'and which the other might presume was intended. It is upon this principle that the seller is only bound to repair the loss which relates to the thing itself, and which results directly from it—not consequential damage. . . . And if the article were purchased by a dealer in it, with a view to be resold for profit, and this was in the contemplation of both parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery.'

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No. 42.

Dec. 1, 1891.

Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

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"The amount which should be awarded for loss of profits is a jury question, which must be determined upon consideration of the whole circumstances of the case. Now, I find that of the huts in the earlier consignments which were disposed of, forty were sold to Mr Ross, at a profit of £7, 2s. 6d., and six were sold in Cape Town, at a profit of £11, 10s. These, however, were first put upon the market, and the purchase of them must be looked upon as to some extent an experiment; and if the huts had turned out not to be so suitable for the purpose for which they were required as expected, the price of these first sold would not have been maintained. And one of the pursuers' own witnesses says that the huts were found to be intolerably hot. Further, Mr Duff says that money for articles sold 'up country' is often difficult of collection, and that in fixing the price of the huts he calculated upon bad debts. But bad debts would reduce the average profit. It is also admitted that about the time when the rejected huts would have been put upon the market, trade and enterprise in South Africa had become somewhat depressed. Taking all these matters into consideration, I have come to the conclusion that a fair sum for loss of profits is £350 0 0

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No. 42.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

Argued for the pursuers;—(1) The pursuers were justified in rejecting the huts. (2) The authorities merely established that, where goods were contracted to be sold for purposes of resale, and the seller failed to deliver them, or delivered them in an unmerchantable condition, the buyer was entitled to a reasonable allowance for loss of profits.¹ The allowance made by the Lord Ordinary was a most reasonable one. Further, the £150 allowed by the Lord Ordinary under the head of damages, for expenses in connection with the rejected huts, was allowed for different expenses from those for which he had made an allowance under the first conclusion.

At advising,—

LORD M'LAREN.—This is a reclaiming note against a judgment of Lord Low in an action of damages for the breach of a contract for the supply of portable iron huts for sale in South Africa. The judgment is to the effect that the huts which were rejected (108 in number) were, by reason of defective construction and insufficient packing, so difficult of erection as to be unfit for the purpose for which they were purchased, and also that they are disconform to the sample huts, and to the representations and warranty of the defenders. (His Lordship then examined the evidence and expressed his concurrence with the Lord Ordinary on the question of breach of contract, and the pursuers' right to reject the huts.)

There remains for consideration the question of the estimation of the damage consequent on the defenders' breach of contract, and its amount. In such cases the rule which is most usually applied is, that the damage is the difference between the contract price and the market price at the time when the breach of contract is ascertained—that is generally on the arrival and examination of the goods. This rule certainly presupposes that a purchaser for resale is not to lose his profit on the adventure, because if he acts upon the rule—that is, if he supplies himself with goods at the market price of the day, he is able to make the same profit on the substituted goods that he would have made on the goods to be supplied under the contract, only his profit is paid to him in two portions so much by the subvendee, and the balance by the seller who is liable in damages. The principle seems to be this, that the first purchaser has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day, and that if he fails in doing so he will only recover from the seller the same sum which the seller would have had to pay in case the purchaser had supplied himself elsewhere.

But is it to be said that if such goods cannot be had at any price in the place of delivery, then the seller, who is in fault, is to pay nothing, and the whole loss is to fall on the purchaser who has fulfilled his part of the contract by paying the price? The affirmative was in substance maintained by the defender's counsel, because they contended that there was no precedent for assessing the damages otherwise than by a reference to market price as the standard of value. But plainly where there is no such standard the damage must be ascertained in some other way, so that the seller shall be put to indemnify the purchaser against such inconvenience as the parties might necessarily foresee or contemplate.

¹ Mayne on Damages, 17, 171; Hammond v. Bussey, 1887, L. R., 20 Q. B. 179, per Lord Esher, pp. 88-89; O'Hanlan v. Great Western Railway Co., 1866, 6 Best and Smith, 484, per Just. Blackburn, p. 591; Bates v. Cameron, Dec. 1855, 18 D. 186; Watt v. Mitchell & Co., July 4, 1839, 1 D. 1157, per Lord Medwyn, 1166.

the result of a failure of duty on the part of the seller. In the present case the huts were in the makers' knowledge sent to South Africa for resale. It could not be supposed that the pursuers would want 108 pioneer huts for their personal use in the colony, and besides it appears from the documents that the defenders had constituted the pursuers their sole "agents" for sale within the colony. If huts could have been obtained in the colony at wholesale prices, it would have been the pursuers' duty to supply themselves so as to lessen the loss to the defenders, but as this could not be done, I am afraid the consequence is that the whole loss must fall on the defenders. That loss is of course the commercial profit which the pursuers have been prevented from making on that part of their capital which is locked up in the defenders' hands. I agree with the Lord Ordinary that when a claim of damages is based on estimated profit we ought to be very cautious in accepting the estimate presented to us. I should not be disposed in any case to allow more than ordinary commercial profit, even if it were clearly proved that in the circumstances of the place of shipment larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates, or ought to contemplate, as the result of his negligence, and according to the opinions expressed in *Hadley v. Baxendale* and cognate cases this is the measure of the seller's liability.

The Lord Ordinary has awarded £500 in two sums, viz., £350 for loss of profit, and £150 for travelling expenses and outlays specially proved. The sum of £350 is equal to a profit of about £3, 7s. on each of 108 huts rejected. The profit on the huts which were sold is proved to have been from £7 to £11, 10s., and the Lord Ordinary's estimate is therefore a low one.

This leads me to say in conclusion that my opinion is—and in this I think your Lordships agree—that the pursuers are not entitled to separate awards of interest on the price and damages; and for this reason, that the estimation of profit presupposes that a price is due and is paid. But we are satisfied that but for the allowance of interest the Lord Ordinary would have given a larger sum in name of damages, and therefore I do not propose to your Lordships that we should make any alteration on the terms of the interlocutor.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—MACONOCHE & HARE, W.S.—Agents.

MRS HELEN TAYLOR RUSSELL OR BOWMAN, Petitioner.—*Sol.-Gen. Murray* No. 42.
—*Kennedy—Cooper.*

DUNCAN MACKINNON AND ANOTHER (Russell's Trustees), Respondents.—*Dec. 1, 1891.*
D.-F. Balfour—Wilson. Bowman v. Russell's Trustees.

REV. JOHN WILKINSON, Respondent.—*Asher—Dundas.*

Judicial Factor—Trust—Removal of trustees.—In a petition by the next of kin of a domiciled Scotsman for removal of his testamentary trustees and the appointment of a judicial factor, the only allegation against the testamentary trustees was that they intended to remove the trust-estate from Scotland to the prejudice of the petitioners, who stated that they were about to bring a reduction of the settlement on the ground of incapacity and undue influence. The trustees having stated that they had no intention of removing the estate from Scotland, the Court refused the petition.

No. 43.

Dec. 1, 1891.
Bowman v.
Russell's
Trustees.

1st DIVISION.

THOMAS MELVILLE RUSSELL, sometime merchant in Calcutta, died at Bridge of Allan, on 3d February 1891, leaving a trust-disposition and settlement, dated 24th October 1890, by which, after declaring himself a native of Scotland and domiciled there, he conveyed his whole estates to trustees, for the purposes of paying small alimentary annuities to the widows of two of his brothers, and of conveying the whole residue of his estate to an institution, in London, called the Mildmay Mission to the Jews.

The trustees named were all resident in London, with the exception of one, who was resident in Scotland. Only one of these trustees accepted office, namely, Duncan Mackinnon, an East India merchant, generally resident in London, but also possessing a house in Scotland, and he, on 11th July 1891, assumed Neil Macmichael, a Glasgow East India merchant, who duly accepted office.

On 2d November 1891, Mrs Helen Taylor Russell or Bowman, one of the two next of kin of the deceased, presented a petition for the sequestration of the trust-estate, the removal of the trustees, and the appointment of a judicial factor.

The petitioner stated that she was about to bring a reduction of the trust-disposition and settlement on the ground that the deceased was not of sound disposing mind at its date, and had executed it in consequence of the undue influence which those connected with the Mildmay Mission had acquired over him,—“The said Duncan Mackinnon is resident in London and is not subject to the ordinary jurisdiction of the Scottish Courts; and it is believed and averred that he and Neil Macmichael contemplated immediately removing the trust-estate entirely out of Scotland and winding it up in England, with the view of trying to defeat any results favourable to the petitioners which may be obtained in the said action of reduction in the Scottish Courts. The contemplated removal of the trust-estate will further put it under the jurisdiction of the Chancery Division of the High Court of Justice in England, and the petitioners fear that in that event their rights in the said trust-estate could only be vindicated if at all, after long and costly litigation in Courts not those of the testator's domicile. Further, it is believed and averred by the petitioners that the said Duncan Mackinnon and Neil Macmichael, in the interests of the said Mildmay Mission to the Jews, and indeed as directed by the said trust-disposition and settlement under which they act, will realise as rapidly as possible the trust-estate, and pay it over to the Mildmay Mission. As the said mission has no domicile in Scotland, and the Scottish Courts have no ordinary jurisdiction over it, it would be extremely difficult, if not impossible, for the petitioners, in the event of their being successful in the said action of reduction, to recover the estate thus paid over to the said mission.”

The trustees lodged answers, in which they denied that they had a intention of removing the trust-estate out of Scotland.¹

The Rev. John Wilkinson, the director and treasurer of the Mildmay Mission, also lodged answers, in which he denied the averments of undue influence and undue influence.

LORD PRESIDENT.—At the close of this debate, I must confess I am still at a loss to know the grounds upon which this application is made. This gentleman left a settlement by which he appointed a number of trustees (all of them it may be observed in passing, with one exception, resident in England). He died on the 3d February 1891. This petition is dated 2d November 1891,

¹ Authority.—*Gilchrist's Trustees v. Dick*, Oct. 20, 1883, 11 R. 22.

we are now at the 1st of December. I have listened attentively to all that Mr Cooper has said, but I am unable to discover any semblance of a reason or ground for removing these two acting trustees. One of them is a partner of a Glasgow firm, and though his general residence is in London he has a residence in Scotland, and the other is a Glasgow merchant resident at Helensburgh. They have told us that they had and have no intention of removing the personal estate in Scotland, and have also said that, if a reduction is brought, they are prepared to hold the estate for behoof of all parties. There is in the meantime no sign of the action of reduction. Some weeks ago we were told it was in course of being raised, and we are told exactly the same to-day. Mr Cooper hinted at some danger at the instance of some persons in England invoking the aid of the Court of Chancery. I cannot see that there is any reason at all for our interference on that ground, unless we are to sequester trust-estates wherever the trustor has seen fit to appoint persons resident in England as his trustees. I am therefore for refusing the petition.

No. 43.

Dec. 1, 1891.
Bowman v.
Russell's
Trustees.

LORD ADAM.—I entirely concur. I do not see the slightest ground for listening to this application. It appears to be based upon a dread of the Court of Chancery, but that of course is not a ground upon which we can proceed.

LORD McLAREN.—The ground, or at least the motive, of this application is an apprehension that proceedings may be taken in England which might have the effect of defeating the claim of the next of kin, or their remedy in the Courts of this country. There are no doubt some cases in which this Court has appointed a judicial factor for the purpose of preventing the estate from being removed to foreign parts. It appears to me, however, that it is a sufficient answer here that the trustees have come forward and disclaimed all intention of acting prejudicially to the petitioner's claim, and in any case until proceedings have been taken in the foreign Court, and we know something of them, we could not entertain an application founded on such grounds. The proceedings, for anything we know, may turn out to be perfectly legal and unobjectionable.

LORD KINNEAR concurred.

THE COURT refused the petition.

FRINGLE, DALLAS, & Co., W.S.—DUNCAN & BLACK, W.S.—J. & J. H. BALFOUR, W.S.—
Agents.

TOWN-COUNCIL OF STROMNESS, Petitioners.—*Lorimer.*

No. 44.

Burgh—Election of magistrates—Burgh of barony incorporated by Royal Charter—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 101)—Failure to elect—Nobile officium.—A burgh of barony was in use to elect its magistrates and council, in terms of its crown charter, in September every third year, the electors being the male owners and tenants of subjects paying £10 annually. The General Police Act, 1862, was adopted in the burgh in 1863, but the elections continued to be conducted in the burgh under the charter, the last having been held in September 1888.

Dec. 1, 1891.
Town-Council
of Stromness.

In November 1891, after the date of election for that year under both the charter and the Police Act had passed, the Court was asked to ordain the town-clerk of the burgh to make up the roll of electors in terms of the General Police Act, 1862, and subsequent statutes, and to appoint a returning officer to hold the election under the provisions of the Ballot Acts. The Court declined to do more under the petition than appoint a returning officer.

No. 41. as shewing what the object of the promoters was. We find it described in a letter from Sir George Grant Suttie to Dr Struthers in that year, in which he says,—“The object of the contribution being to support an infant school, and there being now three female teachers for young children in the parish, it appears to me that the object of the contributors will now be best attained by applying the proceeds of the fund annually to pay the school fees, or otherwise assist the young children of poor but deserving persons,” and it is important to notice that he adds in conclusion that he will be well pleased to hear “that you and your kirk-session will undertake this duty.”

Nov. 28, 1891.
Kirk-Session
of Preston-
pans v. School
Board of Pres-
tonpans.

Another stage has now been reached which has led to the present application being made. The fund has accumulated, and accordingly the original purpose is now, so far as money is concerned, free to take shape. But, on the other hand, there has arisen a board school, and free education has now been established in the parish. Accordingly we have to deal with an altered condition of things, and to consider which scheme most nearly reproduces the original purpose, with the necessary modifications which those changes necessitate.

The proposals of the School Board seem to me to lose sight of nearly every one of the essential features of the purposes for which the fund was established. Indeed, I might say of every one, were it not that Mr Dickson says that his clients are willing to give special attention to the wants of the infant department, by securing for it a more efficient teaching staff. But that is only one out of several features of the original purpose, and I cannot think that it is coming at all near to the original purpose to do what the ratepayers themselves can do, viz., to increase the efficiency of the teaching staff. That is a matter which lies within the ambit of the duties of the School Board. To say that “they are under no obligation, according to the educational code, to do more than they are doing,” is a very partial statement of their position. The code merely states the minimum which the Scotch Education Department require before a school is allowed to share in the grant of imperial money; but it, of course, does not limit the powers of the Board in dealing with local rates, if they and their constituents should desire such increased efficiency.

I have said that I do not think that the original purpose of the fund is kept sufficiently in view in the scheme of the School Board. No doubt, Mr Gillespie in his report proposes that the minister of the parish shall formally hold the fund, and that he shall accordingly have a title and interest to see that the School Board is doing its duty with the money which he pays over to them. But that appears to me to be a shadowy substitute for the administration and control of the fund by the minister and kirk-session, which we see was designed for them by the founders of this fund. And the substance of the School Board's proposal is that this fund shall be applied in supplement of, or rather, I might say, *pro tanto* in substitute for, the rates. I think this quite inadmissible.

Another scheme suggested, but only suggested, is that the income might be applied in supplying clothing to poor children attending the infant department. I think that might have been a very desirable object had it not been for the fact that the reporter and the School Board are clear that it is already sufficiently met by Schaw's Endowment, part of the revenue of which may be applied to that purpose. Accordingly, I think we may leave it out of view.

It appears to me that the proposal of the Kirk-session most adequately meets the original purpose of the fund; and although latterly a somewhat critical attention seems to have been directed towards the objects upon which the fund is to

be bestowed, no scheme has been suggested in competition except those which **No. 41.**
 I have already been compelled to reject. The proposal of the Kirk-session **Nov. 28, 1891.**
 appears to me to be generally in conformity with the original purpose of the Kirk-Session of Preston-
 fund. They propose, as did the founders, to build a school; it is to be an infant pans v. School
 school, as was the founders' intention; it is to be in connection with the parish Board of Pres-
 church, and managed by the kirk-session, which was an essential element of the tonpans.
 founders' wishes; and they desire that there shall be no further limitation upon
 the admission of all children in the parish. The only variance in the scheme
 from the original purpose is, that it will be only education of a certain kind
 which will be given, and that upon Sunday; but, on the other hand, this vari-
 ance is due simply to the supervening changes which have taken away the need
 for what is omitted. Nor is it to be left out of view that when the fund was
 originally started in 1845, Bible education must have bulked very largely in the
 mind of the founders, and, accordingly, comparing the present scheme with that
 of 1845, I cannot say that it differs from it except in degree. I have thus in-
 dicated that I do not regard the proposal of the Kirk-session as completely
 meeting the original purpose of the founders; but my judgment is in favour of
 that proposal, because, to revert to the words of your Lordships' interlocutor, it
 is, of those submitted to us, the one most "nearly in accordance with the
 original purpose for which the fund was established."

If your Lordships take the same view, I think our course will be to remit the
 matter again to Mr Gillespie to prepare a scheme upon the lines which I have
 indicated.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"
 Find that of the schemes suggested for the application of the fund
 in question, the proposal that it should be applied towards the
 building of a church hall to be used for Sunday school purposes
 as well as for congregational purposes and a library, is most nearly
 in accordance with the original purposes for which the fund was
 established; and therefore authorise the petitioners to apply the
 said fund accordingly; and remit to Mr Gillespie to adjust the
 details of a scheme in accordance therewith, regard being had to
 the undertaking of the petitioners to raise the balance of the money
 required for the building of the hall, and of the other terms of said
 proposal, and decern."

MACPHERSON & MACKAY, W.S.—MELVILLE & LINDESAY, W.S.—Agents.

DUFF & COMPANY, Pursuers (Respondents).—*Comrie Thomson—*
McLennan.

No. 42.

THE IRON AND STEEL FENCING AND BUILDINGS COMPANY, Defenders
 (Reclaimers).—*Ure—J. Clark.*

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

Reparation—Breach of contract—Damages—Loss of Profits.—A manufactur-
 ing company in this country entered into a contract for the sale of iron huts of
 a peculiar construction, for which they held patents, to a firm of merchants in
 South Africa, with a view to the huts being resold there by the merchants.
 The earlier consignment of huts sent in pursuance of this contract was sold by
 the merchants at a profit, but subsequent consignments were rejected by them
 as being disconform to contract.

In an action by the merchants against the manufacturers for damages, it was

No. 45.

Dec. 1, 1891.
Letricheux
& David v.
Dunlop & Co.

The "Aber-
tawe."

the custom of the port were not available, no responsibility rested on the charterers, in the absence, at least, of wilful fault on their part. The fault alleged against the defenders here was remote, and was not such as to increase the measure of their obligation, which was only to discharge within a reasonable time. It was to be observed that in the cases of *Moes, Moltere, & Tromp*, and others cited by the reclaimers, the Court were determining the construction of an exception in bills of lading; here the question rather was as to the measure of the obligation in the charter-party.¹ "Detention by railways" was the proximate cause of the delay here, and the Sheriff's judgment was therefore right.

At advising,—

LORD PRESIDENT.—This is a claim of demurrage on a charter-party of the steamship "Abertawe." By the terms of the charter-party the discharge was to have taken place at General Terminus or Queen's Dock, Glasgow; in fact it took place at Port-Glasgow. This variance, though the subject of a plea on record, was not founded on before us, and the argument proceeded on the footing that at Port-Glasgow (as at Glasgow) the cargo of iron ore was to be (in the words of the charter-party) "delivered into trucks." No number of laying-days is fixed, but the cargo was "to be discharged as fast as steamer can deliver after being in berth."

The defence is founded on the following clause in the charter-party:—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, machinery, and boilers, commotion by pitmen, strikes, detention by railways, of whatever nature and kind soever during the said voyage, always mutually excepted." The words "commotion by pitmen, strikes, detention by railways," have been inserted in manuscript as an interlineation on the printed form of the charter.

The appellants have, in the first place, argued that this clause cannot in any view supply a justification of delay in discharging, inasmuch as it is limited to occurrences during the voyage. The observations of the Sheriff-substitute seem to me sufficiently to meet this objection, viz., that such a limitation would practically deny effect to the words in question.

The more earnest argument of the appellants relates to another question. The defenders, founding upon the clause which I have read, have claimed and have obtained from the Sheriffs judgment in their favour on the record, on the ground that the averments of the appellants themselves disclose that the cause of the delay for which demurrage is sued for was "detention by railways." Those averments are the following, which constitute the 4th article of the consendence and the three last sentences of the 5th:—"At Port-Glasgow vessels with iron ore are discharged by the harbour authorities into trucks supplied by the Caledonian Railway Company. The railway company had trucks available for the work of the discharge. But the defenders, in breach of the regulations of the railway company, kept too many trucks unloaded in their works, and because of this the railway company refused to supply trucks for delivery of cargo to them. This was the cause of the delay of the 'Abertawe.'" The question is,—is that a case of "detention by railways" in the sense of the clause?

¹ Steinman & Co. v. Angier Line, *supra*.

the result of a failure of duty on the part of the seller. In the present case the huts were in the makers' knowledge sent to South Africa for resale. It could not be supposed that the pursuers would want 108 pioneer huts for their personal use in the colony, and besides it appears from the documents that the defenders had constituted the pursuers their sole "agents" for sale within the colony. If huts could have been obtained in the colony at wholesale prices, it would have been the pursuers' duty to supply themselves so as to lessen the loss to the defenders, but as this could not be done, I am afraid the consequence is that the whole loss must fall on the defenders. That loss is of course the commercial profit which the pursuers have been prevented from making on that part of their capital which is locked up in the defenders' hands. I agree with the Lord Ordinary that when a claim of damages is based on estimated profit we ought to be very cautious in accepting the estimate presented to us. I should not be disposed in any case to allow more than ordinary commercial profit, even if it were clearly proved that in the circumstances of the place of shipment larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates, or ought to contemplate, as the result of his negligence, and according to the opinions expressed in *Hadley v. Baxendale* and cognate cases this is the measure of the seller's liability.

The Lord Ordinary has awarded £500 in two sums, viz., £350 for loss of profit, and £150 for travelling expenses and outlays specially proved. The sum of £350 is equal to a profit of about £3, 7s. on each of 108 huts rejected. The profit on the huts which were sold is proved to have been from £7 to £11, 10s., and the Lord Ordinary's estimate is therefore a low one.

This leads me to say in conclusion that my opinion is—and in this I think your Lordships agree—that the pursuers are not entitled to separate awards of interest on the price and damages; and for this reason, that the estimation of profit presupposes that a price is due and is paid. But we are satisfied that but for the allowance of interest the Lord Ordinary would have given a larger sum in name of damages, and therefore I do not propose to your Lordships that we should make any alteration on the terms of the interlocutor.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—MACONOCHE & HARE, W.S.—Agents.

MRS HELEN TAYLOR RUSSELL OR BOWMAN, Petitioner.—*Sol.-Gen. Murray*
—*Kennedy—Cooper.*

DUNCAN MACKINNON AND ANOTHER (Russell's Trustees), Respondents.—
D.-F. Balfour—Wilson.

REV. JOHN WILKINSON, Respondent.—*Asher—Dundas.*

Judicial Factor—Trust—Removal of trustees.—In a petition by the next of kin of a domiciled Scotsman for removal of his testamentary trustees and the appointment of a judicial factor, the only allegation against the testamentary trustees was that they intended to remove the trust-estate from Scotland to the prejudice of the petitioners, who stated that they were about to bring a reduction of the settlement on the ground of incapacity and undue influence. The trustees having stated that they had no intention of removing the estate from Scotland, the Court refused the petition.

No. 42.

Dec. 1, 1891.
Duff & Co. v.
Iron and Steel
Fencing and
Buildings Co.

No. 43.

Dec. 1, 1891.
Bowman v.
Russell's
Trustees.

No. 45.

Dec. 1, 1891.
Letricheux
& David v.
Dunlop & Co.

The "Aber-
tawe."

In my opinion, the words "detention by railways," amplified as they are by the general words "of whatever nature and kind soever," cover the case stated by the pursuers on record, and entitle the defenders to the judgment which they have obtained from the Sheriffs.

As the Sheriff-substitute's interlocutor, which is adhered to by the Sheriff, sustains not only the plea as to relevancy but also the 7th plea, which is applicable to facts and not to averments, I should propose formally to recall those interlocutors in order to rest our judgment on the first plea.

LORD ADAM.—I concur with your Lordship. The answer which the charterers make here to the claim for payment of demurrage is that the delay was due to a cause for which they are not responsible, viz., the failure on the part of the railway company to send a supply of trucks. The reply is that that failure was caused by the charterers' fault.

There is no doubt upon the averments of the pursuer as to what was the cause of the delay. The question is, upon the construction of the charter-party, whether it is covered by the clause of exceptions, which includes "detention by railways." The first point which was taken was that the exceptions could be held to apply only while the ship was at sea, and that the "voyage" terminated when she was moored, and could not be held to include the time during which she was discharging her cargo. I cannot agree in that interpretation, because, if it were correct, I cannot see what meaning would be attachable to the words "commotion by pitmen, strikes, &c.," when the vessel is at sea and making her passage. The result therefore of limiting the meaning of the word "voyage" would be to deny effect to these words. Accordingly, I think the word "voyage" must be taken to embrace the period of preparation at the port of departure and the period spent at the port of destination until the cargo has been delivered.

The further question was whether the delay in unloading was due to "detention by railways." There is no doubt that in point of fact it was so caused,—it is so averred, as I have said, by the pursuers,—and that therefore the words of the exception apply. But we are asked to go further, and to enter upon the inquiry whether the "detention by railways" was not caused by the fault of the charterers. I think this would be quite out of the question. Suppose, by way of illustration, that the detention had been caused by a strike, which is another of the excepted causes. It could not be said that the Court would go behind the fact of the strike for the purpose of ascertaining whether it might have been avoided,—whether, for instance, more wages ought to have been given to the workmen in order to avoid it. I think the only matter for us is whether there was, in point of fact, "detention by railways," and if so, whether that was the proximate cause of the delay.

LORD M'LAREN.—My opinion is that, if a *bona fide* order was given by the charterers, and if the trucks were not forwarded by the railway company, that will amount to "detention by railways" in the sense of the charter-party. It is another question whether the railway company were justified in not providing trucks, because, even if it were proved that they were so justified, I think the refusal to send the trucks could be ascribed to nothing but the action of the railway company in the exercise of its rights, the very thing which the insertion of this clause in the charter-party was intended to guard against. For these reasons I concur with your Lordships.

No. 45.

LORD KINNEAR.—I am of the same opinion. There can be no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo lies in general upon the charterer. The law is so laid down by Lord Selborne in the case of *Postlethwaite*, and I take it to be equally clear that, as there is no time stipulated within which the discharge is to be completed, the charterer was bound to discharge within a reasonable time "under the circumstances." The usual mode of discharge at Port-Glasgow, according to the custom of the port, seems to be by trucks, and in the absence of the clause excepting "detention by railways," it might have been a question of more or less difficulty whether the refusal of the railway company to provide trucks was, in the circumstances, an impediment which it was in the power of the charterer to have overcome by the use of reasonable diligence. But the stipulation in question relieves the charterer of all obligation to exercise diligence to obviate detention by railways, because that is a cause of delay for which he stipulates that he is not to be held responsible. To have held the pursuers' averments relevant would have been to refuse effect to the terms of the exception.

Dec. 1, 1891.
Letricheux
& David v.
Dunlop & Co.
The "Aber-
tawe."

I agree with your Lordship in the chair that the charterer might not have been relieved if the detention had occurred through any direct fault of his. It is not alleged that he is chargeable with any fault or negligence in the execution of his contract with the shipowner, but it is said that he failed in the performance of another contract with the railway company, with which the shipowner had no concern. The pursuers' case therefore requires that we should try the question which is said to have arisen between the charterer and the railway company on its merits, in order to find the proper basis for determining the question between the present parties. We cannot allow an inquiry of this kind. The proximate cause of the delay was detention by the railway company's failing to supply trucks. It is to the proximate cause that we must look, and we cannot inquire whether the reason for the railway company's failure was a difference with the defenders, because it is stipulated that the defenders shall not be responsible for the conduct of the railway company.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute, dated 19th November 1890, and of the Sheriff, dated 15th June 1891: Sustain the first plea in law for the defenders: Assoilzie them from the conclusions of the summons: Find the pursuer liable in expenses both in this and in the inferior Court," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—**THOMSON, DICKSON, & SHAW, W.S.**—Agents.

JOHN BAIRD SMITH (Thomas Allan's Trustee), Pursuer (Reclaiming).—*Ure—Salvesen.*

No. 46.

THOMAS ALLAN & SONS, Defenders (Respondents).—*D.-F. Balfour—W. C. Smith.*

Dec. 1, 1891.
Allan's Trustee v. Allan & Sons.

Contract—Lease—Obligation on tenant to keep subjects in repair—Reparation.
—A lease of works and machinery provided that the tenants should uphold the works in good condition to the satisfaction of A. S., an engineer, and that in the event of A. S. being of opinion that the works were not being kept in good condition, and in the event of the tenants failing to execute the necessary repairs, the proprietor should be entitled to do so, and to recover from the tenants the cost thereof, as certified by A. S.

On the tenants leaving the works, prior to the expiration of the lease, the pro-

No. 44.

Dec. 1, 1891.
Town-Council
of Stromness.

1st Division.

THE town of Stromness, in the county of Orkney, was a burgh of barony incorporated by royal charter, with all the powers pertaining thereto, and in particular with power to the burgesses to elect their own magistrates and councillors, viz., two bailies and nine councillors, the male inhabitants infert in or possessing as tenants any heritage yielding £10 annually being the electors. By the charter an election of the whole council was held on the first Wednesday of September every third year. The last election, previous to the presentation of this petition, was held on the first Wednesday of September 1888.

The General Police and Improvement (Scotland) Act, 1862, was adopted by the burgh in 1863, but notwithstanding that fact, and the extension of the franchise under the Act of 1868 to male occupiers of premises of the value of £4 annually, and under the Act of 1882 to females, no change was made in the municipal qualification. Elections, as above stated, continued to be held every third year, and voting by ballot was not introduced.

In these circumstances a petition was presented by the acting Commissioners of Police of the burgh, who were also designed as householders, in which they stated,—“ When preparing for the election, which, according to former practice, would have taken place in September last, doubts arose in the minds of the petitioners on the subject, and, upon advice, they resolved not to hold the election in September on the old qualification, but that effect should be given to the changes above indicated, and the election held in conformity with the Ballot Act, 1872, and the other relative statutes. The authority of the Court for this purpose is accordingly desired by the petitioners. With this view it will be necessary to make up from the Valuation-roll a correct list of voters, including such females as are pointed out by the Act of 1882. It will also be necessary to fix a day for the election, and to have some fit person appointed a returning officer in order to conduct the election under the Ballot Act seeing that the senior bailie (Mr James Spence), on whom the duty is thrown by the Ballot Act, has left Stromness and become resident in Aberdeen, and has demitted office, and that the petitioner, Mr John Ait Shearer, the other bailie, is a candidate for re-election.”

The prayer of the petition was that the Court should “ authorise and ordain the petitioner, John Stanger Copland, town-clerk, Stromness, and treasurer to the Police Commissioners thereof, to make up and certify list or roll of electors of the said burgh of Stromness, duly qualified in terms of law, including male occupiers of lands or premises of the year value of £4 and upwards, as appearing in the Valuation-roll, and female occupiers of lands or premises as aforesaid, who are not married, or, being married, do not live in family with their husbands, or otherwise including only persons qualified in terms of the said charter of Stromness; and to authorise and appoint” the Sheriff-substitute “ to act as returning officer at the election of magistrates and councillors, on Tuesday, the 1st day of November next, or on such other day as your Lordships may appoint, due intimation thereof being given as your Lordships may direct with all the statutory and other powers competent and necessary for the discharge of the said office in manner provided by the General Police and Improvement (Scotland) Act, 1862, the Ballot Act, 1872, and the other Acts regulating Municipal Elections in Scotland.”

When the petition was heard in the Single Bills on 10th November the dates of election named in the charter and in the Police Act were both past.

At the hearing in the Single Bills on 10th November the Court declined to entertain the questions, whether the roll should be made

under the charter or under the Police Acts, and whether the Ballot Act applied, expressing the opinion that if the parties wished them decided they must bring a declarator. At the same time they expressed their willingness to appoint a returning officer, and the hearing was continued.

No. 44.

Dec. 1, 1891.
Town-Council
of Stromness.

The petitioners thereafter lodged a minute stating that they were advised "that the election of magistrates for the burgh of barony of Stromness falls to be made in terms of the charter of the burgh of 1817, except as regards the manner of taking the poll, to which the provisions of the Ballot Act apply," and craved leave to amend the prayer of the petition accordingly.

THE COURT thereafter pronounced this interlocutor:—"Allow the prayer of the petition to be amended, and the same having been done, authorise and appoint Samuel Beveridge Armour, Esquire, Sheriff-substitute of Orkney, at Kirkwall, whom failing, William Cowper, Esquire, town-clerk of Kirkwall, to act as returning officer at the election of magistrates and councillors of the burgh of Stromness, to be held on Wednesday the 23d day of December 1891, on six days' intimation thereof being given by handbills posted in the said burgh, with all the statutory and other powers competent and necessary for the discharge of said office: Find the petitioners entitled to the expenses of the petition, and the procedure following thereon, out of the first assessment for police purposes which may be levied by the magistrates and council, Commissioners of Police of the said burgh, to be elected as aforesaid."

WILLIAM GRAHAM, Solicitor, Agent.

LETRICHEUX & DAVID, Pursuers (Appellants).—*Dickson—Ure.* No. 45.
JAMES DUNLOP & COMPANY, Defenders (Respondents).—*Sol.-Gen. Murray*
—*Dundas.*

Dec. 1, 1891.
Letricheux
& David v.
Dunlop & Co.

Ship—Demurrage—Charter-party—Exceptions—"Detention by railways."
—A charter-party provided that the vessel should proceed to a port named and deliver her cargo in the usual and customary manner on being paid freight at a certain rate "per ton delivered into trucks," and contained the following clause of exceptions:—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, machinery and boilers, commotion by pitmen, strikes, detention by railways, of whatever nature and kind soever during the said voyage, always mutually excepted."

In an action upon the charter-party at the instance of shipowners for payment of demurrage it was averred that there had been delay in the discharge of the cargo owing to the refusal of a railway company to supply trucks to receive it, on account of the charterers having, in breach of the company's regulations, kept too many trucks unloaded in their works. Held that the delay was covered by the exception "detention by railways," and action dismissed as irrelevant.

By charter-party, dated 4th February 1890, between Letricheux & David, shipowners, Swansea, and Lietke & Company, on behalf of James Dunlop & Company, ironmasters, Glasgow, it was stipulated that the s.s. "Abertawe" of Swansea, of 881 tons register, should proceed to Portugal, Bilbao, and there load a cargo of iron ore, and proceed therewith to "a crane berth at General Terminus or Queen's Dock, Glasgow, as ordered on arrival, or so near thereunto as she may safely get, and deliver the same, in the usual and customary manner, on being paid freight, . . . per ton of 20 cwts. delivered into trucks in full of Clyde dues on cargo . . . (The

1st DIVISION.
Sheriff of
Lanarkshire.

No. 46.


Dec. 1, 1891.
Allan's Trust-
ees v. Allan &
Sons.

remitted the cause to the Lord Ordinary, "with instructions to recall the sist, and proceed with the cause."

The pursuer having intimated to the Lord Ordinary that he did not intend to execute the repairs in question, the Lord Ordinary, on 8th September 1891, pronounced this interlocutor:—"The Lord Ordinary recalls the sist formerly granted; and having again considered the cause, in respect that the pursuer states that he does not intend to execute the repairs mentioned in the Lord Ordinary's interlocutor of 15th June 1891, assoilzies the defenders from the conclusions of the summons as laid, and decerns: Finds the defenders entitled to expenses, subject to modification."*

The pursuer reclaimed, and argued;—The Lord Ordinary was in error in thinking that the pursuer had only one remedy, to repair at his own cost and sue for the sum so expended. He had another, to sue for damages for breach of contract. The recall of the former interlocutor of the Lord Ordinary imported that the contention his Lordship had now again sustained was unsound. The pursuer, because he thought it useless to waste money in putting dismantled buildings into repair, ought not to lose every remedy.¹

The defenders argued;—The pursuer having elected the remedy provided under the lease, he was not now entitled to claim damages at common law.

 LORD YOUNG.—There is no doubt of the defenders' obligation under the lease to keep the premises in repair, and to leave them in good repair to the satisfaction of Mr Alexander Steven. After they left the premises, and on a reference to Mr Steven under the authority of this Court, it was found by Mr Steven that the defenders had not left the premises in good repair. That was a breach of contract. The question then came to be what was the remedy of the pursuer, the landlord. The lease specifies one remedy. It provides that if the arbiter is of opinion that the ~~works, machinery, and~~ plant are not in good repair, and the tenants fail to put them into such, the landlord is to be entitled to execute the repairs necessary to put them into proper condition at the expense of the tenants, "who shall be liable in payment of the expense thereof, as the same shall be certified by the said Alexander Steven." But that is not specified as the only remedy. If the landlord, after it was found that repairs must be executed and the tenants had failed to do so, did not choose to put the premises in repair, it seems to me not to be arguable that there was no remedy. There must be also, I think, the remedy of suing for damages for the consequences of the breach of contract. That is exactly what has been done here. The Lord Ordinary previously expressed the opinion that the pursuer's only remedy was to repair and to sue for the cost of repairing, and he sisted process that the pursuer might, if so advised, proceed to repair and to obtain from the arbiter a certificate of the expense thereof, although the pursuer intimated that he did not intend to repair. On a reclaiming note the pursuer again stated that to us, and we also were told that the pursuer declined to repair. But we recalled the

* "NOTE.—I understand that the case was remitted to me by the Inner-House to be disposed of, on the footing that the pursuers do not intend to execute the repairs mentioned in my interlocutor of 15th June 1891. No further argument was addressed to me for the pursuer; and as I see no reason to alter the opinion which I formerly expressed in the note to my interlocutor of 15th June, I think the defenders must be assoilzied."

¹ Bidoulac v. Sinclair's Trustees, Nov. 29, 1889, 17 R. 144.

sist, and remitted to his Lordship to proceed with the action. The Lord Ordinary has again acted on his view that the pursuer has no remedy, except to repair and sue the defenders for the cost. If we had thought that when the case was previously before us, we would not have recalled the sist and remitted the case for further procedure. It is now again before us, and in the same condition as before. I think we should keep the case before us, and should ascertain by evidence the amount necessary to make good the damage to the pursuer from the causes which Mr Steven found to exist.

LORD RUTHERFURD CLARK.—I agree.

LORD TRAYNER.—I also agree. I have no doubt, on the construction of the lease, that the pursuer had the remedy, either of repairing and suing for the cost of the repairs, or of an ordinary common law action of damages. Therefore I think it is clear that the Lord Ordinary's judgment cannot stand. But, in allowing a proof, it is important to keep in view a matter alluded to by Lord Young. The question for proof is the amount in money of the damage sustained by the pursuer in respect of the failure of the defenders to leave the premises in proper repair, as that failure is ascertained and fixed by the report of Mr Steven.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against, except in so far as it recalls the sist therein mentioned: Allow pursuer a proof of his averments in so far as not admitted, and to the defenders a conjunct probation: Appoint the proof to proceed before Lord Trayner, on a day to be afterwards fixed," &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

WILLIAM WILSON AND ANOTHER, Petitioners.—Goudy.

No. 47.

Bankruptcy—Sequestration—Notice of meeting to elect trustee—Computation of time—Bankruptcy (Scotland) Act, 1856 (18 and 19 Vict. c. 79), sec. 67.—Wilson.
Held that in order to comply with the provisions of the 67th section of the Bankruptcy (Scotland) Act, 1856,* there must be an interval of six days after the close of the day of the Gazette notice of the award of a sequestration, and the date to be fixed for the election of a trustee.

THE estates of William Wilson were sequestrated by the Sheriff-sub-1st Division of Ayrshire on 5th October 1891, and in the deliverance awarding sequestration, a meeting of creditors was appointed to be held on 12th October 1891. A notice of the award of the sequestration and of the place and date fixed for the meeting was inserted in the *Edinburgh Gazette* of Tuesday 6th October 1891, being the first publication of the *Gazette* after the deliverance was pronounced.

At the meeting on the 12th October one of the creditors protested against the legality of the proceedings, and objected to the appointment of a trustee, as timeous notice had not been given in terms of the 67th section of the Bankruptcy (Scotland) Act, 1856, six clear days not having elapsed

* The Bankruptcy (Scotland) Act, 1856, sec. 67, enacted,—“The Lord Ordinary or the Sheriff, by the deliverance which awards sequestration, shall appoint a meeting of the creditors to be held at a specified hour on a specified day, being not earlier than six nor later than twelve days from the date of the *Gazette* notice of sequestration having been awarded, . . . to elect a trustee,” &c.

No. 46.
Dec. 1, 1891.
Allan's Trustees v. Allan & Sons.

No. 47.

Dec. 1, 1891.
Wilson.

between the date of the notice and the day fixed for the meeting. The meeting proceeded notwithstanding to elect a trustee, but the Sheriff-substitute declined to confirm the election on the ground that the statutory notice had not been given.

Wilson and one of his creditors now presented a petition to the Court in which they asked the Court to remit to the Sheriff to confirm the election, on the footing that the notice was sufficient.

No answers were lodged, and no appearance was made for the other creditors.

Argued for the petitioners;—The terms of the 67th section of the Bankruptcy Act, 1856, were sufficiently complied with if the meeting was held on the sixth day after the date of the notice. The maxim *dies incipit pro completo habetur* applied, and brought the procedure here into consonance with the provision in the 5th section of the Act that “periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run.” There were no doubt cases in which the Court seemed to have given effect to the view that six clear days must elapse,¹ but there were also cases the other way.² In cases of deathbed reduction it had been settled that the day of making the deed must be excluded from the computation; so too in cases of bankruptcy, in a reduction under the Act 1696, cap. 5; but in both, the sixty days were held to have expired the moment the sixtieth day began.³ So too in cases of poindings within sixty days before the day of bankruptcy.⁴

At advising,—

LORD PRESIDENT.—The Court hold that the terms of section 67 of the Bankruptcy (Scotland) Act of 1856 are such as to require that an interval of six days must elapse after the close of the day of the *Gazette* notice, and before the commencement of the day of meeting.

The meeting to which the petition relates was therefore not legal, and the Court will appoint a fresh meeting to take place.

THE COURT appointed a new meeting of creditors to be held on 11th December 1891 for the election of a trustee and commissioners, and remitted to the Sheriff of Ayr to proceed further in terms of the Bankruptcy Act.

CARMICHAEL & MILLER, W.S., Agents.

No. 48.

Dec. 8, 1891.
Baillie's Trustees v. Baillie.

SIR WILLIAM BAILLIE'S TRUSTEES, First Parties.—*W. Campbell.*

DAME MARY BAILLIE, Second Party.—*W. Campbell.*

SIR GEORGE BAILLIE, Third Party.—*Macfarlane.*

Succession—Fee and liferent—Minerals—Mineral field opened up by testator but not worked.—A husband directed his trustees to pay to his wife in the event of her surviving him, “during her lifetime, the free annual proceeds of my estate and of minerals therein,” and after her death to dispose the estate to B.

Held that the liferenter was entitled to the proceeds not only of mineral workings which the testator was carrying on at the date of his death, but also of workings which he had abandoned as unprofitable.

¹ *E.g.*, Struthers, March 7, 1861, 23 D. 702, 33 Scot. Jur. 346.

² Von Rotberg, Dec. 22, 1876, 4 R. 263.

³ Bell's Comma. (7th edn.) i. 84, and ii. 179.

⁴ Scott v. Rutherford, Dec. 7, 1839, 2 D. 206, 12 Scot. Jur. 234; Greig Anderson, Feb. 23, 1883, 20 S. L. R., 421; Stiven v. Reynolds & Co., Jan. 2 1891, 18 R. 422; Kinnear on Bankruptcy, p. 8.

SIR WILLIAM BAILLIE, Bart., of Polkemmet died on 21st July 1890. He was survived by his wife, but by no children. He left a trust-disposition and settlement, dated 10th April 1889, whereby he conveyed to Mark John Stewart and another, as trustees, his whole heritable and moveable estate, directing them, *inter alia*, as follows:—" (Second) My trustees shall, from and after my death, hold my estate of Polkemmet, comprehending the whole lands, teinds, and other heritages in the county of Linlithgow belonging to me, for the liferent use of Dame Mary Baillie, my wife, in the event of her surviving me; and they shall pay to her during her lifetime the free annual proceeds of said estate, and of minerals therein, and allow her to occupy the mansion-house, offices, and policies." The trust-disposition and settlement further provided in the fifth place:—" (Fifth) on the death of the survivor of me and my said wife, my trustees shall dispoise and convey my whole foresaid heritable estate to George Baillie, now in Australia, my nephew, eldest son of the late Thomas Baillie, my brother, whom failing, to the heirs of his body, whom failing, to" a certain series of heirs.

No. 48.

Dec. 8, 1891.
Baillie's Trustees v. Baillie.2ND DIVISION.

After the testator's death a question arose with regard to the letting of minerals in the estate, and a special case was adjusted, the parties to which were (first) the trustees, (second) Lady Baillie, and (third) George Baillie (now Sir George Baillie, Bart.).

During Sir William Baillie's life he had let the minerals in certain portions of his estate to tenants under leases, which were current at the date of his settlement and at the date of the case. No question arose as to these.

Sir William had also let the minerals in a farm named Burnbrae to a tenant, but the tenant had become bankrupt in 1881 and had abandoned the lease. The pit used by him, however, upon the farm remained open, and could easily be made available for working. Sir William had also in 1886 accepted a proposal to take a lease of the minerals in Burnbrae, and also in other parts of the estate known as Swineabbey, West Foulshiels, and East Whitburn, but the tenant gave up the lease, after proving the mineral field, without working it.

In 1891 Robert Addie & Son, coalmasters, made an offer to the trustees to take a trial lease of the minerals in Burnbrae, Swineabbey, East Whitburn, and West Foulshiels. They stipulated that if minerals were found which they might wish to work they should have a lease from the trustees for thirty-one years from Martinmas 1882.

The questions for decision were,—“1. Have the first parties power to let the minerals in the portions of the estate of Polkemmet referred to for a period not exceeding thirty-one years (1) without the consent of the third party, or (2) with his consent? 2. In the event of either alternative of the first question being answered in the affirmative, is the second party entitled to receive during her lifetime the free lordships or rents of the minerals in the said portions of the estate of Polkemmet?”

Argued for the second party;—The testator had been trying to let the minerals so as to procure an annual return. There had been a temporary failure to obtain mineral rents from these portions of the estate, but that was because the tenant had given them up. But the fields were opened up and ready to be worked again, especially Burnbrae, where the pit remained open. The testator's intention had been clearly indicated by his acts, and that was the proper test.¹ The minerals could therefore be

¹ Campbell's Trustees v. Campbell, March 15, 1882, 9 R. 725, affd. July 6, 1883, 10 R. (H. L.) 65.

No. 48.

Dec. 8, 1891.
Baillie's Trustees v. Baillie.

let without the third party's consent. The words following "free annual proceeds of said estate," viz., "and of minerals therein," shewed the testator's intention, and distinguished the case from that of *Campbell*.

Argued for the third party;—The question was settled by the judgment in *Campbell's* case. The widow's liferent was to be measured by the actual state of the testator's own enjoyment at his death, unless there was express or implied direction to the contrary. There was none such here. It was true that the testator had made trial of the minerals. But the trial had been given up. It was not to be assumed that the testator would have given the whole liferent if he had contemplated that the trustees would think of reopening disused pits.

At advising,—

LORD JUSTICE-CLERK.—In this case we have to decide the effect of the provision which the testator made for his widow in the second purpose of his settlement. That purpose is as follows—(His Lordship quoted the second purpose).

The statement of fact in the special case is, that at various times during the lifetime of the testator the minerals had been opened up and leases entered into by tenants. It also appears that the working of these was not profitable for the tenant, and that the tenant ceased to work the minerals, and that pits upon one of the farms still remain open and could easily be made available for working. That applies to the Burnbrae and Swineabbey minerals. The question put to us is, whether the trustees have power, without the consent of the party who is ultimately to succeed to the estate, or with his consent, to let those mineral fields which have been already opened up. The first question is, of course, whether they have the right or not. The case is peculiar in this respect, that the settlement contains the express declaration that the testator's widow is to have the free annual proceeds of the estate, "and the minerals therein," and it is asked of us whether the trustees are entitled to give the widow the benefit of working these already opened mineral fields by letting them and adding the rents to her liferent.

It seems to have been clearly laid down in the case of *Campbell*, 9 R. 725,—I read from the opinion of the Lord President, at page 728,—that "where a mineral field has been opened up and made part of the fruits of the soil, or has provided an income during the lifetime of the testator, the liferenter of the estate is entitled to continue to have these fruits as part of the free income of the estate. But where it has not been opened up in the lifetime of the testator, but has become a source of revenue since his death, the liferenter is not entitled to enjoy it."

Giving the best consideration I can to the matter, I am of opinion that the widow of this testator is entitled to the annual fruits of these fields which were opened up during the testator's lifetime. He drew the fruits during his life so long as the tenant was able to pay them. Local or temporary circumstances may have prevented the tenant from carrying on the work at a profit, and it may have been stopped for a time. But the minerals were opened up in the testator's lifetime, and taking with us the doctrine of *Campbell's* case, and considering that the testator has expressly given the liferent of the free annual proceeds of "said estate, and of minerals therein," it is difficult to see what minerals he can have intended, unless it was the mineral fields already opened up or the whole minerals. Now, it is not necessary to decide whether the trustees could open

up a new mineral field in any other part of the estate. That is not the question put to us, but the question is, whether they have power to let the minerals already opened up and formerly worked. My opinion is that they are so entitled. No. 48.
Dec. 8, 1891.
Baillie's Trustees v. Baillie.

The only other question is, whether the third party's consent is necessary. I am of opinion that it is not, the question being of the nature which I have indicated and the law laid down in *Campbell's* case being as I have stated.

Therefore I propose that we answer the first question in the affirmative, that we find that the power of the first parties may be exercised without the consent of the third party, and that we answer the second question in the affirmative.

LORD TRAYNER.—By the trust-deed of the late Sir William Baillie his trustees are directed to hold the estate of Polkemmet for the liferent use of the second party, and to “pay to her during her lifetime the free annual proceeds of said estate, and of minerals therein.” A direction to the trustees to pay to the second party the free annual proceeds of the estate for her liferent use would have entitled her to the rents or royalties derived from minerals which had been opened up and worked during the truster's lifetime, and I take it that something more was intended to be given to the second party by the addition of the words “and of the minerals therein.” Whether that would entitle the second party to insist that mineral fields should now be opened up which the testator had not worked or leased, or shewn any intention to work or lease, during his lifetime, in order that she might receive the rents and royalties thereof, I do not say, but I think there is here an expression of the truster's intention (which was wanting in the case of *Campbell*), that the second party should take under the provisions of the trust-deed rents or royalties of minerals beyond what would have been carried by an ordinary liferent provision. In the circumstances stated in the case I think it is reasonable to connect that intention with the minerals which had been let by the truster, or which he had agreed to let, during his lifetime, and which there was ground for believing would be worked by other tenants than those who had taken or agreed to take them from the testator, but had not worked them out, or worked them at all. For these reasons I concur in thinking that the questions put to us should be answered in the manner proposed.

LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THIS interlocutor was pronounced:—“Find that the first question is to be answered in the affirmative, and that the power of the first parties may be exercised without the consent of the third party: Find that the second question is to be answered in the affirmative,” &c.

TODD, MURRAY, & JAMIESON, W.S., Agents.

STUART & STUART, Petitioners (Reclaimers).—*Baxter*.
DONALD MACLEOD, Respondent.—*M'Kechnie—Wilton*.

No. 49.

Bankruptcy—Sequestration—Contingent debt—Crofter—Crofters Holdings (Scotland) Acts, 1886 and 1887 (49 and 50 Vict. c. 29, and 50 and 51 Vict. c. 24).—In answer to an action by a landlord for payment of the arrears of rent Dec. 8, 1891.
Stuart & Macleod.

No. 49.

Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

of a house alleged by the pursuer to be an inn, the defender asked for a sist pending the disposal of an application he had made to the Crofter Commissioners on the footing that the house formed part of a "holding" within the meaning of the Crofters Act, 1886. The Lord Ordinary (Wellwood) *refused* to sist the action, and the defender afterwards withdrew this defence "without prejudice to his application to the Crofters Commission," and consented to decree being granted against him. On expiry of a charge on the extract decree without payment, the landlord's assignee presented a petition for sequestration of the tenant's estate under the Bankruptcy Act, 1856. The debtor objected on the ground that the debt was contingent until the Commission issued its determination. *Held* (rev. judgment of Lord Kincairney, Ordinary) that as the debt was constituted by a decree for payment of arrears of rent of an inn, it could not be held to be for the rent of a "holding" within the meaning of the Crofters Act; that the debt was not therefore contingent, and that sequestration must be awarded.

Observed per Lord McLaren,—"Unless the proprietor and the tenant are agreed that the tenant is a crofter in the sense of the Crofters Act, and is entitled to its benefits, it is only through the ordinary Courts of the country that the dispute can be finally determined."

Bankruptcy—Award of sequestration—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 30.—*Opinions per curiam* in conformity with opinion of Lord President Inglis in *Joel v. Gill*, 21 D. 929, that where all the conditions required by the Bankruptcy Act, 1856, have been complied with the Court has no discretion, but is bound to award sequestration.

Held by Lord Wellwood (Ordinary), upon a construction of the Crofters Holdings (Scotland) Acts, 1886 and 1887, that a decree for payment of arrears of rent may be pronounced against a crofter notwithstanding the dependence of an application to the Commissioners to have a fair rent fixed.

1st DIVISION.
Lord Kin-
cairney.

THIS petition was presented by Messrs Stuart & Stuart, W.S., for sequestration of the estates of Donald Macleod, under the Bankruptcy Act, 1856, in the following circumstances.

On 30th June 1890 Norman Macpherson, Esq., and the Misses Macpherson, his sisters, proprietors *pro indiviso* of the island and estate of Eigg, brought an action against Donald Macleod for payment of £52, 10s., being the amount of seven half-yearly rents of £7, 10s. each from Whitsunday 1887 to Whitsunday 1890 inclusive, alleged to be due in respect of the defender's occupancy of the Scur Inn situated upon the island.

In that action the pursuers averred;—"Upwards of fifty years ago the house now known as the Scur Inn was the house for the tenant of the farm of Galmisdale. That farm having fallen out of lease some forty or fifty years ago, it was divided among crofters, and the farmhouse was let to defender's father, the late Allan Macleod, as an inn, in place of the small cottage near the seashore then occupied by him as such. There was also at same time let to Allan Macleod a croft in Galmisdale, which is now in possession of the defender. The two subjects were let distinctly, and separate rents paid therefor. Subsequently, the pursuers prohibited the said Allan Macleod from selling spirituous liquors in the inn, and in respect thereof let him occupy the house rent free. When in 1878 it was found that the inn had fallen into disrepair, and become insufficient for the requirements of the island, the pursuers, at a very considerable outlay, improved the house and put it into thorough repair, and agreed to give the said Allan Macleod and defender a lease thereof for three years at £15 per annum. . . . No formal lease was prepared, but the arrangement came to under a letter and minute between the parties was acted on, the proprietors repairing and adding to the house, and Allan Macleod and the defender regularly paying the agreed on rent of £15 per

annum, and that over and above and distinct from the rent of the croft in Galmisdale, £14 per annum." Allan Macleod died in 1883, and the defender thereafter remained in occupation of the subjects on the old terms. He regularly paid the rent of the croft in Galmisdale, but had refused to pay the half-yearly rents sued for. No. 49.
—
Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

The defender in that action averred;—(Ans. 2) "Admitted that upwards of fifty years ago the house called by the pursuers the Scur Inn was the dwelling-house for the tenant of the farm of Galmisdale, that the said farm was then divided into crofts, and that the defender's father became a tenant of one of these. *Quoad ultra* denied. Explained that the defender's father having leased the largest croft, there was let along with it to him the said dwelling-house, which was thereafter occupied by him and subsequently by the defender. The pursuers made certain improvements on the dwelling-house about the year 1878 on the footing of a verbal agreement with the defender, whereby he undertook to pay 5 per cent on the cost after the repairs were executed. The pursuers represented that they had expended £300, and charged the defender £15 per annum of additional rent for said croft and dwelling-house. The defender and his father always complained against that increase as excessive." He further admitted that he had refused to pay the half-yearly rents sued for, and explained that he had applied to the Crofters Commissioners, on 2d July 1890, to fix the fair rent for the croft, including the dwelling-house, and arrears payable by him, and that the application had not yet been disposed of. The Commissioners had issued an order, on 15th September 1890, prohibiting "*in hoc statu* all proceedings for the sale of the applicant's effects upon his holding, by virtue of any decree for rent or arrears of rent, and without prejudice to and under reservation of the whole rights and pleas of parties."

The defender pleaded, *inter alia*;—(2) *Lis alibi pendens*. (3) In any view the action ought to be sisted pending the disposal of the defender's application by the Crofters Commissioners.

The Lord Ordinary (Wellwood), on 6th November 1890, repelled the second and third pleas in law for the defender, and allowed a proof.*

* "OPINION.—The second and third pleas in law are founded upon the dependence before the Crofters Commissioners of an application by the defender to have a fair rent fixed.

"The summons in this case was raised on 30th June 1890, and it is admitted that an application was made by the present defender on the 2d of July, and therefore the application was made timeously. Under the Crofters Holdings Acts, 1886, 1887, the Commissioners have certain powers of restraining, to a certain extent, the execution of decrees of Courts of law. Under the Act of 1886, section 6, subsection 4, it is provided that,—'When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined, upon such terms as to payment of rent or otherwise as they shall see fit.'

"Now, that power is confined to preventing the removal of a crofter in respect of any decree obtained against him, until the application before the Commissioners is disposed of. That was thought, after the decision in the case of *Prater v. Macdonald*, 14 R. 181, to give rather a limited power to the Commission; and accordingly, by the Crofters Holdings Act of 1887, section 2, certain wider powers were conferred, but those powers were confined to authorising the Commissioners to prohibit the sale of the crofter's effects upon the holding by virtue of any decree for payment of rent. Now, that section seems to imply that, notwithstanding the dependence of an application to the Commissioners, a decree for arrear of rent may be competently pronounced by the Court.

No. 49.

Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

The defender thereafter lodged the following minute:—"Forsyth, for the defender, stated that he, without prejudice to the defender's application to the Crofters Commission, withdrew the defence stated for the defender, and consented to decree in favour of the pursuer, in terms of the conclusions of the summons." On 20th December following the Lord Ordinary decerned against the defender in terms of the conclusions of the summons, with expenses.

The expenses were taxed at £37, 5s. 10d., and the pursuers thereafter extracted the decree in their favour, and on 29th May 1891 they charged the defender to make payment of £77, 18s. 7d., being rent, interest, and expenses under deduction of a payment to account made under order of the Commissioners. The charge having expired without payment, the pursuers thereafter assigned the decree to their agents, Messrs Stuart & Stuart, W.S.

Messrs Stuart presented the present petition for Macleod's sequestration under the Bankruptcy Act.

Macleod then lodged a minute craving the Court to dismiss the petition, and pleading;—(1) The petition is incompetent pending the respondent's application to the said Commissioners, and is barred by the terms of the order of said Commissioners. (2) The petition is incompetent in respect of its non-compliance with the statutory requirements in so far as, . . . (b) the debt founded on is contingent. He stated that he had acquiesced in Lord Wellwood's interlocutory judgment with the view of avoiding the expense of two inquiries, and that thereafter in respect of his minute, in which without prejudice to his application to the Commissioners he withdrew his defence, decree had been pronounced against him.

The Lord Ordinary on the Bills (Kincairney), on 22d August 1891, refused the petition.*

It also gives the Commissioners power to prohibit the sale of the crofter's effects on the holding. Therefore the result of the provisions in the two Acts is that where an application is timeously made by a crofter for the purpose of having a fair rent fixed, the Crofters Commissioners can issue an order which will have the effect of preventing the crofter being removed from his croft, and also of preventing the sale of the crofter's effects upon the holding in respect of any decree that has been obtained against him. There is nothing either to interfere with or stop the action of the ordinary Courts of law in regard to a claim of debt that a landlord may have against a tenant. I therefore think that the second and third pleas in law in this case are not well founded.

"Mr Forsyth appealed to the discretion of the Court, and maintained that as the matter was under the consideration of the Crofters Commissioners, it would be putting parties to needless expense to pronounce a decision in this action. Well, it may be that through the decision of the Crofters Commissioners the landlord may not be able to recover all that he sues for, but if he wishes to obtain a decree *valeat quantum*, he is entitled to have it. . . . Therefore I shall repel the second and third pleas in law for the defender, . . . and before further answer, allow the pursuers a proof *habili modo* of their arrears, and to the defender a conjunct probation."

* "OPINION.—I think the petition must be refused. The respondent has applied to the Crofter Commissioners to have his rent fixed on the assumption that his possession is a holding in the sense of the Act. It may turn out not to be so, but the Commissioners have provisionally treated it as a holding and have pronounced orders on that footing. I think I must take it in the meantime that it is, or at least may be a holding. If so, it is within the reach of possibility that the arrears for which the petitioners hold a decree, or part of them, may be remitted, and therefore the petitioners' decree is not unconditional; it is in the position of a decree subject to review, and is therefore contingent and insufficient."

The petitioners reclaimed. It was stated at the hearing that one of the Commissioners had just issued an order dismissing Macleod's application on the ground that he was not tenant of a "holding" in the sense of the Act, but that the order might be appealed against to the three Commissioners within fourteen days in terms of the provisions of the Crofters Commission (Delegation of Powers) Act, 1888, and relative regulations. No. 49.
Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

Argued for the petitioners;—A decree for payment of the arrears of rent by a crofter was not suspended by the presentation of an application to the Commissioners to fix a fair rent,¹ and the diligence of sequestration could competently follow thereon. No doubt the crofter was protected against eviction, or might get an order prohibiting the sale of his effects, where he had in the first place made an application for the fixing of a fair rent for his holding.* But unless the Crofters Acts specifically abrogated the right to do diligence that right must still subsist. Besides, the debt on which the diligence proceeded here was arrears of the rent of an inn, which was not a "holding" in the sense of the Crofters Act. The defence originally stated to that effect in the action for payment of arrears which had depended before Lord Wellwood had been withdrawn, and the decree was granted in respect of that withdrawal. The Lord Ordinary had no discretion in regard to awarding sequestration or not. The provisions of the 30th section of the Bankruptcy Act, 1856, being fulfilled, the Court was bound to award it.

Argued for the respondent;—Sequestration was an indirect mode of obtaining the removal of a crofter, and as such the use of that diligence would be regarded jealously by the Court.† The debt which was the basis of the diligence in the present case was contingent, because it depended upon the result of the application to the Commissioners what amount of arrears, if any, were to be paid. The Court of Session had no jurisdiction to determine in the circumstances of the present case whether the respondent was a crofter or not, and the *Duke of Sutherland's* case² was not an authority to that effect. The minute lodged by the respondent in the action before Lord Wellwood, in respect of which the decree which founded the sequestration proceedings was granted, was specially conditioned to be "without prejudice to the defender's application to the Crofters Commission." Further, in the case of *Fraser*,³ the effect of a decree for payment of arrears in the Court of Session was reserved, and the

to found a sequestration.—(Bankruptcy Act, 1856, section 14; *Forbes v. Whyte*, November 29, 1890, 16 R. 182.)

"The petitioners suggested that the petition might be sisted until the condition was purified, but I know of no precedent for such a course, and see no advantage in it.

"Farther, if I have power to refuse a petition for sequestration on the ground of expediency, I think this petition should be refused on that ground—for this reason—that if sequestration were awarded, and if this debt after a lapse of more than forty days were reduced below £50 the respondent might be unable to get the sequestration recalled. He would suffer a wrong without having any apparent remedy. Having in view the observations of the Lord President in *Campbell v. Macfarlane*, 1862, 24 D. 1097, I think that, sitting in the Bill Chamber, I cannot hold that I have not that power.

"I think the petition should be refused on these two grounds. I do not find it necessary to deal with the respondent's other objections."

¹ *Fraser v. Macdonald*, Dec. 7, 1886, 14 R. 181.

² *Crofters Holdings (Scotland) Act*, 1887 (50 and 51 Vict. c. 24), sec. 2.

³ *Crofters Holdings (Scotland) Act*, 1887 (50 and 51 Vict. c. 24), sec. 3.

⁴ *Duke of Sutherland v. Reed*, Dec. 18, 1890, 18 R. 252; *Crofters Holdings (Scotland) Act*, 1886, sec. 25.

⁵ *Fraser v. Macdonald*, *supra*.

No. 49.

Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

amount to be paid, if any, was held to depend upon the result of the application to the Commission. The fact that there was a judgment by one of the Commissioners, to the effect that the respondent was not entitled to the benefits of the Act, did not affect the question of the contingency of the debt so long as an appeal to the three Commissioners was open, as it now was in terms of the provisions of the Crofters Commission (Delegation of Powers) Act, 1888. The debt was therefore clearly contingent, and could not support a petition for sequestration.¹ The granting of sequestration was a matter of discretion where reasonable cause was shewn against it.² There was no race of diligence here, for the landlord was the only creditor, and there was further no danger of dilapidation. The landlord would suffer no hardship by the delay, while the respondent would suffer the greatest hardship if sequestration were granted.

At advising,—

LORD ADAM.—This is a petition at the instance of Messrs Stuart & Stuart, Writers to the Signet, for sequestration of the estates of Donald Macleod. The Lord Ordinary has refused the application, and the question is whether he has been right in so doing.

It is not disputed that the respondent, Macleod, is subject to the jurisdiction of the Scottish Courts, nor is there any question that he is notour bankrupt under the Debtors Act, 1880, nor again is it disputed that the petitioners have produced oath and vouchers of debt to an amount sufficient to warrant the granting of sequestration. Thus all the requisites for obtaining sequestration are present. But it is maintained by the respondent that the petitioning creditors are not qualified, because the debt on which they found is a contingent debt. If that is so, no doubt under section 14 of the Bankruptcy Act, 1856, sequestration cannot be awarded.

The first question then is whether the debt on which the petitioning creditors found is a contingent debt. That debt is constituted by a decree pronounced on 20th December 1890 by Lord Wellwood for the sum of £52, 10s. of principal with interest, and £37, 5s. 10d. of expenses. The sum of £52, 10s. is said to be a contingent debt, in respect that it represents the arrears of rent of subjects, which are a holding in the sense of the Crofters Act, 1886, and because the respondent having applied to the Crofter Commissioners to have a fair rent fixed, it cannot be known until the result of that application how much of these arrears are really payable to the petitioners. That contention is supported by reference to section 6 of the Crofters Act, which provides, subsection (1), that “the landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding. . . .” and subsection (5), that “in the proceedings on such application the Crofters Commission shall take account of the amount of arrears of rent due or to become due before the application is finally determined, . . . and may take evidence of all the circumstances which have led to such arrears, and shall decide whether, in view of such circumstances, the whole or what part of such arrears ought to be paid, . . . and whether in one payment or by instalments, and at what dates the same should be paid, and the amount and dates so fixed shall be deemed to be the total amount of such arrears due by the crofter, and the terms at which the same become payable.”

¹ Forbes v. Whyte, Nov. 29, 1890, 18 R. 182.

² Campbell & Beck v. Macfarlane, June 11, 1862, 24 D. 1097, 34 Scot. Jur. 545; Gardner v. Woodside, June 24, 1862, 24 D. 1133, 34 Scot. Jur. 564.

Now, assuming that the respondent is a crofter, and that the rent of which he is in arrear is the rent of a holding in the sense of the Crofters Act, it is difficult not to concur in the Lord Ordinary's finding that the debt in question is a contingent debt, because it cannot be known, until the respondent's application to the Crofters Commissioners has been disposed of, what amount he will have to pay to the petitioners. But, as I have said, that again must of course depend upon whether the subjects, the rent of which is in arrear, are a holding in the sense of the Act, and whether the respondent is a crofter. This leads us to section 34, the definition clause of the Act. A crofter is defined to mean "any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees." A "holding" is defined as "any piece of land held by a crofter, consisting of arable or pasture land, or of land partly pasture, and which has been occupied and used as arable or pasture land (whether such pasture land is held by the crofter alone or in common with others) immediately preceding the passing of this Act, including the site of his dwelling-house, and any offices or other conveniences connected therewith, but does not include garden ground only, appurtenant to a house."

Now, it is clear from these definitions that "holding" does not mean a house let by itself, but a piece of arable or pasture land, or of both, and that the term "crofter" is not applicable to the tenant of a house by itself.

That being so, we must go to the decree constituting the debt to see whether or not it is a decree for arrears of rent due on a holding in the sense of the Act. The decree was given in terms of the conclusions of the libel, but we must examine the record to see what the sum sued for was. The averments there made shew quite distinctly what the issue between the parties was. The pursuers (whose assignees the present petitioners are) maintained that the Scur Inn was let to the defender at a rent of £15 per annum, and that the inn was a perfectly distinct subject from a croft also possessed by the defender; and the defender that the inn was the house of the croft, and that this £15 a-year was the additional rent charged for the house and croft. It is perfectly clear from other parts of the record that the sum of £52, 10s. sued for is the amount of seven half-yearly payments of the rent of the inn and nothing else. After some proceedings the defender by minute withdrew his defences, and the Lord Ordinary, in respect of that minute, pronounced decree in terms of the conclusions of the libel—that is to say, for the amount of the arrears of the rent of the inn. Now, that being so, and there being no arable or pasture land let along with the inn, it is quite clear that this is not a holding in the sense of the Crofters Act, and that the respondent is not a crofter in the sense of the Act. It appears to me, therefore, that the Commissioners have no jurisdiction to deal with the arrears of rent for the inn, and on that ground I am of opinion that these arrears are not a contingent debt, and that the decision of the Lord Ordinary is wrong.

There is another ground on which the Lord Ordinary has decided the case favourably to the respondent, though he gives forth rather an uncertain sound with regard to it. With all deference to the opinion of the Lord Ordinary, I cannot agree that a Lord Ordinary has any discretion to refuse sequestration if all the conditions required by the statute have been complied with by the petitioner. I think that rule is laid down by the late Lord President in very distinct terms in the case of *Joel v. Gill*, 21 D. 929. His Lordship says (p.

No. 49.
Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

No. 49.

Dec. 8, 1891.
 Stuart &
 Stuart v.
 Macleod.

937):—"In considering the reclaiming note against this interlocutor, it is not necessary to dispose of all the pleas of the petitioner Joel; but it may be right at once to say, that the Court entirely agree with the concluding remark of the Lord Ordinary in his note, 'that if the case falls within the statute, the Court is bound to award sequestration, and to maintain it when awarded.' In awarding and recalling sequestration we are not exercising any discretion; we have the statute, and the statute only, for our guide in the administration of this branch of the law, and are bound to disregard all considerations of mere equity or expediency. Sequestration being a diligence, and the most comprehensive and stringent of all diligences, it would be most unfortunate if its application and effect depended on anything less unbending than a statutory rule." His Lordship evidently thought it of great importance that this view should be impressed upon the profession, because in a subsequent stage of the same case (22 D. 6) he repeats the sentence which I have quoted from his previous judgment. I must say, for myself, speaking from a somewhat long experience, I have always understood that the Act was so administered. I know of no case in which, dealing with an application for sequestration, the Court has used its discretion, and I do not think section 30 of the Bankruptcy Act is capable of any other construction than that put upon it by the late Lord President. The only construction, I think, which can be put upon that section is that, if the necessary evidence is laid before the Lord Ordinary, the Court must award sequestration, unless the debtor instantly pays the debt or produces written evidence of payment. The Court has no discretion, but is bound, the conditions required by the statute being satisfied, to fulfil the merely ministerial duty of awarding sequestration. I therefore dissent from the view hesitatingly expressed by the Lord Ordinary, and am of opinion that the case should be remitted to him to award sequestration.

LORD M'LAREN.—This is an interesting case, because it for the first time brings an order of the Crofter Commissioners exercising the powers of dealing with private property, vested in them by Act of Parliament, into collision with the ordinary jurisdiction of the Courts of law. The effect of the Crofter Acts is that in certain congested districts of the Highlands the landed proprietors, through their representatives in Parliament, have, as a temporary measure, consented to devolve the administration of part of their property on a Parliamentary Commission, who are to arrange the terms of the holdings of a defined class of tenants on an equitable footing. It is very important to the fair working of the Crofter Acts that their provisions should not be extended to persons for whom they were not intended, and who may be altogether outside the class who are recognised by the statutes as proper subjects of legislative protection. Without proposing to give a legal definition of that class (because the statute gives the definition), I may say that they are tenants who are in the condition of earning a bare subsistence from their holdings, and who are not regarded as independent persons able to treat with their landlords on perfectly equal terms, and to contract for themselves. The tenant of an inn, who is carrying on a mercantile business, cannot be considered as in any proper sense a subject whose motive is such as I have described, and there is nothing in the Crofter Acts which would justify the inclusion of an innkeeper within their scope.

In the present case, the respondent made an application to the Crofter Commissioners to fix a fair rent for the subjects let to him, which included an inn

in the Island of Eigg. An application was also made for an order in terms of the Crofters Holdings Act, 1887, restraining all proceedings against him pending the issue of the application. I think that the Commissioners who considered the matter had not perhaps fully realised their duties under the Supplementary Act of 1887 when they issued an order restraining the use of diligence, because, before issuing that order, I think it was incumbent on them to consider whether the petitioner was a crofter in the sense of the Crofters Act. In the absence of such an order by the Commissioners, I do not suppose that any opposition would have been offered to the petition for sequestration, because it had already been determined by a decision of the Second Division of the Court (*Fraser v. Macdonald*, 14 R. 181) that the dependence of a proceeding before the Crofter Commission was not a ground for suspending the effect of a decree, or the use of execution by a creditor. It was apparently the existence of this order which led the Lord Ordinary to take the view that the debt was a contingent one,—a debt which might or might not continue to have existence according to the action which might ultimately be taken by the Commissioners. I agree with Lord Adam that while the Commissioners must necessarily consider the question whether an applicant is a crofter for the purposes of the special jurisdiction or authority conferred on them by the constituting Act, yet if a dispute arises between landlord and tenant on this point, the Commissioners have no jurisdiction as between landlord and tenant to construe the statute, and to determine whether the tenant is or is not a crofter in the sense of the Act. Their duty is, having found a crofter, to consider the question of fair rent as between him and his landlord, and unless the proprietor and the tenant are agreed that the tenant is a crofter in the sense of the statute and is entitled to its benefits, it is only through the ordinary Courts of the country that the dispute can be finally determined.

I am clearly of opinion in this case that the respondent's house is not a crofter holding, and that the Crofter Commissioners have no authority to regulate the conditions of its tenure. If this is also the opinion of your Lordships, it follows that the Lord Ordinary is in error in treating the sum sued for as a contingent debt, upon which sequestration cannot be awarded.

In regard to the concluding paragraph of the Lord Ordinary's note, I may perhaps be allowed to say that I am not sure that Lord Adam has quite appreciated the position taken by the Lord Ordinary. As I read his Lordship's observations, I am not sure that he says anything more than that if he had a discretion, he would not have allowed sequestration to issue. But I do not understand that the Lord Ordinary claims such a discretion, and it is plain that the Court of Bankruptcy does not possess it. If the Court had a discretion in the present case, I should perhaps have considered that it would be best for all parties that sequestration should be awarded, and that the respondent should get his discharge. In view of the difficulty of coming to an agreement in such a question, it is probably fortunate that such a discretion does not exist, but that the diligence must issue so soon as the statutory conditions have been fulfilled.

In all the circumstances I agree that sequestration must be awarded.

LORD KINNEAR.—I agree with Lord Adam. If the debt upon which a petition for sequestration is based is a decree for rent payable by a crofter, and if it appears to the Lord Ordinary or the Sheriff who is asked to award sequestration that the crofter has made an application to the Commissioners which may result in the discharge of a part of the rent, that application would, in my opinion,

No. 49.

Dec. 8, 1891.

Stuart &
Stuart v.
MacLeod.

No. 40.

Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

render the debt contingent. A debt may be contingent in respect not only of a suspensive, but also of a resolute condition, and if, at the time the petition for sequestration is presented, it appears that the efficacy of the debt may depend upon the result of the statutory application, that would make it contingent. I think the contingency would arise upon the application being made to the Commissioners, and not upon the issue of an interim order for the purpose of restraining a sale of the crofter's effects, because the issue of an order to that effect by the Crofters Commission involves no decision of any question as to the applicant's right to appeal to them. We must assume that in issuing an order restraining the sale of the crofter's effects, the Commissioners were acting properly in the exercise of the discretion which the Act of Parliament confers upon them. But the question whether the debt is contingent or absolute does not depend upon their power to grant an interim stay of diligence, but upon their power to discharge arrears of rent. If the latter power has been legally invoked by a person entitled to appeal to the Commissioners under the Act, the debt is contingent; because it cannot be known whether the result of the application may not be to extinguish it, in whole or in part. But I do not think that the issue of the order makes any difference to the question.

But it is not enough that a bankrupt shall merely allege that he is a crofter. It must appear that he is in fact a crofter, and entitled as such to the benefits of the Act. I can quite imagine that a question of some difficulty might arise if the Lord Ordinary or the Sheriff were required to sustain or reject a plea that the debt upon which the sequestration proceeded was contingent, if it were necessary to inquire for that purpose into a disputed statement of facts, and to determine whether in fact the bankrupt was a crofter or not. The Lord Ordinary, in the Bill-Chamber, must proceed upon facts which can be instantly verified. But there is no difficulty of that kind here. I think the question for the consideration of the Lord Ordinary was not whether in point of fact the subject was a crofter holding or not, but whether the decree upon which he was asked to proceed was or was not a decree for the rent of a crofter's holding.

I agree with Lord Adam that when the decree is read with reference to the record it is evident that it is a decree for payment of the rent of an inn, and not of a crofter holding. The defence was that the tenant was a crofter and that defence was withdrawn. If the question had been brought before the Commissioners, in the first instance, they must have considered and decided it in the explication of their statutory jurisdiction. But it was certainly a question which the Court had jurisdiction to decide. It was distinctly raised upon the record, and the defender could not withdraw it from the jurisdiction of the Court by withdrawing his defences for the purpose of appealing to a discretion which he had no title to invoke unless his defence was well founded. The decree which proceeded upon that withdrawal was final and conclusive between the parties, and there was thus sufficient evidence before the Lord Ordinary that the rent for which decree had been given was not the rent of a crofter holding.

It is satisfactory to be informed that the respondent's application has now been rejected by the Commission, because it is thus apparent that the defence which was withdrawn in this Court was not well founded upon its merits. But we must proceed upon the decree, and not upon the subsequent deliverance of the Commissioners.

If the statutory requisites were satisfied, I agree with Lord Adam that the

Lord Ordinary had no discretion as to granting or refusing the application for sequestration. His Lordship appears to have had some doubt upon that point, and therefore I think it is important that it should be known that the question was finally determined by the judgment of the late Lord President in *Joel v. Macleod*. No. 49.
Dec. 8, 1891.
Stuart &
Stuart v.
Macleod.

LORD PRESIDENT.—I concur in the judgment proposed by Lord Adam, and on the grounds stated by his Lordship. I consider that the interlocutor of Lord Wellwood, pronounced on the record before him, concluded adversely to Mr Macleod the question whether the arrears of rent were due for such a holding as to make those arrears liable to be cancelled under the Crofters Act. Holding that decree, the petitioners were entitled to sequestration as creditors in a debt due and not contingent, and I think they ought to have obtained it.

THE COURT accordingly recalled the interlocutor of 22d August 1891, and remitted to the Lord Ordinary to sequestrate the respondent's estates.

STUART & STUART, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

JAMES WALLACE (Inspector of St Nicholas, Aberdeen), Pursuer
(Respondent).—*Comrie Thomson—Watt.*

No. 50.

GEORGE ROSS (Inspector of Laurencekirk), Defender (Appellant).—*Jameson—Crole.*

Dec. 8, 1891.
Wallace v.
Ross.

Proof—Family tradition—Poor—Settlement.—In an action by a relieving parish against a parish alleged to be that of the pauper's birth, the sole proof that the pauper had been born in the defending parish consisted of the testimony of the pauper, who was sixty-nine years of age, and of his sister, who deposed that their mother, now deceased, had frequently told them that the pauper was born at Scotston, in the defending parish, and that they always understood that he was born there. *Held (diss. Lord Young)* that it was not proved that the pauper was born in the defending parish.

JAMES WALLACE, inspector of poor of the parish of St Nicholas, Aberdeen, 2d Division, raised an action in the Sheriff Court at Stonehaven against George Ross, Sheriff of Aberdeen, Banff, and Kincardine, inspector of poor of Laurencekirk, for payment of £24, 7s. 2d. expended by the pursuer's parish on a pauper named John Duncan.

The ground of action was that Duncan had been born in the parish of Laurencekirk.

The defender denied that Duncan had been born in Laurencekirk. He maintained that he had been born in a house on a part of the farm of Haddo which lay in the parish of Garvock, which adjoins Laurencekirk.

A proof was led. It was proved that the pauper, who was about sixty-nine years of age, was the son of David Duncan, a farm-servant, who had been employed on various farms in Kincardineshire in the years prior and subsequent to the pauper's birth. The whole evidence brought to establish that the pauper was born at Scotston in Laurencekirk was that of the pauper himself and of his sister, who was about a year and a-half older. They both stated that their mother, who had been many years dead, had frequently told them that the pauper was born at Scotston in Laurencekirk, and that they always understood that he was born there. Another witness for the pursuer, a man named Balfour, who was about ninety years of age, and knew the pauper's parents, stated that the pauper was born "at Haddo or Scotston," and that he remembered his parents flitting from Haddo to Sillycoats in St Cyrus parish shortly after the pauper was born.

The Sheriff-substitute (Brown), holding that it was proved that the

No. 49.

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 Dec. 8, 1891.
 Stuart & Stuart v. Macleod.
 G.W.

LORD PRESIDENT.—I concur in the judgment proposed by Lord Adam, and on the grounds stated by his Lordship. I consider that the interlocutor of Lord Wellwood, pronounced on the record before him, concluded adversely to Mr Macleod the question whether the arrears of rent were due for such a holding as to make those arrears liable to be cancelled under the Crofters Act. Holding that decree, the petitioners were entitled to sequestration as creditors in a debt due and not contingent, and I think they ought to have obtained it.

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JAMES WALLACE (Inspector of St Nicholas, Aberdeen), Pursuer
 (Respondent).—*Comrie Thomson—Watt.*

No. 50.

GEORGE ROSS (Inspector of Laurencekirk), Defender (Appellant).—*Jameson—Crole.*

Dec. 8, 1891.
 Wallace v. Ross.

Proof—Family tradition—Poor—Settlement.—In an action by a relieving parish against a parish alleged to be that of the pauper's birth, the sole proof that the pauper had been born in the defending parish consisted of the testimony of the pauper, who was sixty-nine years of age, and of his sister, who deposed that their mother, now deceased, had frequently told them that the pauper was born at Scotston, in the defending parish, and that they always understood that he was born there. *Held (diss. Lord Young)* that it was not proved that the pauper was born in the defending parish.

JAMES WALLACE, inspector of poor of the parish of St Nicholas, Aberdeen, raised an action in the Sheriff Court at Stonehaven against George Ross, inspector of poor of Laurencekirk, for payment of £24, 7s. 2d. expended by the pursuer's parish on a pauper named John Duncan.
 2D DIVISION.
 Sheriff of Aberdeen, Banff, and Kincardine.

The ground of action was that Duncan had been born in the parish of Laurencekirk.

The defender denied that Duncan had been born in Laurencekirk. He maintained that he had been born in a house on a part of the farm of Haddo which lay in the parish of Garvock, which adjoins Laurencekirk.

A proof was led. It was proved that the pauper, who was about sixty-nine years of age, was the son of David Duncan, a farm-servant, who had been employed on various farms in Kincardineshire in the years prior and subsequent to the pauper's birth. The whole evidence brought to establish that the pauper was born at Scotston in Laurencekirk was that of the pauper himself and of his sister, who was about a year and a-half older. They both stated that their mother, who had been many years dead, had frequently told them that the pauper was born at Scotston in Laurencekirk, and that they always understood that he was born there. Another witness for the pursuer, a man named Balfour, who was about ninety years of age, and knew the pauper's parents, stated that the pauper was born "at Haddo or Scotston," and that he remembered his parents flitting from Haddo to Sillycoats in St Cyrus parish shortly after the pauper was born.

The Sheriff-substitute (Brown), holding that it was proved that the

No. 50.

Dec. 8, 1891.
Wallace v.
Ross.

pauper was born at the house on the farm of Haddo in Garvock parish, found that "the pursuer has failed to prove" that the pauper was born in Laurencekirk, and assoilzied the defender.

The Sheriff (Guthrie Smith) recalled this judgment, found that the pauper had a birth settlement in Laurencekirk, and granted decree in terms of the conclusions of the action.*

The defender appealed, and argued;—On the evidence it had not been proved that the pauper was born in Laurencekirk. On the question whether the statement of the pauper's mother, as repeated by the pauper and his sister, that the pauper had been born at Scotston, could be received as evidence of family tradition, it was maintained that that was only the evidence of one person, and did not prove the fact. Such a single statement, though repeated by two members of the family, did not constitute family tradition as the term was understood in the law of evidence.¹ The pursuer in attempting to fix liability on another parish must prove that the pauper had a settlement there by evidence just as distinct and unambiguous as the Court required for any other purpose.²

The pursuer's argument sufficiently appears from the opinions.
At advising,—

LORD JUSTICE-CLERK.—The pursuer in this case is the inspector of the parish of St Nicholas, Aberdeen, and his parish having given some relief to a pauper of the name of John Duncan, he now raises this action against the inspector of poor of the parish of Laurencekirk for the purpose of compelling the defender to repay the aliment given by the parish of St Nicholas, Aberdeen, to the pauper. The ground of action alleged is that Laurencekirk is the parish of the pauper's birth. The Sheriffs in the Court below have differed as to the result of the evidence—the Sheriff-substitute having held, and as he states as a matter of easy inference from what was before him, that the pursuer had failed to prove his case. The Sheriff has differed from that opinion, and has decided in favour of the pursuer. I do not think it necessary in this case to go into the evidence at all. The evidence on which the pursuer relies in order to prove his case is the evidence of the recollection of the sister of the pauper, and of the pauper himself, as to what his mother had told them was the place of the pauper's birth. Beyond that, so far as the pursuer is concerned, there is no evidence at all. Now, on the question of evidence, I have come to the conclusion that the evidence is not sufficient to establish the pursuer's case, and I agree with the Sheriff-substitute in thinking so. The case is put on the other side as a case of family tradition; but it does not seem to me that this is a case really of family tradition at all. The pauper's mother is said to have told her son and daughter that he was born

* "NOTE.— . . . I cannot imagine a man going through life and reaching the allotted three score years and ten completely mistaken on a point which with all men, poor as well as rich, is a matter of affectionate interest, the place where he first saw the light, without discovering the error. This it is that makes family tradition valuable as evidence, for it relates to matters on which people are careful to be accurate, and although it may be overturned by some opposing fact, it is not to be rejected for reasons which never pass beyond conjecture and surmise. I have therefore found the parish of Laurencekirk liable to relieve St Nicholas of this pauper."

¹ Macpherson v. Reid's Trustees (Shandwick case), Nov. 17, 1876, 4 R. 132. Lord President at p. 138; Rex v. Erith, 1807, 8 East. 539; Taylor on Evidence, sec. 645-6; Phillips on Evidence, i. 201; Greenleaf on Evidence, secs. 104, 131.

² Lemon v. Wallace, Nov. 26, 1887, 15 R. 92.

THE COURT pronounced this interlocutor :—" . . . Find that the No. 50.
pursuer has failed to prove that John Duncan, the pauper, was
born in the parish of Laurencekirk : Sustain the appeal ; recall the Dec. 8, 1891.
interlocutor of the Sheriff appealed against, affirm the judgment Wallace v.
of the Sheriff-substitute, assolvie the defender from the conclu- Ross.
sions of the action," &c.

ANDREW URQUHART, S.S.C.—WILLIAM B. RAINNIE, S.S.C.—Agents.

FRANCIS MORE (Robertson Chaplin's Trustee), Pursuer (Respondent).— No. 51.
W. Campbell—C. K. Mackenzie.

MRS KATHERINE ROBERTSON KIRKLAND OR HOILE AND OTHERS, Dec. 8, 1891.
Defenders (Reclaimers).—*J. A. Reid—Law.* Chaplin's
Hoile. Trustee v.
Ross.

MRS KATHERINE ROBERTSON KIRKLAND OR HOILE, Pursuer (Reclaimer).—
J. A. Reid—Law.

FRANCIS MORE (Robertson Chaplin's Trustee), Defender (Respondent).—
W. Campbell—C. K. Mackenzie.

Succession — Liferent — Protected liferent — Irritant clause — Bankruptcy — Trustee — Power of sale.—By disposition and settlement an estate was conveyed to certain persons in liferent and certain other persons in fee under a declaration prohibiting the liferenters from "selling, mortgaging, or otherwise disposing of" their interest, and further declaring, that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or part thereof," should be null and void, and that "all parties signing such deeds or instruments" should forfeit their rights in favour of the person next in succession. The liferenter in possession under this disposition granted a trust-disposition for behoof of his creditors, conveying the liferent to the trustees with a power of sale ; subsequently his estates were sequestrated.

Held (1) that the trust-disposition was neither a ~~sale nor a mortgage~~, and consequently was not struck at by the clause of forfeiture ; and (2) that as that clause did not strike at the ~~diligence of creditors~~, the liferent was vested in the trustee by the sequestration ; and that the trustee was entitled to sell the liferent interest without incurring the forfeiture.

(SEE *ante*, *Chaplin's Trustees v. Hoile*, Oct. 30, 1890, 18 R. 27.)

George Robertson Chaplin, of Colliston, died in 1869, leaving a disposition and settlement, dated in 1867, by which he conveyed the lands of Cookston and Unthank, in Forfarshire, to David Souter Robertson, of Lawhead, in liferent, for his liferent use allenary, and after his death to George Robertson Chaplin, youngest son of the said David Souter Robertson, also in liferent, for his liferent use allenary, and to the heirs of the body of the said George Robertson Chaplin, in fee ; whom failing, to Thomas Robertson Chaplin, third son of the said David Souter Robertson, in liferent, and to the heirs of his, the said Thomas Robertson Chaplin's body, in fee ; whom failing, to Katherine Robertson Kirkland or Hoile, widow of John Hoile, merchant in Dundee, for her liferent use allenary, and the heirs of her body in fee ; whom failing, to the heirs of the body of the said David Souter Robertson in fee ; whom failing, to the heirs of the body of Mrs Margaret Souter or Kirkland, the testator's grandniece, in fee.

By the disposition and settlement Mr Robertson Chaplin also disposed the lands of Bowhouse in Stirlingshire to the said David Souter Robertson, in liferent, for his liferent right and use allenary, and after his

1ST DIVISION.
Lord Low.

No. 50.

Dec. 8, 1891.
Wallace v.
Ross.

the view that we must give effect to the family tradition, and I am not sure that that is to be held as insufficient evidence because it resolves into the statement of a single witness. But, finding that the majority of your Lordships are of opinion that that is insufficient, and seeing further that the family tradition is largely discredited by the evidence of William Balfour, I am disposed upon the whole to concur with your Lordship.

LORD TRAYNER.—The question, and the only question raised in this case, is whether the pauper was born in the parish of Laurencekirk. The pursuer's case is based upon the averment that the pauper was born in that parish, and the *onus* of proving that averment of course is on the pursuer. In my opinion he has failed to discharge that *onus*.

The only evidence adduced by the pursuer is the statement of the pauper and of his sister that they were told by their mother that the pauper was born in Laurencekirk. This evidence is quite competent, because the pauper's mother is now dead. But it is the evidence of only one witness, although repeated by two. If the mother had been alive her unsupported testimony would have been insufficient to establish the pursuer's case. It does not become sufficient because, being dead, what she did say when alive, and what probably she would have said had she been examined *in causa* is deposed to by the two persons to whom, in life, she said it. The Sheriff thinks this evidence is sufficient to prove the fact alleged because it is "family tradition." I think the Sheriff is in error in so describing the evidence, and in attributing to it the weight and importance which the law attaches in certain cases to what is properly called family tradition. In questions of pedigree (including such a question as we are here dealing with, as to where a certain person was born) evidence of family tradition is of great importance, but I take it that it is so because, being handed down from generation to generation, and spoken of among the various family relations of each generation, the fact spoken to would probably be contradicted or impugned by some of them if the statement made was not true. A statement current among persons most likely to know of its truth, and never impugned, although often repeated, may very well be accepted as true in after time. And this is what I understand to be evidence by family tradition. But the single statement or repeated statement by a mother to her two children is not of this character. In this case the children had no knowledge whether their mother's statement was correct or erroneous, and as far as the proof shews, the statement by the mother as to the birthplace of the pauper was made to nobody except her two children. The ground, therefore, on which the Sheriff proceeds seems to me not to be applicable to the case. I leave out of account the evidence of the pursuer's own witness, Balfour, which, if it does not contradict the pursuer's averment, raises great doubt of the accuracy of the statement made by the pauper's mother, whose statement, after all, although made with perfect honesty, may be wrong. Nor do I put much stress, if any, upon the fact that the pauper does not seem to be a witness whose accuracy even in repeating what he says he heard can be entirely relied on,—not because of dishonesty or untruthfulness, but from want of accurate or distinct recollection. I will assume that the pauper and his sister repeat quite correctly what their mother said, but even on that assumption I think the evidence of the one witness, the mother, is insufficient for the pursuer's case. I therefore think, with the Sheriff-substitute, that the pursuer has failed to prove the averment, proof of which is essential to his succeeding in the present action.

THE COURT pronounced this interlocutor:—" . . . Find that the pursuer has failed to prove that John Duncan, the pauper, was born in the parish of Laurencekirk: Sustain the appeal; recall the interlocutor of the Sheriff appealed against, affirm the judgment of the Sheriff-substitute, assoilzie the defender from the conclusions of the action," &c.

No. 50.
Dec. 8, 1891.
Wallace v.
Ross.

ANDREW URQUHART, S.S.C.—WILLIAM B. RAINNIE, S.S.C.—Agents.

FRANCIS MORE (Robertson Chaplin's Trustee), Pursuer (Respondent).— No. 51.
W. Campbell—C. K. Mackenzie.

MRS KATHERINE ROBERTSON KIRKLAND OR HOILE AND OTHERS, Dec. 8, 1891.
Defenders (Reclaimers).—*J. A. Reid—Law.* Chaplin's
Trustee v.
Hoile.

MRS KATHERINE ROBERTSON KIRKLAND OR HOILE, Pursuer (Reclaimer).—
J. A. Reid—Law.

FRANCIS MORE (Robertson Chaplin's Trustee), Defender (Respondent).—
W. Campbell—C. K. Mackenzie.

Succession — Liferent — Protected liferent — Irritant clause — Bankruptcy — Trustee — Power of sale.—By disposition and settlement an estate was conveyed to certain persons in liferent and certain other persons in fee under a declaration prohibiting the liferenters from "selling, mortgaging, or otherwise disposing of" their interest, and further declaring, that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or part thereof," should be null and void, and that "all parties signing such deeds or instruments" should forfeit their rights in favour of the person next in succession. The liferenter in possession under this disposition granted a trust-disposition for behoof of his creditors, conveying the liferent to the trustees with a power of sale; subsequently his estates were sequestrated.

Held (1) that the trust-disposition was neither a sale nor a mortgage, and consequently was not struck at by the clause of forfeiture; and (2) that as that clause did not strike at the diligence of creditors, the liferent was vested in the trustee by the sequestration; and that the trustee was entitled to sell the liferent interest without incurring the forfeiture.

(SEE *ante*, *Chaplin's Trustees v. Hoile*, Oct. 30, 1890, 18 R. 27.)

George Robertson Chaplin, of Colliston, died in 1869, leaving a disposition and settlement, dated in 1867, by which he conveyed the lands of Cookston and Unthank, in Forfarshire, to David Souter Robertson, of Lawhead, in liferent, for his liferent use allenary, and after his death to George Robertson Chaplin, youngest son of the said David Souter Robertson, also in liferent, for his liferent use allenary, and to the heirs of the body of the said George Robertson Chaplin, in fee; whom failing, to Thomas Robertson Chaplin, third son of the said David Souter Robertson, in liferent, and to the heirs of his, the said Thomas Robertson Chaplin's body, in fee; whom failing, to Katherine Robertson Kirkland or Hoile, widow of John Hoile, merchant in Dundee, for her liferent use allenary, and the heirs of her body in fee; whom failing, to the heirs of the body of the said David Souter Robertson in fee; whom failing, to the heirs of the body of Mrs Margaret Souter or Kirkland, the testator's grandniece, in fee.

By the disposition and settlement Mr Robertson Chaplin also disposed the lands of Bowhouse in Stirlingshire to the said David Souter Robertson, in liferent, for his liferent right and use allenary, and after his

1ST DIVISION.
Lord Low.

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

death to the said Thomas Robertson Chaplin in liferent, for his liferent right and use allenary, and to the heirs of his body in fee; whom failing, to the said George Robertson Chaplin in liferent, for his liferent right and use allenary, and the heirs of his body in fee; whom failing, to the heirs of the body of the said David Souter Robertson in fee; whom failing, to the heirs of the body of the said Mrs Margaret Souter or Kirkland in fee.

By the disposition and settlement Mr Robertson Chaplin further disposed the lands of Auchengray in Lanarkshire to the said David Souter Robertson in liferent, for his liferent right and use allenary, and after his death to the said George Robertson Chaplin, his son, in liferent, for his liferent right and use allenary, and to the heirs of the body of the said George Robertson Chaplin in fee; whom failing, to Stewart Souter Robertson, eldest son of the said David Souter Robertson, in liferent, for his liferent right and use allenary, and to the heirs of the body of the said Stewart Souter Robertson in fee; whom failing, to David Souter Robertson, son of David Souter Robertson the elder, in liferent, for his liferent right and use allenary, and to the heirs of his body in fee; whom failing, to the heirs of the body of the said David Souter Robertson the elder in fee; whom failing, to the heirs of the body of the said Mrs Margaret Souter Robertson or Kirkland in fee.

The said disposition was granted under certain conditions, which were declared to be inherent qualities of the conveyance, and, *inter alia*, under the conditions that "all parties who shall at my death, or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement, are hereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is hereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments"; it being further declared that "the real burdens and conditions, provisions, and stipulations before written shall be read and construed along with and as inseparable from the several dispositive clauses before written, under which real burdens, conditions, provisions, and stipulations these presents are granted, and shall be accepted of by my said disponees respectively."

David Souter Robertson, of Lawhead, the liferenter first called under all the foregoing destinations, died in November 1888. On his death his youngest son George Robertson Chaplin succeeded to the liferent of the lands of Cookston, Unthank, and Auchengray, under the first and third branches of the foregoing disposition, and his third son Thomas Robertson Chaplin to the liferent of the lands of Bowhouse, under the second branch of the disposition.

On 22d February 1889 Thomas Robertson Chaplin granted a trust-disposition whereby he disposed, assigned, conveyed, and made over to and in favour of George Auldjo Jamieson and Francis More, all his means, estate, and effects, heritable and moveable, real and personal, and in particular his right of liferent of and in the said lands and estates of Bowhouse, and his prospective right of liferent to Cookston, Unthank, and Auchengray, with a declaration that the said George Auldjo Jamieson and Francis More, as trustees for his creditors, should enter into possession of the whole estates thereby conveyed, and hold and administer the same

for behoof of his creditors in debts due by him at the date of the deed; and a further declaration that the said trustees might exercise, during the subsistence of the trust, at their discretion, every power of administration and management of proprietors, and should have power to dispoise, in security of money borrowed for the purposes of the trust, the estate thereby conveyed, and his whole right, title, and interest therein, whether of fee or liferent, and to include a power of sale in the bonds; and should have power also to sell and dispose of the lands, estate, and property falling under the trust, either by public roup or private sale, on such conditions and at such prices as they might think fit; and should have power also, in case it should appear to them in their sole discretion to be expedient and desirable, to apply for an Act of Parliament for authority to sell the liferent of the said lands and estates of Cookston, &c.

No. 51.
Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

On 23d February 1889 George Robertson Chaplin granted a trust-disposition, *mutatis mutandis*, identical with the foregoing.

On 30th December 1890 and 30th January 1891 the estates of George Robertson Chaplin and Thomas Robertson Chaplin respectively were sequestrated under the Bankruptcy Acts, and Francis More was appointed trustee on the sequestrated estates.

On 7th May 1891 More, as trustee on the two sequestrated estates, brought an action for declarator that as trustee foresaid he had right to sell the liferent interests of George Robertson Chaplin and Thomas Robertson Chaplin in the lands of Cookston, Unthank, and Auchengray, and of Bowhouse respectively, and to dispoise and assign the said liferent rights and interests without incurring any irritancy or forfeiture under the disposition and settlement of Mr Robertson Chaplin of Colliston.

The persons called as defenders were, besides the two bankrupts, a number of persons contingently interested under Mr Robertson Chaplin's disposition and settlement, who were stated by the pursuer to be the whole persons so interested.

Mrs Hoile and her children lodged defences.

The pursuer pleaded;—(1) The pursuer is entitled to decree, because the liferent rights in question are vested in him, absolutely and irredeemably, to the same effect as if a decree of adjudication, subject to no legal reversion, had been pronounced in his favour, and had been duly recorded. (2) The liferents in question are rights which (1) the bankrupts might gratuitously convey; and (2) their creditors might attach.

Mrs Hoile and her children founded on the trust-dispositions of 22d and 23d February 1889, and pleaded;—(2) Inasmuch as no decision in this action will be *res judicata* in any action challenging the validity of the proposed sale, the action is premature and incompetent. (3) The liferent interests in question not being adjudgable, no title to the same has passed to the pursuers. (4) That the said interests shall not be sold is an inherent "quality" of the same, and the pursuers can have no higher right or title with reference to the same than the bankrupts. (5) In respect that by signing the trust-deeds for behoof of their creditors referred to, the liferenters have forfeited the said interests, the action should be dismissed.

On 29th May 1891 Mrs Hoile raised an action against the two Robertson Chaplins and Messrs Jamieson and More, as the trustees under their trust-dispositions and in their sequestrations, concluding for declarator that by signing and delivering their trust-dispositions the Robertson Chaplins had respectively incurred the irritancy and forfeiture provided under Mr Robertson Chaplin's disposition and settlement, and so forfeited their liferent interests in the lands of Cookston and Unthank, &c., and "that the pursuer, for the liferent interest in the said lands and

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

estates of Cookston and Unthank, given, granted, and disposed to her as the substitute next in succession after the defenders George Robertson Chaplin and Thomas Robertson Chaplin in existence, is entitled, under and in virtue of the aforesaid real burdens, conditions, provisions, and stipulations, to come in the right and place of the defenders George Robertson Chaplin and Thomas Robertson Chaplin: And that from and after the said 23d day of February 1889 the said lands and estates, with the rents, maills, and duties of the same, have fallen, devolved and accresced, and do now belong, to the pursuer in liferent and the heirs of her body in fee, subject to defeasance, in the event of either the defender George Robertson Chaplin or the defender Thomas Robertson Chaplin dying survived by heirs of his body."

The pursuer pleaded;—(1) On a sound construction of the said disposition and settlement, the trust-disposition of George Robertson Chaplin condescended on was a deed or instrument whereby he sold, mortgaged, or otherwise disposed of his liferent interest in the lands mentioned, or a deed or instrument purporting to be a sale or mortgage of such interest, and he has therefore forfeited and lost the same. (2) On a sound construction of the said disposition and settlement, the trust-disposition of Thomas Robertson Chaplin condescended on was a deed or instrument whereby he sold, mortgaged, or otherwise disposed of his prospective liferent interest in the lands mentioned, or a deed or instrument purporting to be a sale or mortgage of such interest, and he has therefore forfeited and lost the same. (3) The pursuer, as next in succession after the defenders George Robertson Chaplin and Thomas Robertson Chaplin is entitled to come in their right and place, and to have decree as concluded for.

More, as trustee on the sequestrated estates, lodged defences, and pleaded;—(2) The defender is entitled to absolvitor, in respect the liferenters did not incur a forfeiture of their rights by granting the conveyances in question.

On 12th August 1891 the Lord Ordinary (Low), in the action at More's instance, granted decree in terms of the conclusions of the summons.*

* "OPINION.—In my opinion the pursuer is entitled to the decree which he asks, the liferents which are the subjects of this action being liferents in possession of the bankrupts.

"The case seems to me to depend upon whether, by the clause of Mr Robertson Chaplin's disposition and settlement, quoted in article 4 of the condescendence, the diligence of creditors of liferenters in possession is excluded.

"The clause, in the first place, prohibits, *inter alios*, a liferenter 'from selling, mortgaging, or otherwise disposing of his interest.' In the second place, it is provided that 'such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void.' In the third place, it is provided that 'all parties signing such deeds or instruments' shall forfeit their rights, and give place to the person next in succession.

"It is to be observed that there is this difference between the clause of prohibition and the clauses declaring the deeds null and the right of the grantor forfeited, that the former clause strikes not only at sales and mortgages, but also at 'otherwise disposing of' the liferent, while the latter clauses refer to sales or mortgages only.

"It was contended for the defenders that the deed should be read as if the words 'or otherwise disposing of,' or equivalent words, had been continued throughout all the clauses. If the deed were so construed, it would strike at any sort of disposition, and probably even a gratuitous disposition would incur a forfeiture. In my opinion, however, it is not legitimate to read into the clause any words not inserted by the granter. It may be that the general words were

On the same date his Lordship, in the other action, assolized the No. 51.
defenders.*

Dec. 8, 1891.

omitted from the later clauses by mistake. But I cannot tell whether that was so or not, and I must assume that what the granter has said is that which he intended to say. Chaplin's
Trustee v.
Hoile.

"The clause therefore stands thus:—'Selling, mortgaging, and otherwise disposing of' the liferents are prohibited; but in the case of sales and mortgages only is the transaction to be null, and the right of the seller or mortgagor forfeited. In these circumstances, it seems to me that a gift of the liferent could not be challenged, and if that is the case I do not think that it is possible to say that the diligence of creditors is excluded.

"Even if the general words 'or otherwise disposing of' are to be held as implied in all the clauses, I am by no means satisfied that the diligence of creditors would be excluded, because I think that a clause of this sort is directed against voluntary alienations, and not against alienations brought about by operation of law without the consent and contrary to the wish of the liferenter.

"By virtue of the 102d section of the Bankruptcy Act of 1856, the pursuer is in the same position as if he had obtained a decree of adjudication of the liferents, subject to no legal reversion. If therefore the diligence of creditors is not excluded, it follows that the right to the liferents is now vested in the pursuer, and that he is entitled to sell the liferents without incurring any irritancy or forfeiture, because he would sell as in his own right under the implied decree of adjudication, and not as in right of the liferenters.

"It was further contended that nothing had vested in the pursuer, because prior to the sequestration a forfeiture had been incurred by the liferenters having granted trust-deeds by which they conveyed these liferents to trustees for behoof of creditors. This question is directly raised in an action brought by Mrs Hoile to have it found that by executing and delivering the trust-deeds Messrs George and Thomas Robertson Chaplin forfeited the liferents. The present case and that at the instance of Mrs Hoile were argued before me at the same time, and I refer to my opinion in the latter case for the grounds upon which, in my judgment, the trust-deeds did not operate a forfeiture."

* "OPINION.—The pursuer in this case seeks to have it declared that Messrs George and Thomas Robertson Chaplin forfeited the liferent rights which they had in certain estates under their father's settlement, by having granted in 1889 trust-deeds for behoof of their creditors, by which they conveyed to trustees the liferent rights in question. It is not disputed that if a forfeiture has been incurred the liferents devolve upon the pursuer.

"The pursuer founds upon the clause in the late Mr Robertson Chaplin's settlement quoted in article 1 of the condescendence.

"That clause prohibits *inter alios* a liferenter taking under the settlement 'from selling, mortgaging, or otherwise disposing of' his interest, and it is then declared that 'such sales or mortgages' shall be void, that 'all deeds or instruments purporting to be a sale or mortgage' shall be null and void, and that all parties signing 'such deeds or instruments' shall forfeit their right in favour of the person next in succession.

"The pursuer maintains that the trust-deeds to which I have referred are struck at by this clause, and that the execution and delivery of them involved a forfeiture of the rights of the granters in favour of the pursuer.

"I am of opinion that the contention of the pursuer is not well founded. It is true that the part of the clause prohibiting alienation refers not only to sales or mortgages, but to 'otherwise disposing of' the interest, and the latter words are perhaps wide enough to cover a trust-deed for creditors; but the part of the clause in which the transaction is declared void and a forfeiture to be incurred refers only to 'sales and mortgages.' I do not think that it would be legitimate to read into the clause any words which it does not contain, and therefore I am of opinion that no forfeiture is incurred unless the liferent is either sold or mortgaged.

"In the present case there was no sale. The trust-deeds are very much in

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

Mrs Hoile and her children reclaimed, and argued ;—By granting the trust-deeds the liferenters had incurred a forfeiture, for the conditions of the disposition and settlement had been recognised as essential conditions of the liferenters' right.¹ The trust-dispositions were either a sale in the sense that they were an alienation for a consideration—the consideration that the creditors should abstain from diligence—or, at all events, they were mortgages. "Mortgage" was not a word of art in Scots law, but its meaning was sufficiently clear, and it embraced trust-deeds like the present. At anyrate, the irritant clause was to be read in the light of the prohibitory clause, and hence the words "or otherwise disposing of" were to be read into the irritant clause. The malignant rules of construction applied in the case of deeds of entail had no place here, when the question was simply one of testamentary intention. The testator's intention was that if the liferenters should alienate their right, that right should determine. That was a legal intention, and must be given effect to.² 2. The action of declarator by the trustees was premature, for the trustee might never sell, and the Court would not decide such a question *ab ante*.³ But in any case decree ought not to be granted. The trustee took the estate *tantum et tale* as it stood in the bankrupts, and they could not themselves have sold.

Argued for the trustee ;—1. The irritant clause struck at sales and mortgages only ; and these trust-deeds were neither. Such a clause was to be strictly construed, the presumption being for liberty.⁴ Even if an irritancy had been incurred, the sequestration had the effect of purging it.⁵

the ordinary form. The estates of the granters, and, *inter alia*, the liferent rights, are conveyed to trustees, who are authorised to enter into possession and to administer for behoof of the creditors. A general power of sale is given to the trustees, and they are empowered, if they think it expedient, to apply for an Act of Parliament for authority to sell the liferented lands. Such a deed may result in a sale ; and a sale by the trustees under it would, in so far as the forfeiture clause is concerned, be equivalent to a sale by the grantor ; but the deed does not itself constitute or operate a sale.

"Is, then, a trust-deed for behoof of creditors a mortgage within the meaning of the clause ? 'Mortgage' is not, I imagine, a proper term of Scotch law at all, and I do not know what precisely is the meaning and effect of the word. *Prima facie* a trust-deed for behoof of creditors is not a mortgage, and certainly is not (to use the words of the clause in the settlement) a deed 'purporting to be a mortgage.' I believe, however, that the right of a mortgagee is somewhat similar to that of the creditor in a bond and disposition in security ; and I think that the term 'mortgage,' as used in the clause, may fairly be taken as referring to the conveyance of the liferent right, or whatever the interest of the party may be, to a creditor in security, and for payment of his debt. But that is not what is done in a trust-deed for behoof of creditors. There is no conveyance to any creditor, but an assignation of the right to trustees, in order that they may administer it for behoof of the general body of creditors. I think that it would be an unwarranted stretch of language to call such a transaction a mortgage.

"I am therefore of opinion that no forfeiture has been incurred, and that the defenders are entitled to absolvitor."

¹ Chaplin's Trustees v. Hoile, 18 R. 27.

² *Ex parte Eyston, In re Throckmorton*, 1877, L. R., 7 Chanc. Div. 145. *Hurst v. Hurst*, 1882, L. R., 21 Chanc. Div. 278 ; *Lewin on Trusts*, 8th edn. 101.

³ *Lord Galloway v. Lord Garlies*, June 26, 1838, 16 S. 1212, 10 Scot. Jur. 524. *Harvey v. Harvey's Trustees*, June 28, 1860, 22 D. 1310, 32 Scot. Jur. 613.

⁴ *Fairlie v. Cunningham*, March 28, 1860, 22 D. (H. L.) 8, 32 Scot. Jur. 473. *Cathcart v. Cathcart*, July 18, 1835, 5 W. and S. 315.


⁵ *Sandford on Entails*, 2d edn., 454 ; *Abernethie v. Forbes*, 1840, 1 Rob. App. Cases, 434, 13 Scot. Jur. 613.

The pursuer had no title to sue, seeing that her right under the destination was contingent on the two Chaplins dying without issue. 2. The trustee in a sequestration was in a better position than a trustee under a voluntary deed, for he took the estate as if on a decree of adjudication after expiry of the legal ;¹ and there was no clause, expressly or by implication, prohibiting voluntary alienation by the bankrupts, or converting the right of the liferenters into an alimentary right. Even if gratuitous alienation were struck at, a deed done *in invitum* by the diligence of creditors was not.²

At advising,—

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.



LORD PRESIDENT.—These actions relate to the effect of the same deed, and in my opinion the Lord Ordinary has decided both actions rightly. The first question is, whether by granting a private trust in favour of creditors the right of the liferenter has been forfeited? It is necessary to the party asserting the affirmative that he should prove that there has been a forfeiture under the terms of the trust-disposition and settlement of Mr George Robertson Chaplin. Now, in that deed there is a prohibition of “selling, mortgaging, or otherwise disposing of”—applying the words to the present case—“the liferent interest.” In the irritancy clause there is at all events the appearance of a narrower scope, because the provision is that “such sales or mortgages, if made, shall be void.” Now, Mr Law has maintained that the latter words “such sales or mortgages” in the irritancy clause must be held to comprehend not only selling and mortgaging, but also, as described in the prohibitory clause, “or otherwise disposing of such interest.” In my opinion that would be contrary to sound construction. It appears to me that by the selection of these words the truster has evidenced that “otherwise disposing”—as indeed the words themselves import—means something different from either selling or mortgaging, and I do not think it possible to hold that, when he takes the first two instead of the whole three words as descriptive of the object of the irritancy, he means the same thing as what he had expressed in the whole three.

If then that be so, the question is, whether this trust-disposition can be called a mortgage in the sense of that trust-disposition and settlement of Mr George Robertson Chaplin? Now, I suppose, without pressing into the argument the cases which turn on a construction of deeds of strict entail, it is enough to affirm that, where a forfeiture is sought to be enforced you must clearly shew that according to the reasonable and ordinary construction of the terms used the heir in possession was consciously—I will not say consciously, but necessarily—acting in contravention of what has been prohibited. That leads us to consider what is the meaning of the word “mortgage.” It is, of course, not a term of art in our law, but at the same time it has a sufficiently definite meaning, and I think in its primary sense it means a particular charge upon property. To say that a trust-disposition for behoof of creditors generally is a mortgage would strike one as, if not a misapplication, at all events a very loose use of that term; and if that observation be correct, then I think it is impossible to hold that this deed is a mortgage in such a sense as to infer forfeiture under this settlement. On that ground I think the Lord Ordinary is right in the first action.

The second action relates to the claim of the trustee in the sequestration to

¹ Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 102.

² *Lear v. Leggett*, 2 Sim. 479, aff. 1 Russ. and My. 690; *Avison v. Holmes*, 1 J. and H. 530.

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

dispose of this estate or liferent. There the pleas to a certain extent go over the same ground, but what we have to consider, apart from the question I have already discussed, is whether the trustee in the sequestration is excluded by the terms of this trust-deed from realising the right of the bankrupt. Now, if the right of the bankrupt be such as the Lord Ordinary thinks it is in his decision in the first action, I cannot say I think there is much difficulty as to the right of the trustee. He is vested in the bankrupt's right of liferent, which is not protected against anything but sales and mortgages. The trustee comes in for the purpose of realisation, and in my opinion he is entitled to dispose of this.

Mr Law has addressed to us an argument to the effect that the action is incompetent; but the position of the trustee is that his statutory duty is that of realisation, and he is at once confronted with the question whether this is estate which he is entitled to dispose of. He brings into Court a person who has a sufficient interest at all events to raise the question, and in my opinion there is nothing premature in his thus proceeding.

Accordingly, I am in favour of adhering to the Lord Ordinary's interlocutor in both cases.

LORD ADAM.—I am of the same opinion. The question raised in the first action is, whether this trust-deed in favour of creditors granted by George Robertson Chaplin is a deed or an act "selling or mortgaging or otherwise disposing of such interest." Now, the first question in regard to this point is, whether there is any effective clause striking against "otherwise disposing of such interest." I concur with your Lordship that there is no such clause, and I agree with your Lordship that, without having recourse to the malignant construction which has been put on clauses in deeds of entail, we are bound, as we always do, to construe clauses of forfeiture with strictness. I think that is an invariable rule in the law of Scotland. We are to give them a reasonable but at the same time a strict construction.

Now, we find here that the irritant clause strikes at "such sales or mortgages." These are the only things struck at, and it is only the rights of the parties signing such deeds that are affected. That being so, I am clear that the only question before us to consider is, whether this trust granted by George Robertson Chaplin is a sale or mortgage? That is to my mind the question in this case. Now, I agree with your Lordship that it is certainly not a sale. No doubt it contains powers of sale, but that is a very different thing from saying that it is a deed selling the right, because, of course, granting power to sell is granting a mandate to sell, and if that mandate be never executed there is never a sale of the subject. Therefore on that ground it is impossible to say that the trust in favour of creditors is a deed of sale.

In the next place, I agree with your Lordship that it is not a mortgage. What a mortgage may be I should be very unwilling to attempt to define. I do not think it is at all necessary to do that, for I agree with your Lordship that the question is, whether this is a mortgage by the law of Scotland, and I am quite clear it is not.

On these grounds I agree with your Lordship that the interlocutor is right. In my view the private trust-deed is not struck at by the prohibition which the settlement affords. And if that be so, it is unnecessary to decide any of the other somewhat difficult questions raised.

The second action is an action by the trustee in the sequestrated estate to have

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

it found that he is entitled to sell and dispose of the liferents. I think the Lord Ordinary's decision is right in that case too, and, as your Lordship has said, the construction we have put upon the prohibitive clause in the other case goes far to settle this case, because if we are to hold that the irritant and resolutive clauses only apply to the cases of sale and mortgage, then we are in this position—that we have nothing here but this liferent, except that the party in liferent use is prohibited from selling or mortgaging it. But I think the right which the trustee has acquired was acquired neither by sale nor by mortgage. If it were competent or possible to have excluded validly the contraction of debt, the trustee might possibly have been excluded in that way. But if the bankrupt could contract debt, then the trustee in the sequestration could acquire the right; I do not see how the right of the trustee can be struck at by this clause. It was argued—and I think rightly argued—that gratuitous alienation is not prohibited by this deed, and if that be so the case falls under the 102d section of the Act 19 and 20 Vict. c. 79, for that section says that in all cases where the holder of a right of property can alienate land, then the trustee shall have the same rights as if he had obtained a decree of declarator of expiry of the legal. If that be so, then George Robertson Chaplin could have gratuitously alienated, and his trustee has undoubted right to the decree he asks for.

LORD M'LAREN.—So far as my observation extends, I should say that hitherto testators and settlers of estates have recognised the futility of attempting to put the enjoyment of their estates under limitation, and have confined their efforts to securing the descent of the fee unencumbered by the acts of those who have the enjoyment of it in succession. But the deed of Mr Robertson Chaplin proceeds on a different footing altogether, because he, or whoever prepared the deed, must have known that under the present statutory law a deed in such terms could have no effect in the direction of perpetuating the fee, but that whoever took the fee under the deed necessarily had the full dominion and disposal of the estate. But he has attempted to limit the powers of the persons who are to take life interests in his property, and that not by a way with which we are familiar in such deeds,—I mean by constituting an alimentary trust,—but by words of open and undisguised restraint on the powers of the liferenter over the estate which is given to him.

Now, the Lord Ordinary in construing these limiting clauses has proceeded, as I think correctly, on the principle of strict construction. I think that this is the true principle of construction to be applied to such clauses—to all clauses which are of the nature of restraints on the disposing power. I am not prepared to say that in the construction of entails the Courts have applied any different rule of construction from that which would be proper in construing any clause directed against alienation. That was certainly the view expressed by Lord Wensleydale in one of the later cases—I think the *Kintore* entail case—where he defined the rule of construction in this way—that if there were two possible constructions of a clause, both equally probable, that one which was favourable to freedom should be preferred rather than one which would have the effect of restraining the right of the grantee. But no Judge has gone so far as to say that if there are two possible constructions, and the construction which is consistent with a limitation of the grantee's powers be the better construction of the two, you are to reject that and adopt the less tenable construction, the one which is evidently not the true construction, because it is favourable to liberty. That is

No. 51

Dec. 8, 1897.
Chaplin's
Trustee
Hoile.

all that I understand is meant by the rule of strict construction. It means only this, that between two arguments which appear equally probable, you ought to prefer the view that is favourable to liberty.

Applying that principle to these clauses, I think there can be no reasonable doubt that we are not entitled to treat the trust in favour of creditors as a mortgage. In the first place, mortgage is not a term of art in our law, but giving the word its colloquial or more general meaning, we may say that it is a kind of security or deed by which a landowner obtains money on the security of his property. Now, in a certain sense a trust for creditors is a deed of security, but its essential quality is that it is a deed by which the granter appoints someone to administer his estate for the benefit of persons to whom he has already contracted debt. It is therefore not a deed of security in the ordinary sense—a voluntary deed of alienation in consideration of a present advance—but is really a deed in fulfilment of legal obligations for payment of debts already contracted. There is here no prohibition against contraction of personal debt, and there could not well be in a deed of this class. Accordingly, it appears to me to be a reasonable view of the clause that the testator only intended to prohibit the grantee from raising money on his life interest by way of mortgage, but not to prohibit the granting of such deeds as might be reasonably necessary for the extrication of the grantee's affairs. I therefore prefer that construction as being the one which is most favourable to the grantee's powers, the presumption being that such clauses are inserted for the benefit of the grantee.

The trust therefore, in my judgment, is well constituted, but that does not prevent subsequent creditors (whose interests are not recognised by the trust) from taking separate measures for the purpose of having the estate brought under judicial administration, and I agree with your Lordships that the clause under construction in no way strikes at the diligence of creditors, or at distribution under the process of sequestration.

The result is, that I agree with the Lord Ordinary in his conclusion regarding the second action in sustaining the right of the trustee in bankruptcy to attach this estate.

LORD KINNEAR.—I also concur with reference to both actions. The conclusive consideration appears to me to be that there is nothing struck at by the irritant or resolute parts of the clause in question except deeds or instruments purporting to be sales or mortgages, and therefore whatever else may have been prohibited, the only question we have to consider under the action of forfeiture is, whether a conveyance in a trust-deed for the benefit of the whole creditors of the granter of the conveyance is a sale or mortgage? I am very clearly of opinion with your Lordships that it is not a sale. It is a mandate to sell, and if the trustees had carried their mandate into effect it might well have been said that the clause of forfeiture had come into operation. But then they did not carry out the mandate, because they were advised that before doing so they should ascertain what the effect of that clause was, and having brought an action into Court for that purpose they discovered that they could not do what they might otherwise have done. The first conveyance therefore never was anything but a mandate to sell. The mandate was never carried out, and it has now fallen, and therefore I am unable to say that any forfeiture has arisen on that ground. If the power to sell was not carried out, then the only effect of that first conveyance was to put the trustees into the administration of the estate.

The only remaining question therefore is, whether a deed appointing trustees to administer the liferent interest of the granters for the benefit of all their creditors is a mortgage? Now, I agree with what your Lordships have said, that "mortgage" is not, as used in this clause, a term of art. The word is not altogether without technical signification in the law of Scotland, because it is a statutory term for a kind of security created or allowed by Act of Parliament to be created for railway and other undertakings; but it is clear enough it is not in that sense that the word is used in this clause, and therefore the only conclusion is that it is used in a popular sense as a word of ordinary language. Now, it appears to me that if it is used as a word of ordinary language it is very difficult to assign to it any definite legal effect, because the persons who use words that are not technical to describe securities over land can hardly be supposed to have adverted particularly to the legal operation of such securities, and therefore I should myself have very great difficulty in construing a clause of a deed—either of a testamentary or any other written instrument—where the term "mortgage" occurs, if it were absolutely necessary for the purpose of such construction to consider whether the security intended to be described was a security that would enable the land to be sold, or in what particular manner it was supposed that the land would be affected by it. But I agree with your Lordships that, whatever else it may be, at all events it must be a particular security over land in favour of some particular creditor, and therefore cannot be extended so as to embrace a general trust of this kind for the administration of an estate for the benefit of all creditors alike.

As to the second action, I agree with your Lordships. I think it is very clear that the clause in question does not prohibit the liferenter from contracting debt. It follows that it does not protect the liferent interest from the diligence of creditors; and it follows again that if his interest is not protected from his creditors' diligence it may be carried, on a sequestration, by the vesting clauses of the Bankruptcy Act.

THE COURT adhered.

TODS, MURRAY, & JAMIESON, W.S.—JOHN RHIND, S.S.C.—Agents.

No. 51.

Dec. 8, 1891.
Chaplin's
Trustee v.
Hoile.

No. 52.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

HENRY DUNN SMITH, Pursuer (Respondent).—*Comrie Thomson—W. C. Smith.*

THE SCHOOL BOARD OF INVERARAY AND GLENARAY, Defenders
(Reclaimers).—*Shaw—Dickson.*

School—Education Act, 1872 (35 and 36 Vict. cap. 62)—Contract between "old" parochial teacher and school board as to emoluments—Government grant.
—After the passing of the Education Act, 1872, the School Board of Inveraray entered into an arrangement with the "old" parochial teacher, who continued in office under them, by which the emoluments of the latter were to include "all the Government grants without any deductions, except the salary or salaries of a pupil teacher or pupil teachers." From 1873 to 1886 inclusive the School Board paid to the teacher the whole Government grants received by them, deducting only pupil teachers' salaries. In 1887 and following years they refused to pay to him (1) a grant in the shape of an increased grant for attendance made to certain Highland counties, including Argyll, by a minute of the Scottish Education Department dated 30th April 1885, and (2) a grant for needlework, introduced in 1887 by the Education Code. In an action by the teacher to recover the amount of these grants, held (*diss.* Lord Young) (1) that

No. 52. it was not *ultra vires* of the School Board of 1873 to make such an agreement with the pursuer; and (2) that the grants in question fell within the agreement.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

Observations on the case of Somers v. School Board of Terriothead, 7 R. 121.

2D DIVISION.
Ld. Stormonth
Darling.

HENRY DUNN SMITH was appointed teacher of the burgh parochial school of Inveraray in 1854.

In 1873 the first School Board elected for the district of Inveraray and Glenaray, in terms of the Education Act, 1872, entered into negotiations with Mr Smith as to the amount of his future emoluments. After some communings an agreement was arrived at conform to the following minute of the board, dated 23d October 1873, and acceptance by Mr Smith:—“(1) The board are disposed to agree to give all the Government grants without any deductions except the salary or salaries of a pupil teacher or pupil teachers. . . . (4) This arrangement to take effect from and after the end of the current quarter, being 5th December next (1873).

“ I hereby agree to the foregoing arrangement.

“ HENRY DUNN SMITH.”

From 1873 down to 1886 inclusive the School Board paid to Mr Smith the whole Government grants received by them, subject only to the deductions specified in the minute of the School Board.

By minute of the Committee of the Privy Council on Education in Scotland, dated 30th April 1885, known as the “Highland Minute,” a parliamentary grant, in the shape of an increased grant for attendance, was made to the school boards in certain specified counties in Scotland, including the county of Argyll. This grant, known as the Highland grant, was made in respect of the exceptionally large expenditure incurred or to be incurred in providing efficient education in the counties in question, especially having regard to the number of school buildings required and the defective attendance.

In 1887 a special grant for needlework was introduced by the Revised Code of the Education Department.

In August 1887 the School Board refused to pay Mr Smith the Government grants received by them for the year ending 31st May 1887, so far as consisting of the Highland grant and the grant for needlework, amounting together to £18, 8s.

In the same way in succeeding years the School Board refused to pay Mr Smith these grants, amounting to £21, 4s. for the year ending 31st May 1888, to £20, 3s. for the year ending 31st May 1889, and to £20, 13s. for the year ending 31st May 1890.

In March 1891 Mr Smith raised an action against the School Board concluding for payment of these above sums, with interest.

The pursuer pleaded;—(2) On a sound construction of said agreement the pursuer, being entitled to the whole parliamentary grants while he retains his office of schoolmaster, subject only to the deductions specified, should have decree as concluded for.

The defenders pleaded;—(4) *Esto* that the said agreement is still binding, the defenders are entitled to absolver, in respect that the specific grants sued for do not fall within its terms. (5) It having been *ultra vires* of the School Board to agree to give over all the Government grants to the pursuer, the defenders are entitled to absolver.

On 2d June 1891 the Lord Ordinary (Stormonth Darling) pronounced this interlocutor:—“Decerns in terms of the conclusions of the summons Finds the pursuer entitled to expenses.”*

* “OPINION.—The pursuer, who is teacher of the Church Square Pub

The defenders reclaimed, and argued;—The Government grants in question were special. At the date of the agreement no such grants were or

Dec. 8, 1891.

School, Inveraray, here sues the School Board of Inveraray for certain portions of the Government grant earned by his school during the years 1887 to 1890 inclusive. He was appointed in 1854, and the question turns on the construction of a contract made between him and the defenders in 1873, under which they agreed to give him, as part of his emoluments, 'all the Government grants, without any deductions, except the salary or salaries of a pupil teacher or pupil teachers.'

Smith v.
School Board
of Inveraray.

"It is admitted by the defenders that, from 1873 down to 1886 inclusive, they paid to the pursuer the whole Government grants received by them, subject only to the deductions above mentioned. In 1887, however, they refused to pay him the additional grant for attendance introduced by the minute of the Scottish Education Department, dated 30th April 1885, and commonly known as the 'Highland Minute,' as also a grant for needlework, introduced by the Code of 1887.

"They justify this refusal on the ground (1) . . . that the special grants in question were not in the contemplation of parties at the time when the agreement was made, and do not fall within its terms; and (2) that if the agreement covered these grants, it was *ultra vires* of the School Board to surrender to the pursuer sums which were intended by Parliament for the relief of the ratepayers.

"The pursuer was a teacher in office at the passing of the Act of 1872, and entitled to the protection afforded by the Act to persons in that position. But it will be seen that the question between the parties is not whether he has been prejudiced in his emoluments by the action of the Board within the meaning of section 55, but is entirely a question as to the construction of the agreement, and the right of the School Board to make it.

"I am of opinion that the pursuer is entitled to the sums which he claims.

"The defence that the grants in question were special, and not in the contemplation of parties at the time of the agreement, is much more deserving of attention, though I do not think it is well founded. It is true that the minute of 30th April 1885 proceeded on the ground that some special aid was required for the Highland counties, owing to the scattered population requiring numerous small schools, and the consequent heavy burden laid on the rates. But this was no new discovery. The Act of 1872 had itself provided, by section 67, exceptionally favourable treatment as regards both building and other grants for the counties of Inverness, Argyll, Ross, Orkney, and Shetland (to which Parliament has since added Sutherland and Caithness), and the additional aid afforded under the minute of 1885 was chiefly by an increase in the rate of grant for average attendance. When it was agreed in 1873 that the pursuer should get 'all the Government grants,' it must have been foreseen not only that the ordinary grants might rise, but also that the favour already extended to schools in Argyllshire might be still further increased. An ingenious attempt was made by Mr Shaw for the defenders to assimilate the question to those cases of which *Dunbar's Trustees v. British Fisheries Society* (5 R. 350, affd. 5 R. (H. L.) 221) is the leading instance, in which obligations in relief of public burdens have been held not to cover new burdens imposed by supervenient legislation. But the principle of these cases is, not that an increase in the amount of the assessment resulting from subsequent legislation will take a burden out of the clause, but that to have this effect there must be a difference in the character or incidence of the burden. Accordingly, in *Dunbar's* case, although road assessments imposed by local Acts were held to be new burdens outside the clause of relief, the greatly enhanced poor-rate introduced by the Act of 1845 was held to fall within it. I do not think, therefore, that these cases afford any support to the defenders' argument.

"The remaining plea—that it was *ultra vires* of the School Board to surrender these grants—necessarily depends to a large extent on the defenders' success in

No. 52.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

could be in contemplation of the parties. The Government grants then existing were alone referred to in the minute of the School Board. The Highland grant was not an extension of a former grant, but a special grant made to provide for exceptional circumstances in certain counties. Grants made for specific purposes, and subsequent to the agreement, did not fall within its terms.¹ The case of *Somers*² did not touch this branch of the argument, as in that case the school board refused to carry out an agreement, the meaning of which was not in dispute. Even if these special grants fell within the terms of the minute, it was *ultra vires* of the School Board to give to the teacher grants made for specific purposes subsequent to the date of the minute. A school board would practically deprive Parliament of the power of making grants for specific purposes if they could impound such grants before they were made.

Argued for the pursuer;—The words of the contract were quite distinct, the Board agreed “to give all the Government grants” to the pursuer. The Highland grant of 1885 was merely an extension of a former grant for average attendance. Both of the grants in question were made to encourage education, and under section 43 of the Education Act of 1872 were to be paid into the school fund. The decision in *Somers* was directly against the School Board in both the positions they had taken up. These grants were entirely distinct from the class of grants of different character and incidence imposed by supervenient legislation.

At advising,—

LORD JUSTICE-CLERK.—The pursuer is teacher of the Church Square Public School, Inveraray. He was parochial teacher at the passing of the Act of 1872, and after the Act was passed he and the new School Board negotiated and entered into an arrangement as to what were to be his emoluments of office for the future. Parochial teachers held their offices as public offices *ad vitam aut culpam*. The Act of 1872 did not disturb their position, and after it passed school boards negotiated, as this school board did, with the parochial school-

shewing that the grants were new and special. For, after the judgment in *Somers v. School Board of Teviothead*, 7 R. 121, it would be hopeless to maintain that in dealing with an ‘old’ schoolmaster it is *ultra vires* of a school board to make a permanent arrangement, and to include in the emoluments so secured to him the Government grant. Nay more, in that case (as noticed in the Lord Ordinary’s note) an unsuccessful attempt was made by the school board to distinguish a part of the grant, called the ‘distance grant,’ on the ground that it was subsequent and special. The distance grant is an addition made to meet the case of sparsely populated districts in any part of Scotland, and is of precisely the same character, and made with the same object, as the increased grants to the Highland counties. The *Teviothead* case is therefore a strong authority in favour of the pursuer. But if I am right in holding that the grants under the ‘Highland Minute’ were simply ordinary grants at higher rates, there was nothing special about them, except as to the area over which they extended.

“I would only add that all grants for elementary education are intended, in a sense, to relieve the rates. Nor does it follow that they are diverted from their proper purpose by being allocated to an ‘old’ teacher, for the school board have to satisfy his claims out of the school fund, and if they do not use the grant for that purpose, the burden would fall on the rates. Agreements like the one in question have an element of risk about them, but they are not on that account unlawful, and if the teacher in some cases is the gainer, the result might be different.”

¹ *Dunbar’s Trustees v. British Fisheries Society*, Dec. 19, 1877, 5 R. 350.

² *Somers v. School Board of Teviothead*, Oct. 31, 1879, 7 R. 121.

masters, who continued in office under them, as to what were to be the emoluments of these masters for the future.

According to law the schoolmaster was entitled to all the school fees, and the only change the Act made was that the school boards through their officer were bound to collect these fees instead of the parochial schoolmaster. The convenience of the school board in making their arrangements as to salaries made it advisable that a different and more definite scheme should be adopted for paying the teacher. For this purpose in the present case the School Board entered into an arrangement with the pursuer by which the emoluments of the latter were to include "all the Government grants without any deductions, except the salary or salaries of a pupil teacher or pupil teachers."

The first question for our consideration is,—Had the School Board any power to enter into such a contract? Whatever difficulty might have been experienced if the question had been raised immediately after the passing of the Act of 1872, there can be none now, for the matter has been directly decided in the case of *Somers*, where it was held that an arrangement by which the Government grant was disposed of for the benefit of the parochial schoolmaster is an arrangement which the School Board are entitled to make. This decision is clear and direct and binding on us, unless we have such strong doubt of its soundness as to make it our duty to send the case to be heard before a fuller bench. I have no such difficulty or doubt, and accept that case as an authority.

The second question for our consideration is,—The arrangement being competent, what is the effect of the clause making it,—Is the pursuer entitled under that clause in the present circumstances to the whole Government grants, including the new grant of 1885? It is plain that the School Board in making the contract with the pursuer could not have expressed it in more general terms. The contract might have stated that the teacher's emoluments were not to exceed the Government grants as at that date, or were to consist of the Government grants until a new arrangement were made. The contract is not so limited, it is expressed—we must hold purposely—in general terms. It is quite plain that under that agreement if the Government grants were reduced by Parliament or otherwise, the schoolmaster would have to suffer a reduction of salary. He took that risk. In the same manner it seems to me that the School Board took the risk of the Government grants becoming of greater value and of this schoolmaster being proportionately benefited.

In these circumstances (1) the question as to the right of the School Board to enter into this agreement being settled by the case of *Somers*, and (2) there being no doubt as to the true meaning of the agreement, I think that the Lord Ordinary's interlocutor should be affirmed.

LORD YOUNG.—I think the present case is distinguishable in a very material feature from the case of *Somers*, but I have nevertheless to state it as my opinion that that case was not well decided. I altogether dissent from the view that we are bound to accept all prior decisions as binding upon us, whatever may be our opinion as to the erroneousness of the views expressed. It would require a statute to make a decision so binding that the Supreme Court—the very same Court in which the decision was pronounced—were not entitled to reconsider such decision. It is a matter of judgment and discretion in individual cases whether it is so clear to the minds of the Judges dealing with a case that a former decision

No. 52.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

No. 52.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

was so erroneous that they can at once act on that view, or require the case to be argued before the whole Court or an increased number of Judges. That is a matter in which it is impossible to lay down any absolute judgment at all; but the proposition that a judgment, because it is a decision, must in all cases be accepted and acted on as binding is one from which I entirely dissent. There are some general views which meet with approval. One is that with respect to matters of form, and some other matters where it really does not signify what the rule is, the only matter of importance being that there should be a rule, and that it should be adhered to,—with respect to such matters, the Court will uphold the rule laid down in prior cases. Again, where you have a series *rerum judicatarum* or the authority of text writers, there is good sense in the view that the Court will not depart from the law thus established. But I altogether dissent from the view that we are to accept every individual decision as absolutely binding, and that we are not to examine it and use our own judgment and discretion in following it or not in the case in which it is referred to as an authority.

But, as I have stated, I think this case is distinguishable in a material respect from the case of *Somers*. In that case, an old teacher having a right to the school fees transacted with the school board as to the conditions on which he would part with that right and surrender it to them. That was proper matter for contract. Whether they could contract by giving him the terms they did is another matter, but the subject itself was a proper matter for contract, viz., the terms upon which the schoolmaster would give up his right to fees which he had by his appointment, and which were secured to him by statute. Here, as it appears to me, there was no matter for contract at all. The schoolmaster was giving up nothing. There was nothing to contract about, and it would not have occurred to me, looking at the minute, that when it was written a contract was in the mind of anybody.

But the question of chief interest in the case is—a contract being assumed to have been entered into—can a school board contract away for any period of time the Government grants? Here the contract was made in 1873,—that is, eighteen years ago, and the proposition we have to consider is, that by that contract made eighteen years ago the Government grant now, and so long as the pursuer in this action shall retain his position as schoolmaster, is not under the management of the School Board, and that they are not entitled to administer it according to their judgment as to what is best for the conduct of the school with the management of which they are charged. That seems to me to be a very wonderful proposition, and I think proceeds on a total misconception of what the Government grant is. The Government grant is made out of moneys voted by Parliament for the year, and which Parliament is under no obligation to vote. It has been annually proposed for a great number of years now, but it may be stopped at any time. The vote need not be moved, or if it is, the House of Commons need not assent to it. The administration of the money which is thus voted is committed by statute to the Committee of the Privy Council, but if Parliament did not vote the money they would have nothing to administer. They are required by statute to determine how it is to be divided among the various school managers, including the school boards. Exercising their judgment, the committee make the grant from time to time to the school managers to be applied by them in the conduct of the schools under their charge according to their judgment and discretion. It is in the option of the school managers

and of the school boards as such, to accept the grant or not as they please. The Government has no charge of the management of the schools, no authority, no business in their management. School boards are entirely independent of the Government with regard to the schools under their charge. Now, what is to become of the grants which are made to school boards on their complying with the requisite conditions? They are directed by statute to be paid into the school funds. In every parish or burgh a fund must be established by the school board, and a treasurer appointed to take charge of it; and the statute, at clause 43, says that the fund is to consist of money provided by Parliament, money raised by loan, and so on. And what is to be done with the money of the school board? It is to be applied and spent by the school board for behoof of the schools under their management according to their judgment and discretion. How can that be a subject of a contract which is to endure for twenty years? Now, I do not think it possible to maintain that such a contract is lawful. If it was, the result would be that here there had been no school fund since 1873.

No. 52.
Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

A school board for the time, exercising their judgment in the matter, may conscientiously, in the discharge of their duty, feel disposed to give the Government grant to the schoolmaster. It is said that the School Board of 1873 felt so disposed. They would not intelligently feel so disposed except with reference to the circumstances of 1873, viz, the schoolmaster, the state of the school, the state of public opinion as to the requirements of education and the cost of it, and the amount of the grant at that time. A great deal has happened since then. They are not stagnant, I suppose, even in Inveraray, but are progressing with the times. Public opinion as to the education given in the school has very much changed; more teachers are employed; there is more Government grant. How does it follow that because the School Board of 1873, with reference to the circumstances of 1873, felt disposed to give up their grant to their schoolmaster, that should be at all proper or consistent with the duty of the School Board of 1891? I do not think that the judgment and discretion of the present School Board is to be displaced in this way by a contract made by the first School Board appointed under the statute. I am clearly of opinion that such a contract is illegal, and altogether beyond the power of the School Board.

To what length is this to be carried? The deficiency in the school fund is to be supplied by rates. Could a school board hand over all these rates to a schoolmaster during his term of office and enter into a contract to that effect binding their successors in office? I confess I feel myself quite unable to agree to any such proposition. What about bequests or gifts? Gifts or bequests for the promotion of education in the parish may be granted or left to the School Board. Suppose the contract of 1873 by the School Board bore that "the School Board are disposed to give Mr Smith all gifts, general bequests and legacies which may be left to them during his term of office." Would that be a good contract, and entirely debar the School Board for the time being, eighteen or twenty years afterwards, from exercising their judgment or discretion in the matter? I say that would be out of the question, but not more so than in regard to the Government grant, which is as distinctly given to be put into the school fund and administered according to the judgment and discretion of the School Board for the time as it is possible for money to be.

There is one other matter I desire to refer to. I think it a clear proposition, although contrary to the view of the Judges who decided the case of *Somers*,

No. 52.

Dec. 8, 1891.
Smith v.
School Board
of Inveraray.

that a school board cannot make a contract with an old schoolmaster in the way of restraining and fettering the judgment of subsequent school boards in the management of the funds under their charge which they could not have made with a new teacher.

I am, therefore, clearly of opinion that there was here no contract whatever between the School Board and schoolmaster in 1873, and further, notwithstanding the case of *Somers*, I think that if a contract was intended, it was altogether beyond the power of the School Board of 1873 to fetter and curtail the discretion and judgment of the School Board of 1891 in the discharge of their duty. I am therefore of opinion that the judgment of the Lord Ordinary ought to be reversed and the defenders assolizied.

LORD RUTHERFURD CLARK.—When this case was argued before us the defenders admitted the existence of the contract. I take the case as the parties have stated it. The only questions argued were first, whether the contract was binding on the present School Board, and secondly, what was the legal meaning of the contract. On the first question little was said by the defenders, and I am of opinion that the contract was binding, following the judgment in the case of *Somers*, which, I think, is direct authority on the point. On the second question I agree with the Lord Ordinary. On the whole matter, I am of opinion with your Lordship that his judgment should be upheld.

LORD TRAYNER.—At their meeting held on 23d October 1873 the School Board of Inveraray and Glenaray, as then constituted, resolved to allow the pursuer a certain salary, and added that they were “disposed to agree to give” (that is, to the pursuer) “all the Government grants without any deductions except the salary or salaries of a pupil teacher or pupil teachers.” The minute of that meeting, expressed in the language I have quoted, was apparently communicated to the pursuer, who wrote thereon, “I hereby agree to the foregoing arrangement.” From the date of that minute down to the month of August 1887—that is, a period of nearly fourteen years, the arrangement or agreement constituted by the resolution in the minute and its acceptance was acted on by the parties. The pursuer is now asking nothing more than that that agreement shall be fulfilled. It was not maintained at the bar, in the course of the discussion, that the minute and acceptance did not constitute an agreement or contract between the parties, and, indeed, when it was suggested to the defenders that such an argument might be maintained on the somewhat peculiar words of the minute, that the School Board was “disposed to agree,” &c., that suggestion was not adopted. Both parties represented that there was a contract between them, but the defenders maintained (1) that it was *ultra vires* of the then School Board to enter into the agreement in so far as it related to the Government grants, at least to the effect of binding their successors; and (2) that the agreement, even if still in force, did not entitle the pursuer to the particular Government grant now in question. On these points my judgment is against the defenders.

That such an agreement or contract was one which the School Board had power to make so as to be binding on them and their successors, has already been decided by the case of *Somers*. I feel the very great force of the observations made by Lord Young upon that decision, but I am prepared, in this case, to follow it. Even if so disposed, I should not think it desirable to question

the authority of that decision now, because since its date agreements may have been entered into on the footing that the law as there determined is sound, and because future agreements between school boards and schoolmasters, who held office prior to 1872 are, in the nature of things, likely to be very few. It is only with reference to agreements made with such schoolmasters that the case of *Somers* is of any great importance.

As to whether the Government grant now more directly in question is one which the pursuer can claim under his agreement, I agree with the Lord Ordinary. I think this grant is not a new grant, either in character or purpose, but is merely the enlargement or increase of a grant existing at the time the agreement was made.

THE COURT adhered.

ADAM W. GIFFORD, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

CALEDONIAN RAILWAY COMPANY, Complainers (Respondents).—

D.-F. Balfour—Sol.-Gen. Murray—Clyde.

JOHN P. M'BRIE, Respondent (Reclaiming).—*Comrie Thomson—*

C. J. Guthrie—A. O. Deas.

No. 53.

Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

Railway—Reparation—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33), sec. 6—Glasgow Central Railway Act, 1888 (51 and 52 Vict. c. cxxiv.), sec. 41.—Section 6 of the Railway Clauses Consolidation Act, 1845, enacts that a railway company shall make "to the owners and occupiers and all parties interested in any lands" "injuriously affected by the construction" of the railway full compensation "for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

A railway company authorised by a special Act to construct certain railways in Glasgow was, by one of its clauses bearing to be for the protection of the Corporation of Glasgow, bound to make such alterations on sewers affected by the construction of the railway as the corporation might deem necessary.

Held that section 6 of the Railway Clauses Act did not apply to damage to lands caused by the construction of sewers under section 41 of the special Act, as such damage was not caused by the construction of the railway.

By the Glasgow Central Railway Act, 1888, and other Acts incorporated therewith, the Caledonian Railway Company were authorised to construct certain railways and works in Glasgow.

Sec. 41 * enacted, for the protection of the Corporation of Glasgow, that

* "For the further protection of the Lord Provost, Magistrates, and Council of the city of Glasgow as a municipal corporation, and as trustees or commissioners acting in execution of the several public and local or personal Acts, by which any powers, jurisdiction, or authorities are conferred on them, . . . the following provisions shall have effect and be binding on the company (that is to say)—(L) Where any of the works to be done under or by virtue of this Act shall or may pass over, under, or by the side of, or so as to interfere with, any sewer, drain, water-course, defence, or work under the jurisdiction or control of the corporation, or shall or may in any way affect the sewerage or drainage of the district under their control, the company shall make good any damage which may be done by their operations to any of the sewers, and shall clean the same should they get silted up in consequence of any of the operations of the company during or after the construction of the company's works, and shall provide by new, altered, or substituted works, including outfall sewers, in such manner as the corporation may deem necessary (and for the construction of which they

1ST DIVISION.
Ld. Kyllachy.

No. 53.
—
Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

(subsec. L) where any of the works to be done under the Act should interfere with the sewers or drainage of the district under the control of the corporation, the company should provide by new, altered, or substituted works, "in such manner as the corporation may deem necessary (and for the construction of which they shall be bound to afford all reasonable facilities, and communicate their powers so far as necessary), for the proper protection of, and for preventing injury or impediment to, the sewers."

It was provided by subsection O of the same section,—“The special provisions herein contained for the protection of the corporation and the Glasgow Botanic Institution shall not be deemed to supersede or dispense with the provisions of the Railway Clauses Consolidation (Scotland) Act, 1845, but these, except in so far as they may be inconsistent with any of the special provisions herein contained, shall be and remain in full force and effect.”

The railway company executed certain sewer works under this clause upon streets beyond the limits of deviation.

On 24th November 1890 Mr John P. M'Bride served a notice upon the railway company, in terms of the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation (Scotland) Act, 1845, the Glasgow Police Act, 1866, the Glasgow Central Railway Act, 1888, and the Caledonian Railway Act, 1890, in which he stated that he was heritable proprietor of an iron store and machinery yard, and also of two brick and stone tenements of dwelling-houses, all extending from Nos. 39 to 55 M'Alpine Street, Glasgow; that the said iron store and machinery yard had been occupied by defender for the purpose of his business; that his business had been considerably interfered with by the company's operations in constructing a large tunnel or sewer in the front of his property, whereby the buildings themselves had been seriously damaged, and the access to them completely blocked up for several months, and the delivery of the iron stored therein rendered impossible, and thereby suffered loss and damage, which he estimated under the following heads:—“(1) Estimated cost of taking down and restoring where necessary the undernoted buildings . . . £2500; (2) loss and damage sustained and to be sustained to respondent's business, as above narrated, £3000.” Failing payment of that sum, he called upon the company to present a petition to the Sheriff to have his claim settled in terms of the Acts of Parliament above mentioned.

On 15th December 1890 the railway company, while denying the validity and competency of the claim, presented a petition to the Sheriff under protest, and on the same day the Sheriff-substitute fixed the 30th January following as a diet for the nomination of a special jury.

On 25th January 1891 the railway company presented a note of suspension in the Bill-Chamber, craving the Court to interdict M'Bride from following out his notice of 24th November and proceeding further with his pretended claim for compensation, and to suspend the Sheriff-substitute's deliverance of 15th December.

shall be bound to afford all reasonable facilities, and communicate their powers so far as necessary) for the proper protection of, and for preventing injury or impediment to, the sewers and works hereinbefore referred to, by or by reason of the said intended works, or any part thereof, and shall save harmless the corporation against all and every the expense to be occasioned thereby, and such works may be done by or under the direction, superintendence, and control of the corporation, at the costs, charges, and expenses in all respects of the company, and all reasonable costs, charges, and expenses thereby occasioned shall be paid by the company on demand. . . .”

The complainers stated,—“The respondent’s said notice and claim for compensation is incompetent, invalid, and not conform to statute. The sewer in question is outside the limits of deviation of the railways and works authorised by the Glasgow Central Railway Act, 1888, and was executed by the complainers under the provisions of section 41, subsection (L) of that Act,* by which it is provided that, for the construction of the sewers therein referred to, the corporation of Glasgow shall be bound to communicate their powers to the complainers. Section 328 of the Glasgow Police Act, 1866, under which the corporation of Glasgow are authorised to construct sewers, provides as follows (quoted below).† No sewer was carried or continued by the complainers into or through any lands or heritages belonging to or occupied by the respondent. The loss and damage to the respondent’s business, in respect of which compensation is claimed, was occasioned, as set forth in said notice, by the temporary obstruction of the street, and the claim in respect of such loss and damage is incompetent, and unauthorised by statute, and irrelevant to found any claim against the complainers. Further, no property or right or interest of the respondent has been taken or entered upon, or interfered with, or damaged, or injured by the complainers so as to found any competent or relevant claim for compensation.”

The respondent did not deny that the works in question had been executed under the provisions quoted above, but averred further that his property had been injuriously affected in the sense of section 6 of the Railways Clauses Consolidation (Scotland) Act, 1845.‡

The complainers pleaded, *inter alia* ;—(2) The operations complained

No. 53.

Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

* Quoted *supra*, p. 255, note.

† The Glasgow Police Act, 1866, sec. 328, enacts,—“The board” (of Police of Glasgow) “shall make provision for draining in a suitable manner the portions of the turnpike roads within the city and the public streets, and may, with that object, construct or continue in or under any of the said roads or streets, one or more ordinary or special public sewers, and may from time to time alter, renew, or add to such sewers, as to them shall seem proper, and may carry and continue the said sewers into or through any lands or heritages within the city, and may repair, maintain, and cleanse the said sewers; provided that they shall make reasonable compensation to the proprietors and occupiers of such lands and heritages for any damage which may be done by reason of the exercise of the powers hereby conferred, and such compensation shall, in the option of the board, be assessed either by the Dean of Guild or in manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, for determining the amount of compensation to be paid for lands taken under the provisions thereof.”

‡ The Railways Clauses Consolidation (Scotland) Act, 1845, sec. 6, provides,—“In exercising the power given to the company by the special Act to construct the railway and to take the lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation (Scotland) Act, and the company shall make to the owners and occupiers, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last mentioned Act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof.”

No. 53.

Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

of having been executed under the authority and subject to the provisions of the Glasgow Police Act, 1866, as the said Act is incorporated with the Glasgow Central Railway Act, 1888, and the respondent having no right of compensation under said Acts in respect of any of the matters referred to in said notice and claim, the said notice and claim are incompetent, and the complainers are entitled to decree, as craved.

The respondent pleaded, *inter alia*;—(2) The respondent's property having been injuriously affected, within the meaning of the Railways Clauses Consolidation (Scotland) Act, 1845, the respondent is entitled to compensation, and to have the same assessed in terms of the Lands Clauses Acts. (3) The notice and claim of the respondent being competent, valid, and authorised by statute, decree of suspension and interdict should be refused.

The Lord Ordinary (Kyllachy), on 8th July 1891, sustained the reasons of suspension, and declared the interdict formerly granted perpetual.*

* "OPINION.— . . . The complainers have in their amended record raised a totally new question, which admits, I think, of being at once disposed of. They allege, and the fact is not disputed, that the operations in connection with which the respondent claims compensation are being executed by them in pursuance of their obligations to the corporation of Glasgow, under section 41 of their special Act of 1888, and particularly in pursuance of the obligation contained in subsection L of that section, which subsection is not quoted on record, but is as follows"—(See footnote, p. 255).

"The complainers contend that, in these circumstances, and in virtue of the provisions of this section, they are vested with all the powers, and by consequence all the immunities, of the corporation, and that the result of that is to bring them within the provisions of the 328th section of the Glasgow Police Act of 1866, which is quoted in article 6 of the complainers' statement, and provides in effect for the construction, renewal, or repair of sewers in or through any lands or heritages within the city on payment of compensation 'to the proprietors and occupiers of such lands and heritages for any damage which may be done by reason of the exercise of the powers hereby conferred.' The respondent being merely a frontager to the street in which the complainers' operations are being conducted, and not being an owner or occupier of any land or heritage occupied by those operations, it is contended that his claim for compensation is expressly excluded.

"The respondent's answer is that, although the complainers were vested with the powers of the corporation, they are not vested with its immunities, and he appeals to subsection O of the same 41st section of the special Act, which provides as follows:—'The special provisions herein contained for the protection of the corporation and the Glasgow Botanic Institution shall not be deemed to supersede or dispense with the provisions of the Railway Clauses Consolidation (Scotland) Act, 1845; but these, except in so far as they may be inconsistent with any of the special provisions herein contained, shall be and remain in full force and effect.'

"I have not been able to read the last subsection as enlarging the claims for compensation competent to individuals in the position of the respondent. The whole section is declared to have for its purposes merely the protection of the corporation and certain other specified public bodies, and the subsection I have just read cannot, I think, be construed without reference to the limitation. And with respect to the argument that a transfer of powers does not necessarily imply a transfer of immunities, I am afraid it is rather against that argument that under the provisions of subsection L the works in question might have been executed by the corporation themselves at the expense of the railway company, in which case it is difficult to see how the respondent could have made good any claim for compensation, except under the limitation expressed in the 328th section of the Glasgow Police Act above referred to.

"On the whole, therefore, I think that the matter is sufficiently clear on record and on the statutes to make it vain to proceed with the proposed jury trial, and

No. 53.

M'Bride reclaimed, and argued;—Admittedly the works were being constructed under the 41st section of the Glasgow Central Railway Act, 1888. By that section the railway company came under certain obligations to the corporation of Glasgow, and it was provided, *inter alia*, that the corporation "should communicate their powers" to the company. These powers were defined in the 328th section of the Glasgow Police Act, 1866, and they were given in that Act for the public benefit. The immunities conferred upon the corporation by that Act were not to be presumed to be transferred to mere traders like the railway company. Enactments conferring powers for the benefit of private persons such as the railway company were to be construed very strictly, and the right to compensation in a case like the present could not be taken away except by very clear provision to that effect.¹ Further, upon a sound reading of the 328th section of the Police Act no immunity was conferred upon the corporation in a case like the present, and it did not exclude a claim for compensation where damage had been sustained by reason of such operations as were complained of. This view was supported by the proviso contained in subsection O of the 41st section of the Act of 1888. It could not be maintained that the claimer had been deprived by a mere side-wind of the right he would have had otherwise under the Railways Clauses Act.

Argued for the railway company;—The complainer proposed to proceed with a statutory arbitration, and had given the necessary notices under the Lands Clauses Act. It was for him, therefore, to satisfy the Court that he had a good case for compensation under the statutes. It was true that if by operations carried on by his neighbour a person's support was destroyed, damages would be due at common law.² But there was no case of that kind here. Admittedly the works in question were being conducted under subsection L of the 41st section of the special Act of 1888, by which the railway company were enabled to repair any damage their works might cause to the corporation sewers. Indeed, in terms of that section the railway company were now in the shoes of the corporation. The powers of the corporation, which were thus transferred to the railway company, were set out in the 328th section of the Glasgow Police Act of 1866, and by that section compensation was restricted to "the proprietors and occupiers of lands and heritages." That being so, and the claim for compensation being thus confined to those through whose lands the operations were conducted, it was clear that the complainer had no claim under that section, as he was merely a frontager. The Lands Clauses Act was introduced in subsection O of the 41st section of the company's special Act only as the machinery for giving effect to a claim to which it was applicable. But here there was no land taken. The introduction of the term "immunities" by the Lord Ordinary was unfortunate, for this was no case of immunity. In order to found a claim for compensation the injury must be actionable apart from the statutory powers.³ Further, where powers were conferred by statute, and the Legislature had sanctioned the doing of a particular thing, any claim for compensation for injuries through

I shall therefore grant interdict against so proceeding, with expenses to the complainers since the date of the second closing of the record."

¹ Maxwell on Statutes, ii. 363; Clyde v. Glasgow City and District Railway Co., July 16, 1885, 12 R. 1315; Scales v. Pickering, 1828, 4 Bingham's Reps. 448; Kingston-upon-Hull Dock Co. v. La Marche, 1828, 8 Barnwell & Cresswell, 42; Stockton Railway Co. v. Barrett, 1844, 11 Clarke and Fin. 590.

² Dalton v. Angus, 1881, L. R., 6 App. Ca. 740.

³ Deas on Railways, 271 and 281; Hammersmith Railway Co. v. Brand, 1869, L. R., 4 Eng. and Ir. Apps. 171, 201.

Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

No. 53. operations conducted under the statute must be confined within the limits allowed by the statute.¹

Dec. 8, 1891.
Caledonian
Railway Co. v.
M'Bride.

At advising,—

LORD PRESIDENT.—A claim for compensation under the statutes has been made by the reclaimer, Mr M'Bride, against the Caledonian Railway Company, for injurious affection of his lands; and he has given what purport to be the statutory notices in that behalf. The company ask interdict of further proceedings under those notices, and their pleadings challenge the reclaimer to state under what statute his claim for compensation arises. His reply, given in the sixth answer and second plea, is,—Under the 6th section of the Railways Clauses Consolidation (Scotland) Act, 1845.

Now, the alleged injury to the reclaimer's property is that certain buildings in M'Alpine Street, Glasgow, have been damaged, and the access temporarily blocked by the construction of a sewer in the centre of the street. Those operations, however, are admittedly not within the limits of deviation of the railways authorised by the special Act (which is the Glasgow Central Railway Act, 1888); and the 6th section of the Railways Clauses Act gives right to compensation for injurious affection only where the construction of the railway is the cause. The section founded on by the reclaimer, therefore, fails to support his claim.

This is, in my opinion, decisive of the case, unless it could have been shewn that the 6th section of the Railways Clauses Act has been, by some other enactment, extended or applied to works not included in its own terms.

I think that there has been no such extension or application, and shall state the relation of the several enactments bearing on the question.

The sewer in M'Alpine Street was constructed by the railway company in consequence of the 41st section of their special Act. That section has nothing to do with the construction of the railways authorised by the Act, its object being stated, in its opening words, to be the further protection of the Glasgow Corporation, the Glasgow Tramway Company, and the Glasgow Botanic Institution. Among its very numerous and miscellaneous subsections, subsection (L) is concerned with the safety of the sewers belonging to the corporation, and requires the company, in certain events, to provide for their protection by new works. Incidentally to this, and in furtherance of it, it is enacted that the corporation shall be bound to afford to the company all reasonable facilities, and communicate their powers so far as necessary. The sewer in M'Alpine Street was constructed by the company in fulfilment of their obligations to the corporation under this subsection, and the company point to the 328th section of the Glasgow Police Act as containing powers conferred on the corporation which have been communicated to them, which authorise this operation, and which, while providing for compensation, does so only to the owners of lands into or through which the sewers have to be taken. Now, admittedly, this sewer in M'Alpine Street was not taken into or through the reclaimer's lands; and therefore he is not in the one case for which compensation is directly provided in this section.

But the reclaimer founds on subsection (O) of the 41st section of the special Act, which lays it down that the special provisions for the protection of the

¹ Hammersmith Railway Co. v. Brand, *supra*; Rex v. Pease, 1832, 4 B. & A. 30; Vaughan v. Taff Vale Railway Co., 1860, 5 H. & N. 679; contrasted with Jones v. Festiniog Railway Co., 1868, L. R., 3 Q. B. 733.

corporation and the Botanic Institution shall not be deemed to dispense with the provisions of the Railways Clauses Consolidation (Scotland) Act, but that these, except in so far as they may be inconsistent with any of the special provisions contained in section 41, shall be and remain in full force and effect. Now, it is enough to say that this is only a salvo of the Railway Clauses Act for such cases as its terms cover, and is not an extension of it to cases which its terms do not cover. The terms of the 6th section of the Railways Clauses Act would cover a number of cases arising under various subsections of the 41st section of the special Act; they do not cover, and are not here intended to cover, the case of works outside the railway itself.

Whether the powers of the corporation (and by consequence the company) under the 328th section of the Glasgow Police Act give right to withdraw support from the lands or from the buildings, or from any particular building in the streets in which they operate, are questions which do not arise here. What we decide is that, if they do, there is no statutory right to compensation such as is here sought; and if they do not it is obvious that the remedy for an excess of statutory power cannot lie in statutory compensation.

I am for adhering to the interlocutor of the Lord Ordinary.

LORD M'LAREN and LORD KINNENAR concurred.

LORD ADAM was absent.

THE COURT adhered.

HOPE, MANN, & KIRK, W.S.—ROBERT STEWART, S.S.C.—Agents.

MRS ELIZABETH M'KENZIE OR DAWSON, Pursuer (Reclaimers).—

James Reid.

THOMAS M'KENZIE, Defender (Respondent).—*C. J. Guthrie—Gunn.*

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

Donation—Donatio inter vivos—Deposit-receipt—Proof—Presumption.—A son after his mother's death cashed a deposit-receipt in her name for £240. She had lived with him, and was sixty-three years of age at her death. The deposit-receipt was endorsed by a cross, and bore the signature of the son and of his sister as witnesses attesting this cross as the mother's mark.

In an action by one of the mother's next of kin the son alleged that he had acquired the deposit-receipt by donation *inter vivos*. Evidence which held insufficient to overcome the presumption against donation.

MRS MARY JANE LAWSON OR M'KENZIE, widow of Alexander M'Kenzie, 1st Division. handresser, Glasgow, died there intestate, at the age of sixty-three, on 27th December 1890. After her death Thomas M'Kenzie, a son of the deceased, with whom she resided, cashed a deposit-receipt by the Clydesdale Bank in her favour for £240. The deposit-receipt was then indorsed with a cross, attested by the signature of the said Thomas M'Kenzie and of a sister, Mrs Martha M'Kenzie or Gebelmann. Lord Kin- cairney.

The present action was raised by Mrs Elizabeth M'Kenzie or Dawson, mother daughter of the deceased, against Thomas M'Kenzie, as a vitious intruder with the deceased's estate, for count and reckoning and payment of the pursuer's share, as one of the six children of the deceased.

The defender stated that on 16th December 1890 his mother "made a donation" to him of the deposit-receipt and the sum therein contained, and gave delivery of it to him as his writ on that date in presence of his sister Martha. He pleaded;—(2) The pursuer's mother having made a donation of said deposit-receipt and its contents to the defender, he should be absolved.

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

The Lord Ordinary (Kincairney) allowed a proof, the defender to lead. The following facts were proved:—

Mrs M'Kenzie's husband died in 1882.

In 1883 she received a legacy from a relation of her husband of £490, and at the same time her children received legacies of £100 each. The legacies of the mother and of those children who lived with her were deposited in bank on deposit-receipts, and the deposit-receipts were kept together in a box of which Mrs M'Kenzie kept the key. Mrs M'Kenzie was in the custom of drawing money from the bank from time to time; she did so by making a cross on the back of the deposit-receipt, which was attested by two witnesses, generally, if not always, by two of her children, one of whom took the receipt to the bank, drew the money required, and got a new deposit-receipt in favour of Mrs M'Kenzie for the balance.

In that way the sum in bank gradually diminished. On 19th November 1888 it amounted to £340, on 26th November 1889 to £280, and on 12th December 1890 to £240—so that she had spent £100 in the last two years of her life. How she disposed of these sums did not clearly appear.

Mrs M'Kenzie was survived by six children—the pursuer, who was living separate from her husband, from whom she received £1 per week of aliment—(she had also a son earning wages); Alexander, who was married, and was a hairdresser in business with his brother Thomas, the defender; Thomas, the defender, who was unmarried, with whom his mother lived; Martha, wife of Frederick Gebelmann, who, with her husband, lived with the defender; Jessie, widow of Victor Pippin (who had died in September 1889), who was in poor circumstances; and Daniel, who lived in Melbourne.

Mrs Pippin deponed,—“I was in the habit of visiting my mother two or three times a-week for a number of years. My mother was not in good health for some years, and used to be confined to bed. I know that the defender supported the household before and after my father's death. I remember of my mother getting a sum of money left to her some years ago. It was put on deposit-receipt in the Clydesdale Bank. I have had conversations with my mother about her money frequently when she felt she was ill. She always said the money was to be the defender's. The first time I remember of her saying so was about two years ago, but she has said so frequently since whenever she felt very ill. The last occasion on which she made that statement to me was about a fortnight before she died. There was no one present besides myself. My mother said at that time that she felt very ill, and that she was going to give this deposit receipt to the defender to-night. When I called on the following day I was told that she had given the deposit-receipt to the defender. About two months after my husband died I called one day to see my mother when she was very ill. On that occasion she sent me down to my brother's shop to tell the defender to come up and get the deposit-receipt, as she felt very ill, and she was afraid she would drop down like my husband some day. I went and told the defender what my mother said, and he laughed and said,—‘Go back and tell her that she will live for many years yet.’ . . . I remember of the defender calling upon me about two days after he got the deposit-receipt. He told me then that my mother had given him the deposit-receipt. My mother had told me the day after she had given the deposit-receipt to the defender what she had done, and the defender told me himself afterwards. With the exception of the fortnight before my mother's death I think I saw the pursuer on twice in the house during a period of three or four years. My mother was nursed in her illness by my sister Martha and the defender. I

mother was particularly fond of the defender, and relied upon him very much indeed. She used to say that if anyone made a noise about anything it would be the pursuer that would do so. I am getting parochial relief just now. It was my mother who suggested that I should apply for it. The defender has been giving me some money for about a year. He gives me 2s. 6d., 1s. 6d., 2s., and sometimes 5s. on a Saturday. Cross.—
 I never heard my mother say to the defender that he was to look after me, and my brother never told me that my mother had said so to him. Defender never told me that he had got his mother's money on condition that he was to look after me, or anything like that. He has promised to take me into his house to stay with him. He never asked me to stay with him while my mother was alive.
 So far as I know, my mother never spent any of her money, except when she was going away from home. When my mother spoke to me about leaving the money to defender about a fortnight before she died, I did not think at that time that she was dying. (Q.) Did your mother think so herself? (A.) She would not tell me, for I was very ill myself. (Q.) When your mother told you on that occasion that the defender was to get the money that night, did you not think from that that she thought she was going to die? (A.) I thought she was very ill, but I did not think she was going to die. (Q.) If your mother had recovered, was the money to belong to her or to the defender? (A.) I cannot tell, but she always spoke about the money as going to be the defender's. (Q.) Did your mother not speak to you as if she meant to keep her money as long as she lived, and that the defender was to have it after she died? (A.) She wanted to give it to the defender when she was in life. When my mother said that defender was to get the money that night, she did not say that she thought she was dying.”

Mrs M'Kenzie, wife of the said Alexander M'Kenzie, deponed,—Mrs M'Kenzie “used to say that the pursuer would never handle a penny of hers, and that she had got all that she would ever get. Mrs M'Kenzie also said that the defender would get all that she had, as he deserved it. (Q.) Did she say that frequently? (A.) Well, whenever she was saying anything about the pursuer; she has said that two or three times. The first time I heard her say it was about four years ago when she had a quarrel with the pursuer. She also stated that to me about two weeks before she died. There was no one else in the bedroom at the time. Mrs M'Kenzie then said that the pursuer had come there to annoy her, and was wanting the things before she was away, but that she had got all that she would ever get, for she had made that all right, and had left it to defender, as he deserved it for being so kind to her. I was frequently about the house during Mrs M'Kenzie's last illness until the pursuer came, and then I did not go up so often. The defender generally used to nurse his mother, and he used to sit up with her at nights after he left his work. Mrs M'Kenzie could not write. The pursuer had not been about her mother's house for four years until about two or three weeks before her mother's death. By the Court.—(Q.) Might the pursuer not have been in her mother's house without you knowing? (A.) She was not there when I went, and I knew that she had not been there, because they were not speaking. . . . Cross.—. . . I understood that Mrs M'Kenzie meant to keep her money while she lived, and that when she died the defender was to get it.”

Frederick Gebelmann deponed,—“I was married to Martha M'Kenzie, a daughter of the late Mrs M'Kenzie, on 15th July 1890. . . . I remember of speaking to the late Mrs M'Kenzie as to my intention of marrying her daughter. That was nine or ten months before she died.

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

No. 54.
Dec. 8, 1891.
Dawson v.
M'Kenzie.

Mrs M'Kenzie said that she had nothing against my marriage if I would be agreeable to stay in the house, as she was used to her daughter Martha nursing her, but that Martha was to get the house furniture and the defender was to get all the money she had. Mrs M'Kenzie repeated that statement to me very often. . . ."

Miss Margaret Crawford, a professional nurse, deponed,—“I was in the habit of nursing Mrs M'Kenzie. I was frequently at the house, and I knew the family very well. Mrs M'Kenzie sometimes spoke to me about her money affairs. About fifteen months ago she spoke to me decidedly about them. She said, ‘Tom, you know, has always been a good son to me, and I am going to tell you that I have left all to him. I asked him to give me his hand that he would never forget Alick if I would leave all to him, for he deserves it, and he has always been dutiful and taken us all into the house and asked nothing in return.’ There was no one else present when that was said. At different times Mrs M'Kenzie has made similar statements to me about her affairs. Her statement was always that Tom would get everything, and it was always her dread that there would be any disturbance which would prevent defender from getting the money. Mrs M'Kenzie also mentioned that it was her dread that the pursuer would create a disturbance. Cross-examined.—Mrs M'Kenzie was a clever and intelligent woman, and when she made the statement about her affairs to me she was in her ordinary health. . . . I remember when Mrs M'Kenzie was speaking to me about lifting her money that she said it was required for the house and for the shop, as the shop was not doing well. She said that she gave money to help the shop, and to start a machine which cost a great lot of money, something like £100. Re-examined.—It was about half-a-dozen years ago that Mrs M'Kenzie mentioned about giving money for the shop. . . . I nursed Mrs M'Kenzie about two years ago. She was afflicted with asthma. I did not think her dangerously ill, because she got so often better.”

Mrs Forrester, who had known Mrs M'Kenzie for thirty-four years, and visited her regularly, deponed,—“ . . . I saw Mrs M'Kenzie several times when she was ill, and shortly before she died. I used to go over on the Sabbath evenings. She generally used to speak to me about the defender's kindness to her, and how attentive he had been to her. I knew the pursuer. I knew that she had not been about the house for two or three years before her mother died until July last. I saw the pursuer at Mrs M'Kenzie's house once or twice between July last and the date of Mrs M'Kenzie's death. The pursuer is a very strange tempered woman, and she and her mother did not do well together. The last time I saw Mrs M'Kenzie was on a Sabbath evening about three weeks before she died. That would be about the beginning of December last. She said to me on that occasion that she thought she would not be long here, that she had not a great deal to leave now, but that it was for Tom. She also said that she hoped there would be no noise about it; she always had a dread of the pursuer. . . ."

Mrs Brash, a widow, deponed,—“I was in the habit of visiting Mrs M'Kenzie very often. . . . Mrs M'Kenzie generally said to me when I was there, that whatever money she had she would leave to the defender. . . . (Q.) Did she ever give any reason why the defender should be so favoured? (A.) Because he had been a most dutiful son to her. I have heard Mrs M'Kenzie say that the pursuer would get nothing belonging to her as she was not deserving of it.”

The defender deponed,—“(Q.) Did your mother ever offer you the deposit-receipt? (A.) Yes, about two months after the sudden death of Mrs Pippin's husband, in September 1889, my mother sent Mrs Pippin

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

down to the shop to tell me to come up and go to lift the money, that she felt so ill that she was afraid that she would die in something like the same way as Mr Pippin. I did not go up to the house, as I knew my mother's way, and I said to Mrs Pippin that my mother would see some of us away yet. . . . I remember of my mother uplifting a sum of £20 on 12th December last. On the following day she gave me £10 to pay taxes and some accounts. On Tuesday, 16th December, when I came home for dinner about four o'clock, my mother told me that she had not been so well, and she asked me to have my dinner in the bedroom. After I had taken my dinner, she asked if I had enough money to pay the taxes, and I said that I still required £1. My mother then said she had a few pounds in the box which she would give me, and she told my sister Mrs Gebelmann to open the box and bring a pen and ink. She then put her mark on the deposit-receipt of 12th December 1890, asked me to sign it also, and handing the receipt to me said,—‘Now, that is yours.’ I took the deposit-receipt and placing it in the envelope returned it to the box, and my sister locked up the box again. I did not take the deposit-receipt out of the box again until the morning after the death, when I uplifted the money and re-deposited it in my own name. In connection with a question which arose with my niece Agnes Duncan after she got married, my mother asked me to go up and see Mr John Wilson, writer, Glasgow. Mr Wilson afterwards came down to see my mother, and gave her some advice on the subject. Mr Wilson afterwards said to me that my mother was very bad, and that it would be necessary to get her testament. I told my mother what Mr Wilson had said, and she said that there would be no testament with her—what she had she would give me in my hand. A day or two after I got the deposit-receipt from my mother, I told Mrs Pippin that my mother had given it to me. . . .

Cross-examined.— . . . (Q.) The first deposit-receipt produced is dated 1st February 1888, and is for £380, while the last one is dated 12th December 1890, for £240. Can you give me any idea where that £140 went to if you were keeping your mother all that time? (A.) My mother went to Carrickfergus in Ireland for her health for ten or twelve weeks at a time, and she took my brother Alexander's wife, my sister Martha, and Agnes Duncan with her, and kept them all there. That is what she did with the money, and she lifted it for that purpose. My mother used also to go down the Clyde occasionally. I could not tell how much money was consumed on these visits to Ireland. She generally went about June, and she has been there half-a-dozen times since she got the money. . . . I never was in Ireland with my mother. I did not know anything about the uplifting of the deposit-receipts from time to time; that was all done by my two sisters. (Q.) The deposit-receipts have been mostly cashed for sums of £10; do you represent that these sums were expended in visits to Ireland? (A.) I have known my mother to spend £20 in Ireland for a couple of months. My mother never helped to pay the household expenses with the interest and sums withdrawn from these deposit-receipts, and I never asked her to do so. . . . (Q.) Did you understand why she should leave nothing to the daughter who had just lost her husband? (A.) When my mother handed the deposit-receipt to me on the 16th December, she made me promise that I would look after Mrs Pippin. . . . I have been giving Mrs Pippin a few shillings a-week ever since she lost her husband. . . . (Q.) After taking out the deposit-receipt in her own name on 12th December, when do you think she first conceived the notion of giving the contents to you? (A.) On the following Tuesday, 16th December. She then said that she had got off it now all that she would require. (Q.) If that was the case, why

No. 54.

Dec. 8, 1891:
Dawson v.
M'Kenzie.

was the last deposit-receipt not taken out in your name? (A.) When I got the deposit-receipt I just put it in the box, and it was not taken out until after the death. I had been told by Mr Wilson, after my mother would not make a testament, that it would be necessary to get delivery of the deposit-receipt, and that is the reason why I put it into the box, and thought no more about it after it was endorsed. I thought that after the deposit-receipt was given to me nothing more was required. . . . (Q.) Was your idea that, even although your mother recovered, you could have kept that money from her and never given her any? (A.) Certainly; I considered that it was wholly mine. My mother had said to me when handing me the deposit-receipt, 'That is yours.' She also said, 'Promise me that you will look after Mrs Pippin.' She said that when she handed over the deposit-receipt to me. (Q.) And you considered that you got the money with that charge? (A.) Yes. (Q.) To administer it, looking after Mrs Pippin? (A.) Yes, and I promised her to do so. (Q.) You took delivery of it on that condition, that you would fulfil your dying mother's wish in that respect? (A.) Yes. My mother had also said that the furniture was to belong to my sister Mrs Gebelmann, but that was some months before. She said nothing about the furniture at the time the deposit-receipt was handed over to me. On the occasion when my mother spoke about the furniture she was unwell, and what she said was, that, on account of Martha nursing her, she was entitled to the furniture. I considered that the handing over of the furniture to Mrs Gebelmann and of the deposit-receipt to me was part of the arrangement of my mother's affairs in view of her death. . . . The money in the deposit-receipt and the furniture embraced all that my mother possessed in the world. (Q.) Did you not think it necessary to let your brother Alexander know that your mother had parted with all her estate? (A.) No; he knew that it was my mother's intention to part with it to me. I cannot say why I did not tell my brother Alexander that my mother had carried out her intention. . . . My mother had often spoken about my getting the money before 16th December last. She has mentioned that to all the members of the family except Alexander. She has also spoken about it to my brother-in-law, Frederick Gebelmann. (Q.) Was it a subject of common talk amongst you that it was your mother's intention to give you the money? (A.) It was. That had been well understood for years before my mother's death. . . . I never heard my mother say that the pursuer was to get any of her money. (Q.) Did your mother ever say that she would get nothing? (A.) Yes. When my mother would not make her testament, Mr Wilson advised me to get delivery of the deposit-receipt. (Q.) And you got delivery of it? (A.) Yes. . . . My mother's deposit-receipt was kept along with my sister's and my own in one box. There was only one key to the box, and my mother generally kept it in a drawer. My mother frequently talked to me about the money when she was very ill. My mother said to me that she was afraid the pursuer would get the money. I told my mother that Mr Wilson said it was necessary that I should get delivery of the deposit-receipt. That was nine months before she died. At that time my mother said that there would be no testament with her, that she would give it to me into my hand. I never asked my mother for the deposit-receipt. For seven or eight years my mother was confined to the house during the winter time being up one day and in bed another. My mother's condition did not get worse between 13th and 16th December. When she gave me the deposit-receipt on 16th December, she was able to sit at the fire. My interview with my mother at that time would last perhaps two hours. I generally came to my dinner at four o'clock, and it would be after six

before I left. I suppose my mother endorsed the deposit-receipt at that time because she felt so ill. By the Court.— . . . When my mother gave me the deposit-receipt she said that she did not think she would get better.”

No. 54.

Dec. 8, 1891.

Dawson v.

M'Kenzie.

Mrs Martha Gebelmann deponed,—“ My brother Tom got the deposit-receipt in question on the 16th of December, I think. I fix the date because I bought a cloak on that day. (Shewn No. 25)—That is a receipt for payment of the cloak, dated 16th December. It was my mother who gave me the money to buy the cloak. It was on the same day that my brother had the transaction about the deposit-receipt. Those in the house on that occasion were my brother, my mother, and myself. My brother and I were brought into my mother's room about four o'clock in the afternoon. My mother was in bed at the time. My brother Tom had come up for his dinner, and my mother asked him to come into the room. On that occasion my mother gave me £1 to go for the cloak, and I went. When I came back my mother said to my brother Tom, had he paid the taxes ? and he said he had paid them all but one, for which he wanted £1. He said he would pay it himself. My mother told me to bring her the little box in which she had her deposit-receipt. I did so, and she gave me £4, which she had borrowed from me. There were three deposit-receipts in the box—one belonging to myself for £100, another belonging to my brother for £100, and the third deposit-receipt was my mother's. I handed my mother her own deposit-receipt at her request. She then asked me to bring her pen and ink, which I did. She made a cross on the deposit-receipt, and then my brother and I signed it at her request. She then handed the deposit to my brother Tom, saying, ' There, that's yours, as I have got all that I require of it, and I know you will look after your sister Jessie,' meaning Mrs Pippin. My brother then put the deposit-receipt into the box, along with the other two deposit-receipts. That box was the common family repository where all our valuables were kept. My mother frequently during her life spoke to me about that money on deposit-receipt. She many a time during a period of years said that the money she had was Tom's. I have heard her say so in presence of Mrs Dawson. On one occasion, three or four years before my mother's death, my sister wanted a tureen that my mother had. My mother said that perhaps she would live us all out, and made a little fun at the time. She said that the money she had was my brother Tom's, and anything that was in the house she would give to me, as she knew that my brother Tom would not take it from me. I think £11 is the fair value of the furniture belonging to my mother in the house. The furniture was old and worn out. Cross.— . . . My mother said that she gave the whole of the furniture to me. She did so at the same time as she gave Tom the deposit-receipt. (Q.) You get the furniture and Tom gets the whole money, so that between you you get the whole estate ? (A.) Yes, it was my mother's wish that we should. My mother did not say to me that she did not wish Alexander, or Mrs Pippin, or Mrs Dawson to get anything. (Q.) Can you give any reason why they should not get a share as well as yourself ? (A.) My brother Tom and I were the only ones who looked after my mother and did anything for her. (Q.) Why should you and your brother get it all ? (A.) I helped with my brother to nurse my mother. I sat up at night, and did all I could. I was the youngest in the house. Mrs Pippin is very poor. She got £100 as well as I. I cannot say where that £100 is now; I don't know whether she has got it. As far as I remember, I have stated all that my mother said on the 16th of December when the deposit-receipt was handed over to my brother. (Q.) Is it not the case that your mother

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

signed the receipt and handed it to Tom in order that he should get a pound or two out of the receipt to pay the taxes? (A.) No, he said he would pay the tax himself out of his own money. When my mother gave the deposit-receipt to Tom, the conversation began about some taxes which had to be paid. I think it was the income-tax, and that it amounted to £1, but I cannot really say. (Q.) And it was because of this amount of money that your mother asked you to fetch the deposit-receipt out of the box? (A.) Yes, and to give me the £4 which she had borrowed from me. (Q.) Did your mother get £1 on that occasion to give to Tom? (A.) No, he said he would pay it himself. (Q.) If she did not give him the £1, can you explain why it was necessary to take the deposit-receipt out of the box? (A.) Because she was going to repay me the £4 which she had borrowed, and she gave it to me. It was on 16th December that she gave me the £4."

Alexander M'Kenzie (who was examined for the pursuer) deponed,—“The defender told me that my mother had given him her money. I cannot say whether he told me before or after my mother died. . . . I was not at all annoyed when the defender told me that my mother had given him all her money. The words he used were that my mother had given the deposit of her money to him. The defender did not say anything to me about Mrs Pippin. He did not say at that time that my mother had told him he was to look after Mrs Pippin. (Q.) Did he tell you shortly after your mother's death that he was to look after Mrs Pippin? (A.) Yes; and he has always done so, and did so before my mother's death. I am married, and I could not afford to look after them as he could. I have heard the defender tell Mrs Pippin that my mother desired him to look after her. (Q.) Is it not rather strange that Mrs Pippin never heard that? (A.) Since her husband died Mrs Pippin has not been well, and it is quite possible that things might often be said in her presence which she might pay no attention to. . . . By the Court.—It was generally understood by myself and the other members of the family before my mother died that the defender was to get my mother's money. That was understood amongst us for three or four years at anyrate."

Mr Wilson, writer, was not examined. In a letter addressed by him as the defender's agent to the pursuer's agent, dated 14th January 1891, he stated that the deposit-receipt was handed over to his client on the 14th December previously, and in the account of the deceased's personal estate sworn to by the defender the particulars of the £240 given were "an immediate gift, *inter vivos*, on 12th December 1890."

The Lord Ordinary (Kincairney), on 21st August 1891, pronounced this interlocutor:—"Finds (1) that Mrs M'Kenzie, mother of the pursuer and defender, died on 27th December 1890; (2) that on 16th December 1890 she made a donation *inter vivos* to the defender, of a bank deposit-receipt in her favour for £240, and of the said £240 contained therein: Finds that the defender has not intromitted with any other part of the estate of the deceased: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds him entitled to expenses," &c.*

* "OPINION.— . . . A proof has now been taken in which the defender led. I do not think that the evidence adduced by him has been met to any serious extent by counter evidence; and what the defender has to overcome is not so much the pursuer's counter evidence as the very strong presumption against the donation which he avers.

"There is always a strong presumption against donation, either *inter vivos* or *mortis causa*.

"In this particular case the presumption is exceptionally strong. What is

The pursuer reclaimed, and argued ;—There was a strong presumption against donation, and it was stronger against an *inter vivos* gift than one

No. 54.

Dec. 8, 1891.

Dawson v.
M'Kenzie.

averred is not donation *mortis causa* but a donation *inter vivos* and absolute, and there is authority for the proposition that a more complete proof is required to establish the latter than the former—(*Sharp v. Paton*, 27th June 1883, 10 R. 1000, per Lord Deas, 1008). Further, what is said to have been bestowed was practically Mrs M'Kenzie's whole estate. The gift would leave her penniless and dependent on her son ; further, she had five other children with legal claim to legitim on her death, a right not readily or easily defeated, and not in all cases liable to be defeated ; and lastly, the donation is alleged to have been made by a blank indorsation of a deposit-receipt—Mrs M'Kenzie's indorsation having been made by a cross on the back of the deposit-receipt (she being unable to write) attested by the defender and by his sister Mrs Gebelmann.

"The defender's case, therefore, requires careful examination, and it is not without hesitation that I have ultimately come to the conclusion that it has been made out.

"The facts are shortly these :—

"Mrs M'Kenzie's husband had died in 1882. The defender depones that for some years previously his father had resided with and been maintained by him ; that his mother had continued to reside with him, and that he had maintained her, and also his sister Martha, afterwards Mrs Gebelmann, and his niece, Agnes Duncan, until they were married. It would rather appear, however, that Mrs M'Kenzie must have contributed either to the expense of the housekeeping or of the business.

"Mrs M'Kenzie had four other children, one resident in Melbourne, and the others had been married.

"The defender depones that his mother frequently expressed her intention that he should have her money, and her desire to avoid, if possible, disputes about it after her death. It appears to have been generally understood in the family that the defender should have his mother's money, and to have been acquiesced in as natural, I suppose, because she had lived in his house.

"Not long before her death Mrs M'Kenzie had occasion to consult Mr Wilson, a lawyer, and he, noticing the frail state of her health, had advised the defender that she ought to make her will. The defender repeated this advice to his mother, and he depones that she replied that there would be no testament with her ; what she had she would give into his, the defender's, hand. On another occasion, Mr Wilson, when this was mentioned to him, advised the defender that it would be necessary that he should get delivery of the deposit-receipt.

"One would have wished to know the precise advice which Mr Wilson gave, but that gentleman has not been examined.

"It appears that Mrs M'Kenzie had been in failing health for several years, and that latterly she never left her house during winter. She suffered from asthma, and was much indisposed. The evidence is not so clear as might be wished about the state of her health shortly before her death. She died on 27th December 1890, at the age of sixty-three. On 12th December she drew £20 from bank, and a new deposit-receipt for £240 in her favour was made out. The donation is said to have been made on 16th December, when she seems to have been seriously ill, though not in a condition materially worse than on the 12th.

"The defender depones that on that day she asked him to come to her room ; that her daughter, Mrs Gebelmann, was present ; and that Mrs M'Kenzie desired Mrs Gebelmann to bring her the deposit-receipt and pen and ink ; and that she then made her cross on the deposit-receipt by way of indorsation, and that the defender wrote his name on it as a witness.

"She then handed it to him, and said, 'Now, that is yours.' He then replaced the deposit-receipt in the box, which was locked by Mrs Gebelmann, and never touched it again until he took it out of the box after his mother's death and cashed it at the bank without informing the clerk at the bank that

No. 54.

Dec. 8, 1891.

Dawson v.
M'Kenzie.

mortis causa.¹ In every case of alleged donation independent testimony was required.² Here there was no evidence beyond that of the alleged

his mother had died. He says, on cross-examination, that his mother made him promise to look after his sister, Mrs Pippin, who seems to have been very poor, and was indeed in receipt of parochial relief.

"The pursuer's counsel endeavoured to establish discrepancies between the defender's evidence and that of Mrs Gebelmann; but I think her evidence substantially corroborates her brother's on all material points. She mentions, what he does not, that she also signed the deposit-receipt as a witness to her mother's indorsation.

"The defender and Mrs Gebelmann also depone that they understood that the gift to the defender was absolute.

"Mrs Pippin depones that her mother had told her of her intention to give the defender the deposit-receipt, and she was afterwards told, by the defender I suppose, that she had done so.

"That I think is the whole of the direct evidence on the point.

"It is not and indeed hardly could be contradicted. I have no right to hold that these witnesses are perjured, and I can find no solid reason to doubt their substantial veracity. It appears to me to be sufficiently, though not perhaps superabundantly proved that on 16th December Mrs M'Kenzie had the deposit-receipt taken out of its box and brought to her for no other reason than that she might endorse it, and give it to the defender. She had clearly no need to draw the money at the time, and if the occurrence took place at all, that was her only intelligible object.

"I therefore think it proved that she made a donation of the deposit-receipt and its contents to the defender.

"But the question of real difficulty remains: Was this donation intended to be an absolute donation or only a donation *mortis causa*? Was it meant to be irrevocable or not?

"The defender, Mrs Gebelmann, and Mrs Pippin deponed that they understood that it was absolute and irrevocable.

"Mrs M'Kenzie died about a fortnight afterwards, and nothing that occurred after the 16th December throws any light on the point.

"It is no doubt, generally speaking, antecedently very unlikely that one should make an absolute gift of her whole property, and often an assertion to that effect might seem so incredible as to be almost incapable of proof. Nevertheless, if it be considered that Mrs M'Kenzie had lived in family with her son probably during all his life, and may have had the most ample reason to feel an absolute reliance on his filial affection, she may have done what the defender says she did. It is probably the case that what she desired was to secure that he should have the money after her death; but she may very probably have thought that the best way to secure that was to give it to him during her life, and the notion of a donation *mortis causa* is probably too complicated and artificial to be plausibly ascribed to her.

"I have certainly difficulty on the point, but I am not prepared to reject the defender's evidence.

"The indirect evidence, at least the balance of it, is to the effect that Mrs M'Kenzie and the defender lived on cordial terms; that she entertained much affection for him and received in return corresponding attention. It also shews that she had a fixed purpose that he should have her money, but the impression of the witnesses was that the defender was to get her money after her death and not during her life.

"It is in favour of the defender's case that his statement that his mother had given him her money did not surprise the other members of the family except the pursuer, is believed by them, and contentedly acquiesced in. This is even

¹ Sharp v. Paton, June 21, 1883, 10 R. 1000; Ross v. Mallis, Dec. 7, 1871, 10 Macph. 197, 44 Scot. Jur. 119.

² Gibson v. Hutchison, July 5, 1872, 10 Macph. 923, 44 Scot. Jur. 514; Crosbie's Trustees v. Wright, May 28, 1880, 7 R. 823.

donee and his sister, to whom it was alleged the furniture had been given. Even upon the defender's own testimony the gift was one for administration for behoof of other members of the family as well as of himself. A gift under conditions was in law no gift.¹

No. 54.
Dec. 8, 1891.
Dawson v.
M'Kenzie.

Argued for the defender;—This was not a question of balancing of testimony, for it was all on one side. The only question was whether there was sufficient evidence to overcome the presumption.² The *animus donandi* was abundantly proved, and a good reason for it was that the defender had supported several members of the family for years. The direct evidence in favour of an *inter vivos* gift was all that was required, and was consistent. Failing an *inter vivos* gift, a *donatio mortis causa* had been made out. It was not necessary that a *donatio mortis causa* should be made in immediate prospect of death.³

At advising,—

LORD PRESIDENT.—The defender in this action rests his claim to the money for which he is sued on an alleged donation by his mother shortly before her death. A well-settled rule in such cases—I quote from the late Lord President in *Sharp v. Paton*, 21st June 1883, 10 R. 1006—is that “there is a strong presumption against donation, and it requires very strong and unimpeachable evidence to overcome it.” I have anxiously examined the evidence in this present case, and have come to the conclusion that it distinctly falls short of this requirement.

The deposit-receipt, which was the subject of the alleged gift, constituted, with her furniture, the whole estate of the deceased. The defender is one of her six surviving children, and of the other five none are said to be affluent, and at least one is in indigence. The facts regarding the maintenance of the family in former years do not seem to support the suggestion that the estate of the deceased had been to any large extent saved by the defender during her lifetime from burdens which would naturally have fallen on it.

Although the case of the defender is donation *inter vivos*, he is, of course, well entitled to derive what support he can from the age or health of the deceased, or her own notions about her health, as diminishing the inherent improbability of her divesting herself of her whole estate during her life. The

case with the defender's brother, Alexander M'Kenzie, who was called as a witness by the pursuer, but whose evidence is really strongly for the defender, and I am not able to say that any undue means have been used to bring about this state of feeling.

“It was argued for the pursuer that the gift, supposing it made, was not in my view an absolute donation, but was burdened with an obligation to support the defender's sister, Mrs Pippin, and was really of the nature of a trust, and was, if that were so, wholly ineffectual. The case of *Thomson v. Dunlop*, 23d January 1884, 11 R. 453, seems to justify that position. But I am of opinion that the facts of this case do not raise the point, because, assuming that there was *inter vivos* donation, I do not think that it can be held that any legal obligation to support Mrs Pippin was imposed on the defender. I think rather that she was commended to his care with that confidence which the gift to him, supposing it made, so amply demonstrates. I think it cannot be represented that the defender was not a donee but a trustee. . . .”

¹ *Thomson, &c. v. Dunlop*, Jan. 23, 1884, 11 R. 453.

² *Macdonald v. Macdonald*, June 11, 1889, 16 R. 758; *Gibson v. Hutchison*, *supra*; *Crosbie's Trustees v. Wright*, *supra*; *Thomson's Executor v. Thomson*, June 8, 1882, 9 R. 911.

³ *Blyth, &c. v. Curle*, Feb. 20, 1885, 12 R. 674; but see *M'Nicol v. M'Dougal*, Oct. 25, 1889, 17 R. 25.

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

facts, however, do not go far in this direction. The deceased was only sixty-three. Apart from her having died a fortnight later, there is nothing to shew that at 16th December her illness was critical, or that a conviction had been borne in upon her that her use of worldly goods was over. The testimony of Mrs Pippin comes nearest this point, but it is diluted and not strengthened by its references to former occasions, and it is not supported either by her own opinion of her mother's health or by the subsequent speech and conduct of the deceased and the other members of the household.

On two occasions spoken to by independent witnesses the deceased seems to have expressed intentions of leaving her money to the defender. The defender indeed has himself thrown some doubt on the accuracy of his mother's recorded statements to friends on this subject by examining a witness (Margaret Crawford), who says that months before her death the deceased told her she had already "left all to" the defender, which was certainly not the case. I am disposed, however, to consider that the other two women establish that when she spoke to them she had testamentary intentions of that kind more or less deliberate.

I have mentioned these matters first, not because they are of primary importance, but in order to see how far the defender gathers antecedent probability to sustain him in the case which he has to make out by direct evidence. To that evidence I now come, and I shall state first in summary why I consider it insufficient to establish donation. First, there is no real evidence whatever; second, the testimony directly relating to the gift is solely that of interested persons; third, the testimony of those interested persons, taken as it is given, does not clearly, circumstantially, and consistently tell what was said and done so as to demonstrate donation.

In all previous cases of this kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place, and which goes so far towards donation. The money is invested in name of the donee, or the deposit-receipt is endorsed in his favour under the hand of the donor. Here there is a blank indorsation attested by a mark. The illiteracy of the deceased, of course, renders this form of signature consistent with the defender's case if it were otherwise made out, but not the less is he without what is generally the first step in such cases, independent proof, by a signature telling its own story, that the deceased did something to realise or part with the fund. Apart from testimony there is nothing to shew that Mrs M'Kenzie put pen to paper on the occasion in question, or that it ever occurred.

In considering the testimony, the salient feature is that only the defender and Mrs Gebelmann are said to have been present when the gift was made. Now, the estate of their mother having consisted of the deposit-receipt and the furniture, Mrs Gebelmann depones that, at the same time as she gave the deposit-receipt to the defender she gave the furniture to her, Mrs Gebelmann. The defender, on the other hand, depones that his mother said nothing about the furniture on that occasion, although she had done so some months before. I cannot regard this discrepancy otherwise than as of grave importance. It throws doubt on the story, and at least shews that there is not on the part of both that pointed recollection of what the deceased woman really said about her property which enables us to proceed with confidence regarding the other part of it, or to be clear whether she was minded to divest herself of all she had, or only of her money.

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

Turning now to what is spoken to as having been said about the deposit-receipt, the first thing which strikes one is that this important and affecting act of the mother giving away her all has a most inept beginning or occasion. "The transaction," says the defender, "originated in my stating that I was short of £1,"—for the taxes, as appears. The account of the gift itself had better be given as it stands,—“On Tuesday, 16th December, when I came home for dinner about four o'clock, my mother told me that she had not been so well, and she asked me to have my dinner in the bedroom. After I had taken my dinner, she asked if I had enough money to pay the taxes, and I said that I still required £1. My mother then said she had a few pounds in the box which she would give me, and she told my sister Mrs Gebelmann to open the box and bring a pen and ink. She then put her mark on the deposit-receipt of 12th December 1890, asked me to sign it also, and handing the receipt to me said,—‘Now, that is yours.’ I took the deposit-receipt and placing it in an envelope returned it to the box, and my sister locked up the box again. I did not take the deposit-receipt out of the box again until the morning after the death, when I uplifted the money and re-deposited it in my own name.” Now, apart from everything else, it seems to me that it would be impossible to accept this excessively bald and blank story as importing a donation, and yet this is the defender's case, where it ought to be at its best, in his own examination in chief. The pursuer, it is true, by her cross-examination, succeeded in infusing some colour into the narrative, and Mrs Gebelmann's account is a little fuller. Yet the only speech ascribed to the deceased never reaches higher than the following :—“There, that's yours, as I have got all I require of it, and I know you will look after your sister Jessie.” Now, this might mean all that the defender requires, if it were led up to, or followed, or explained, or acted on. But when all is said, the substance of the interview is simply that the conversation having begun about the £1 for the taxes, the money-box is asked for; the deposit-receipt taken out and endorsed (as it had been often before when money was required); it is handed to the defender with the words which I have quoted, in their briefer or ampler form; and the defender, apparently without a word in reply, puts the deposit-receipt back in its place.

Nobody seems to have said or done anything further on the subject (with one doubtful exception) until Mrs M'Kenzie died. Then the defender that very morning went to the bank and uplifted the money, omitting to tell the bank that the depositor was dead.

The doubtful exception to which I refer is a communication said to have been made by the deceased to Mrs Pippin. “My mother,” says Mrs Pippin, “had told me, the day after she had given the deposit-receipt to my brother, what she had done, and the defender told me afterwards.” Now, it is obvious that such evidence is perfectly useless, for it does not even profess to tell what the deceased said, and even if it is to be taken as meaning that she used the word “gave,” that is wholly ambiguous and proves nothing.

The fact that the defender kept the alleged gift secret from all the rest of the family except Mrs Pippin, who appears to be dependent on him, cannot be overlooked. The Court is, I think, bound to exercise peculiar caution in such a case. There may have been good reasons for such secrecy, but the means of testing the facts are thereby proportionally diminished.

But further, in a case where the defender has at the time acted with such reserve towards his relatives, it became him to be specially frank and above-

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

board in possessing the Court of all available evidence. Now, I do not think he has been so. As he presents his case, his attitude was that of the passive recipient of his mother's bounty. But it incidentally appeared in cross-examination that, before the alleged gift, he had been taking counsel with a lawyer, and I have found and heard no satisfactory explanation of the following sentence:—"I had been told by Mr Wilson, after my mother would not make a will, that it would be necessary to get delivery of the deposit-receipt, and that is the reason why I put it into the box and thought no more about it after it was endorsed." Now, Mr Wilson was not examined; he and the defender may have had quite legitimate occasion for this conversation, whether it took place with or without the knowledge of the deceased; but the importance of the incident was manifest, and the suggestion of the sentence which I have read is rather sinister; but it at all events shews that there is an omitted chapter in the narrative, and the omission confirms my indisposition to hold the case to be proved.

I should have hesitated to propose, as I now do, that the Lord Ordinary's interlocutor be recalled, if the question had been one of mere credibility. But I consider the evidence, even as it stands, to be insufficient in quality to establish donation.

LORD ADAM.—The question in this case is whether it is proved by the defender that a donation of a sum of £240 contained in a deposit-receipt was made to him by his mother in 1890. There is always a strong presumption against donation, so strong indeed that it is within the last thirty or forty years that parole proof has been held sufficient to establish it. I agree that, in the words of the late Lord President, "it requires very strong and unimpeachable evidence to overcome the presumption against donation." In the present case this presumption is specially strong, looking to the facts adverted to by your Lordship, that this woman was only sixty-three years old, and, though frail, was at the time of the alleged donation in the same condition of health that she had been in for months before, and that the alleged donation is of her whole estate, with the result that she thereby placed herself in the position of being entirely dependent upon her son or upon charity.

Now, what is the reason given by the defender for the alleged donation? He says that he kept his mother, and paid the household expenses, and that that consideration was one of the motives which led his mother to make the donation. It was pointed out to him in cross-examination that the legacy received by his mother in 1883 amounted to £490, that on 1st February 1888 it had diminished to £380, and on 12th December 1890 to £240, and he is asked to account for the decrease. His answer is that the money had been spent on visits to Carrickfergus, where she generally went in June of each year. It was further pointed out that there were ten deposit-receipts between 1st February 1888 and 2d July 1890, and he is unable to account for that. There is other evidence shewing that the defender's mother did contribute to the expenses of the household, because it appears that a sum of £20 was drawn on 12th December 1890, and the defender admits that he got £10 of it to pay taxes on some accounts. The defender therefore is not very candid or very accurate when he states that he supported his mother.

These observations, however, merely go to the general probability or improbability of the donation having been made, and I agree that his case must depend upon

the evidence of the only two persons who were present when the donation is said to have been made, and that when such a case depends on the evidence of two witnesses only, one of whom has so great an interest in the result, we cannot give effect to their evidence unless it appears to be thoroughly satisfactory and reliable. I do not suppose that the Court will ever give effect to a donation of this kind, unless they are in possession of all the facts and circumstances at the time of the alleged donation. I agree with your Lordship that the evidence of the two witnesses is not satisfactory. They contradict one another in various particulars, and I do not think that any of your Lordships would accept what is said by the defender in his examination in chief—when, if he were a candid man, we should expect to have a full account of what took place—as sufficient to constitute donation. In cross-examination he makes various additions. He says, for instance, with regard to Mrs Pippin,—“When my mother handed the deposit-receipt to me on the 16th December, she made me promise that I would look after Mrs Pippin”; and again, “My mother had said to me when handing me the deposit-receipt, ‘That is yours.’ She also said, ‘Promise me that you will look after Mrs Pippin.’ She said that when she handed over the deposit-receipt to me,” and he follows this up by saying, “I have promised to take her and her family into my house to live.” In another passage he says that when his mother made the donation “she said that she had got off it now all that she would require,” making for the first time the suggestion that when she made the donation his mother thought herself *in articulo mortis*. This suggestion, however, he repeats in a subsequent passage of his evidence in answer to a question by the Court,—“She said she would not require any more money because she felt herself done. When my mother gave me the deposit-receipt, she said that she did not think she would get better.” This evidence may have been intended to meet what was obviously a possible explanation of the action of the deceased in the view of the pursuer, viz., that the deposit-receipt was handed to the defender in trust for administration only. In any case, it appears to me to be a very important consideration that these additions to his story are made by the defender under the pressure of cross-examination. If he had been a candid man we would have had the whole account in his examination in chief.

Again, when we come to compare his evidence with the evidence of his sister, the other witness to the alleged donation, we do not find that she gives the same account of the matter. She adds various points of which we hear nothing from the defender; she says very distinctly that her mother gave her a gift of the furniture at the same time as she gave the defender the deposit-receipt, but the defender says that that gift was made months before. It seems to me that evidence such as this cannot be relied on.

There is also another passage in Mrs Gebelmann's evidence to which I would like to advert. It is as follows,—“(Q.) When your mother said that Tom was to look after Mrs Pippin, what did you understand her to mean? (A.) She meant that my brother would never see my sister want anything. (Q.) Did you understand her to mean by that that Tom was to give her her share of the money which he had in the deposit-receipt? (A.) No, she meant that he would never see Jessie want. (Q.) Where was he to get the money to give to Jessie? (A.) He always worked for money, and she knew that he would help Jessie. She said that she did not mean him to give her any money out of the deposit-receipt.” One can see the motive of these questions, for if no money was to be given to Mrs Pippin out of the deposit-receipt, then there was no

No. 54.
Dec. 8, 1891.
Dawson v.
M'Kenzie.

No. 54.

Dec. 8, 1891.
Dawson v.
M'Kenzie.

trust imposed on the defender, but it seems to me a very odd thing that the old lady should have limited her directions as to Mrs Pippin in the way spoken to by Mrs Gebelmann. The statement may be true, but it is not very credible.

Now, if we cannot rely on the evidence of the two principal witnesses the defender's case must fail. There is no real evidence to support it. A blank indorsation of a deposit-receipt is sometimes not of much importance in a case of this kind. Here I think it is very important. Further, the witnesses to the mark of the deceased were the defender and his sister Mrs Gebelmann, and the defender does not go to the bank at once to get the receipt transferred. He puts it back in the box from which it had been taken, and only goes to the bank after his mother's death. The evidence of the other witnesses for the defender, with the exception of Mrs Pippin, is to the effect that his mother intended to leave him her money at her death, and that appears to me rather against than in favour of the defender's case. As to Mrs Pippin's evidence, I cannot in the circumstances accept it as reliable. We know that she is a needy woman, and that since the date of the alleged donation the defender has promised to take her and her family to live with him. Further, there seems to have been considerable confusion on the side of the defender as to the date of the alleged donation. In the residue account prepared by his agent we find the date stated as 12th December, and in a letter by the same agent written on 14th January 1891 the donation is said to have been made on 14th December. How did this confusion arise? No explanation is given. In such a state of the evidence the Court would, I think, be very wrong were it to hold that there was here such strong and clear evidence as to leave no reasonable doubt that a donation was made to the defender.

LORD M'LAREN.—I agree with the view of the evidence which has been presented by your Lordship in the chair, and which has been further developed by Lord Adam, and were it not for the great importance of the principles involved in the case, I should not have added anything to the opinions which have been delivered.

It is to be remembered that all the cases of donation which come before the Court, whether described as *donationes mortis causa* or *inter vivos*, are really cases of gifts or alleged gifts by a moribund person to those who are around and about him. I had occasion to consider the subject very seriously when taking the proof in the case of *Sharp v. Paton*, and it appeared to me then that some of the previously decided cases came dangerously near to the point of giving effect to a nuncupative will. It is very difficult to find a real distinction between what is called a nuncupative or verbal will and a gift of bank money, not admitting of actual delivery, bestowed in contemplation of death and accompanied by words of testamentary intention. If it were open to reconsider the matter, I should doubt whether the Court would now sanction the principle by which money in bank vouched by a deposit-receipt is held to be well transferred by handing over or pointing to the receipt. I ventured in the case of *Sharp* to suggest what appeared to me to be a reasonable limitation, viz., that we should not sustain a case of deathbed donation where it is supported by no evidence other than that of the alleged donee and of persons subject to his or her influence. That view was adopted by the Court on a full consideration of the authorities, and I am unable to find in the facts of this case any solid di-

tion which will take it out of the category of the cases which were condemned in the case of *Sharp*. No. 54.

A proper case of donation *mortis causa* is where a moveable corporeal subject is handed to the donee in the presence of witnesses, with the implied condition that it is to be handed back in the event of the donor's recovery from the illness from which he is suffering. The indorsation of a deposit-receipt does not seem to me to be a proper way of transferring money in bank from a dying person to a donee, and certainly where the transference is said to be effected by an indorsation in blank, it can amount to nothing, and is quite inadequate to pass any right whatever. The present case is no better when it is attempted to refer it to the category of donation *inter vivos*, because in that view the mandate to uplift the money falls upon the death of the mandant. There is therefore wanting in the present case what is necessary to constitute a good *donatio inter vivos*, either the actual handing over of the subject of the gift during life or a power given to the donee to receive it after death. If this was a *donatio inter vivos* to take effect immediately and irrevocably, then the donee ought to have gone to the bank and cashed the deposit-receipt at once. If that had been done, and an action had then been brought by the defender's mother calling upon him to account, would the Court ever have entertained the theory of donation in the face of an assertion by her that she had signed the receipt for the purpose of his uplifting the proceeds and handing them to her? Dec. 8, 1891. Dawson v. M'Kenzie.

We have not the evidence of the defunct in this case to oppose to that of the defender, but we are not therefore released from the duty of scrutinising the evidence by which the alleged gift is supported. This is due to the fact that the defender delayed to act upon the alleged donation until his mother was dead, when there was no one to contradict him. I ought to guard myself against being supposed to make any imputation on the truthfulness of the parties in the case. It is of the nature of such cases that we never know where the truth is, and possibly the witnesses who favour the view of donation may be speaking the truth, but the question is whether we can hold property to be transferred where there is no evidence other than that of those who will benefit by the alleged transfer. While the Lord Ordinary may be correct in characterising the case as one of difficulty, I think the tendency of the decisions has been to establish a sounder ground of judgment in recent cases, and persons who mean to give away money on deathbed must find a better way of doing so than by the indorsation of deposit-receipts.

LORD KINNAR was absent.

THE COURT recalled the interlocutor of the Lord Ordinary: "Find that the defender has failed to prove that the deceased Mrs M'Kenzie made a donation to him of the deposit-receipt for £240 mentioned on record, and that he, the defender, is bound to account for said sum, with interest at the rate of 5 per cent per annum from 27th December 1890 as part of the estate of the deceased, and decern," &c.

MACPHERSON & MACKAY, W.S.—WHIGHAM & COWAN, S.S.C.—Agents.

No. 55.

Dec. 9, 1891.
Malcolm v.
Campbell.

MISS AGNES CHRISTINA MALCOLM, Pursuer (Reclaimer).—

Dickson—Salvesen.

MRS AGNES TRAILL OR CAMPBELL, Defender (Respondent).—

W. C. Smith—Cullen.

Contract—Sale of heritage—Unilateral agreement.—In an action by A B for declarator that the defender had sold a house to the pursuer, the pursuer founded on the following document subscribed by the defender before witnesses, and delivered by her to the pursuer,—“I have agreed to sell my house . . . for one hundred and fifty pounds to A B.” The Court *assolizied* the defender, holding that the document did not import a unilateral obligation by the defender to sell the house to the pursuer at a certain price, which would have been effectual without writing on the part of the pursuer, but imported merely one side of a bilateral contract of sale of heritage, which could have no effect until completed in writing by the other party.

1ST DIVISION.
Lord Kin-
cairney.

ON 23d June 1891 Miss Agnes Christina Malcolm, stationer, High Street, Leven, raised an action against Mrs Agnes Traill or Campbell, residing at 82 High Street there, concluding for declarator that the defender had on 16th June 1891 sold to the pursuer the property No. 82 High Street, Leven, and for decree ordaining the defender to execute a valid conveyance thereof in favour of the pursuer, or alternatively for £250 damages.

The pursuer stated;—(Cond. 3) At a meeting between the pursuer and the defender the latter stated “she desired to sell her property, and ultimately both parties agreed on £150 as the price.” (Cond. 4) “The parties having concluded the contract of sale of the said house as above mentioned, the defender thereafter signed, in the presence of two subscribing witnesses, the following agreement:—‘Leven, June 16, 1891.—I have agreed to sell my house at corner of High Street, Leven, for one hundred and fifty pounds to Miss A. C. Malcolm.’ This agreement, which accurately embodies the contract of sale concluded between the parties, was at once delivered to the pursuer, and is still retained by her.”

The defender in answer stated that she signed the document founded on by the pursuer, “not intending or understanding in so doing that the contract of sale was thereby concluded, but on the footing that she was to receive from pursuer a written missive of acceptance, expressing pursuer’s part of the bargain in order to render the transaction complete. No such written acceptance or missive was however received by defender or signed by pursuer.”

The pursuer pleaded;—A valid and effectual contract of sale of the said subjects having been constituted by the said missive, and by the delivery thereof as condescended, and the defender having refused to fulfil the same, the pursuer is entitled to decree of implement as craved.

The defender pleaded;—(1) The action is irrelevant. (2) There being no concluded contract of sale between the parties, the defender should be *assolizied*.

On 12th November the Lord Ordinary (Kincairney) sustained the first and second pleas in law for the defender, and *assolizied* her from the conclusions of the action, with expenses.*

* “OPINION.—I am of opinion that the defender should be *assolizied*.

“The pursuer’s averment is (cond. 3), that on 16th June 1891 the defender stated to the pursuer that she (the defender) desired to sell her property, and that both parties agreed on £150 as the price, and that the defender agreed to give immediate entry. The pursuer further avers that the parties having concluded the contract of sale the defender signed the following agreement:—

The pursuer reclaimed, and argued ;—This was not the case of an offer to sell, which required the acceptance of the other party before it became enforceable, but of a unilateral obligation to dispoise on the pursuer tendering the price.* If necessary, the pursuer was willing to amend her record. No. 55.
Dec. 9, 1891.
Malcolm v.
Campbell.

Argued for the defender ;—*Ex facie* of this document it was nothing more than a record, under the hand of one of the parties only, of the fact of a contract of sale having been verbally concluded. The subject being heritage, a contract of sale to be effectual must be in writing, and signed by both parties. It was not possible to read the document as embodying a unilateral obligation binding on the defender only. It contained no words of unilateral obligation, merely a statement that the defender had “agreed,” and agreed meant agreed with someone, or, in other words,

‘Leven, 16th June 1891.—I have agreed to sell my house at corner of High Street, Leven, for £150, to Miss A. C. Malcolm.’ This document was duly attested. It was not signed by the pursuer, and no corresponding agreement or missive was executed by her. I do not read this document as a disposition of the house or as a unilateral promise to dispoise it, but as—what the pursuer herself calls it—a contract or agreement, and therefore mutual and bilateral.

“The defender, on the day on which this document was signed and delivered, withdrew her offer. It is not pretended that by that time there had been any *rei interventus*, and the question therefore is, whether the bargain was by that time beyond recall, or whether the defender had a *locus penitentie*. The defender maintained that she had, and referred to *Goldston v. Young*, 8th Dec. 1868, 7 Macph. 188, 41 Scot. Jur. 122.

“The pursuer maintained that that case did not apply, because there the contract in form and expression was mutual, and was embodied in two deeds—an offer and acceptance—and she maintained that this case fell under the proposition stated in Bell’s Principles, sec. 889, that a promise in writing to dispoise land if delivered is good without acceptance, and her counsel referred in support of that proposition to the following authorities :—*Ferguson v. Paterson*, 23d Nov. 1748, M. 8440 ; *Muirhead v. Chalmers*, 10th Aug. 1759, M. 3414 ; *Fulton v. Johnstone*, 26th Feb. 1761, M. 8446 ; and *Barron v. Rose*, 23d July 1794, M. 8463. Of these cases *Ferguson v. Paterson* seems to be most in the pursuer’s favour, and it does indeed resemble this case somewhat closely, but it appears to be of doubtful authority. It was stated from the bench in *Barron v. Rose* to be special, to have been misunderstood, and to decide no general point. In *Muirhead v. Chalmers* there was ample *rei interventus* to warrant the judgment on that ground. In *Fulton v. Johnstone* the defender was assoilzied, although the ground of absolvitor may have been that the deed was not delivered. *Barron v. Rose*, in which the defender was assoilzied, is rather against the pursuer than for her. It is true that in that case there were two missives, the one probative and the latter improbativ. But the judgment would, I think, have been the same had the latter missive not been executed, and if that had been so the case would have been much the same as this. *Shedden v. Sproul Crawford*, 6th July 1768, M. 8456, seems in favour of the defender. In *Sproat v. Wilson and Wallace*, 24th January 1800, Hume, 920, a missive of lease signed by both parties, and holograph of one, was held not binding, and in *Sinclair v. Weddell*, 8th Dec. 1868, 41 Scot. Jur. 121, a judgment was pronounced to a similar effect.

“On the whole, I think that while it may be true that a unilateral promise to convey land is binding on the grantor if it imply no obligation on the grantee, yet the cases to which that rule is applicable must rarely occur, and that in this case what is averred by the pursuer is not a promise but a mutual contract, which must bind both parties or neither, and that it is clear that it does not bind the pursuer.”

* The authorities cited by the parties were those quoted by the Lord Ordinary.

No. 55.

Dec. 9, 1891.
Malcolm v.
Campbell.

contracted. Even if the document were capable of being read as setting forth a unilateral obligation by the defender, the pursuer was barred from adopting that reading, for her whole case was founded upon contract.

LORD PRESIDENT.—The judgment of the Lord Ordinary in this case appears to me to be very clearly right. That the owner of heritage may become bound by a writing under his own hand to dispoise it on payment of a price, although there is no writing under the hand of the proposed dispoinee, cannot well be disputed, because the cases which have been cited shew that anyone can place in the hands of another a valid obligation to dispoise heritage upon payment of a certain price. The question here is, whether this writing sets out such an obligation to dispoise, or is merely a memorandum of a bilateral agreement between both the parties but under the hand of one of them only. We were referred to a passage in the opinion of the late Lord President, in the case of *Goldston v. Young*, 7 Macph. 188—where all the prior authorities were considered—which precisely distinguishes these two classes of cases. His Lordship says,—“The case is one of mutual contract. Not only is it so libelled in the summons, but it is impossible to represent it as anything else, for it is constituted by mutual missives both of which are essential to the constitution of the contract. Therefore this entirely differs from that class of cases where a written holograph promise to convey heritage has been held enforceable without acceptance, because in these cases there was no mutual contract but simply a unilateral obligation.” Now, is this case one in which there was no mutual contract, but simply a unilateral obligation? In the first place, the document does not purport to embody an obligation, but to be merely the record of an agreement. The words “I have agreed” set out the fact of an agreement, and an agreement is necessarily a mutual or bilateral arrangement. But the pursuer has certainly clinched the matter in the most remarkable style, because I do not think that Mr Cullen exaggerated when he said that the record rings and resounds with the word “contract.” In the third article of her condescendence the pursuer states that the defender “desired to sell her property, and ultimately both parties agreed on £150 as the price.” Then in the fourth article the pursuer goes on to state that “the parties having concluded the contract of sale of the said house as above mentioned, the defender thereafter signed, in the presence of two subscribing witnesses, the following agreement,” and after quoting the document, she proceeds, “this agreement, which accurately embodies the contract of sale concluded between the parties, was at once delivered to the pursuer.” Finally, the first plea in law for the pursuer expressly rests her case upon “a valid and effectual contract of sale” of the subjects.

Now, Mr Dickson—I must do him the justice to say with some hesitation and not in very confident tones—has proposed to amend his record. But how would an amendment be effected? It would be effected by deleting those essential averments of fact upon which the case at present is rested, and substituting therefor a statement that there was not a contract of sale, but what is to be contrasted with that—a unilateral obligation; and that again would involve this, that in place of being, as set out in the original record, bound, the pursuer was free, because what she got was not a contract to which she was party, but a unilateral obligation by the defender alone. To allow an amendment of that kind would be entirely to transcend our powers of amendment

Therefore the case must be decided as it stands, and I cannot say that it presents any difficulty. It is a case in which it is proposed to establish a contract of sale by a memorandum of agreement under the hand of one of the parties only. It seems to me to fall entirely within the decided cases, and therefore I think we should adhere to the interlocutor of the Lord Ordinary.

No. 55.

Dec. 9, 1891.

Malcolm v. Campbell.

LORD ADAM.—I am of the same opinion. I do not doubt that persons are able to bind and oblige themselves by unilateral obligation to do most acts which are not *contra bonos mores*. A person may bind himself by a single document, to which he alone is a party, to dispose a house to another person for a certain sum, but that does not appear to me to be the nature of the document here. It does not embody a unilateral obligation; it appears to be clear on the face of the document that it expresses the fact of a mutual agreement; and that being so, I am of opinion that the interlocutor of the Lord Ordinary is perfectly sound.

LORD M'LAREN.—I agree that the question for our consideration is, whether the document to which the case relates was intended by the parties to be complete in itself—to be a complete expression of the matter about which they were transacting, or whether it is only one side of what is called in another part of the country an indenture—that is, a bilateral agreement. One must, in deference to the authorities, admit that a unilateral obligation to convey land for a price is a legal obligation, but I must say that to my mind it is not a very intelligible obligation, because one does not see how a contract of sale—for sale is a contract under all circumstances—one does not see how the contract is to be worked out. Apparently the suggestion is that such a unilateral obligation is an obligation by which one party becomes bound as seller without receiving in return any obligation which he can enforce, the purchaser being entitled to agree to the sale or not as he pleases. Assuming that that is a legal mode whereby an intending seller may oblige himself, it is certainly not a very probable arrangement, or, I think, a very businesslike proceeding on his part, and the presumption must certainly be against such an interpretation of a business matter about which parties are transacting. The view that parties have contemplated a mutual contract of sale is very much more consistent with what is usual in the business of life, and is, in the absence of adverse circumstances, I think, a probable interpretation of the matter, especially when the word agreement is used, as it is in this case. I have no hesitation in coming to the conclusion that the thing which the parties had agreed upon was a sale. Now, if that be so, there is not being the conjoint consent of seller and purchaser which the law holds to be necessary to a contract of sale, we have not here a complete expression of that contract in the form which the law requires. We have some evidence of consent, but that evidence is insufficient for the purpose of binding the parties according to the principles of our law relating to the sale of heritable property. I am therefore of opinion that the Lord Ordinary has taken the right view of the case.

LORD KINNEAR was absent.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—T. TEMPLE MUIR, S.S.C.—Agents.

No. 56.

Dec. 10, 1891.
Campbell v.
A. & D. Morrison.

GEORGE CAMPBELL, Pursuer (Respondent).—*Strachan—Watt.*
A. & D. MORRISON, Defenders (Reclaimers).—*Johnston—Ure.*

Reparation—Breach of Contract—Jus tertii.—A workman in the employment of a firm of engineers, who were engaged in fitting up engines in a ship which was lying in a dry dock, fell from the gangway, which was the only means of access to the ship, and was injured. He raised an action of damages against the ship-carpenters, who had docked the vessel and put up the gangway, averring that they had been employed to dock the vessel by the shipbuilders; that they had undertaken this work, and had performed it; and that the gangway which it was their duty to provide, and which they did provide, was defective. He also averred that the shipbuilders had no connection with the engineers in whose employment he was.

Held that he had stated no relevant grounds for damages, the failure to supply a sufficient gangway, if it truly were insufficient, being not a delict, but a breach of the contract between the ship-carpenters and the shipbuilders, with which neither the pursuer nor his employers had any concern.

Discharge—Reparation—Payment by one of several persons sued.—A workman in the employment of a firm of engineers, who were fitting up engines in a ship which was lying in a dry dock, fell from a gangway connecting the ship with the shore and was injured. He raised an action of damages in the Sheriff Court against (1) his own employers, (2) the builders of the ship, and (3) the ship-carpenters who had docked the ship and put up the gangway. This action was dismissed for want of jurisdiction. The workman accepted two small sums from his own employers and from the builders, acknowledging receipt of the payment by the former as "in full of expenses incurred . . . in connection with his alleged claim for damages," and discharging the latter in consideration of this payment "of and from all claims of reparation, and for payment of legal and other expenses now or hereafter competent to me." He then raised an action of damages for £500 in the Court of Session against the ship-carpenters. *Held* (*per* Lord Low, Ordinary) that he was not barred from doing so by these payments or the terms of his discharges. *Opinions reserved* in the Inner-House.

2D DIVISION.
Lord Low.

GEORGE CAMPBELL, an apprentice in the employment of Messrs Kincaid & Company, Limited, engineers in Greenock, was, in September 1890, engaged in working on the engines of the s.s. "Alexandria," then lying in the Garvel Graving Dock at Greenock. On the morning of the 12th September he fell from a gangway, which was the only means of access from the edge of the dock to the vessel, and was injured. He raised an action on 28th January 1891 against Messrs A. & D. Morrison, ship-carpenters in Greenock, for £500 in name of damages for his injuries.

As his ground of action against the defenders he averred,—"In order that the work might be done by the pursuer and other workmen engaged at the vessel, she had to be docked, and the operations in connection with the docking of said vessel were undertaken and performed by the defenders, and a gangway, from the side of the dock to the ship for the use of all the workmen engaged thereon, was supplied and laid down by them, which it was their duty to do. The said gangway was the only means of access to the vessel. It was part of the duty of the defenders when docking the vessel to provide a gangway for the use of the pursuer and anyone requiring to go on board the vessel, but the gangway which they provided was dangerous and defective. . . . It is believed that the defenders were employed to dock the vessel by Seath & Company [the shipbuilders], who had no connection whatever with pursuer's employers but were employed by the owners of the vessel to paint her hull."

He specified the defects which were alleged to exist in the construction of the gangway, and pleaded fault on the part of the defenders.

The defenders pleaded;—(1) The statements of the pursuer are not relevant and sufficient to sustain the conclusions of the summons. No. 56.

The defenders pleaded, *separatim*, (9) that the pursuer was barred from recovering against them in consequence of having accepted sums in name of damages in respect of the accident which was the foundation of the present action. They were allowed a proof of their averments on this point, and the result of that proof was as follows:—

The pursuer brought an action in the Sheriff Court of Greenock against his own employers [Messrs Kincaid & Company], the builders of the ship [Messrs Seath & Company], and the present defenders, who had contracted with Messrs Seath & Company for docking the ship. The action was thrown out on a plea of no jurisdiction. The pursuer's agent, Mr M'Dowall, then determined to bring an action in the Court of Session against the present defenders alone, as being the parties against whom the pursuer was most likely to establish his claim. M'Dowall, however, was unwilling absolutely to give up the claim which he had made against Seath & Company and Kincaid & Company without receiving some consideration for doing so, and it occurred to him that he might, at all events, obtain from these two firms a sum which would put him in funds to carry on the Court of Session action. He accordingly went to the agents of Seath & Company and obtained from them a sum of £12, for which he granted a receipt, in which he acknowledged receipt of the money "as in full of expenses incurred by my client and myself, as his agent, in connection with his alleged claim for damages. . . . And in consideration of the said payment the said T. R. Seath & Company, but they only, are discharged of all said alleged claims." Mr M'Dowall then went to Mr Oattes, the agent of the Employers' Insurance Company of Great Britain, with whom Messrs Kincaid & Company were insured, and who had defended the action in the Sheriff Court in Kincaid & Company's name. Mr M'Dowall told Mr Oattes that he was raising an action in the Court of Session against the present defenders, and was considering whether or not Kincaid & Company should also be called, and he intimated that if the insurance company would make a payment to the pursuer, which would help with the expenses of the Court of Session action, the pursuer would give up his claim against Kincaid & Company. Mr Oattes agreed to the proposal, and ultimately the amount to be paid by the insurance company was fixed at £17, 10s. A discharge was prepared by Mr Oattes, and was ultimately signed by the pursuer and his father. The latter, however, only signed the discharge on being assured by Mr M'Dowall that it would not prejudice the pursuer's right to sue the present action. By this discharge the pursuer, with consent of his father, and in consideration of £17, 10s. paid to him by Kincaid & Company, discharged that company "of and from all claims of reparation, and for payment of legal and other expenses now or hereafter competent to me," in respect of injuries occasioned by the action. The pursuer and his father also bound and obliged themselves to free and relieve Kincaid & Company "from all claims of relief competent to any other person liable in reparation for said accident."

On 11th September 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the pursuer has not accepted any sum in name of damages, or as reparation for the injuries libelled: Therefore repels the ninth plea in law for the defenders: Appoints the cause to be enrolled for farther procedure: Farther, grants leave to reclaim."*

* "OPINION.—The averment upon which I allowed a proof is to the effect that the pursuer accepted, in respect of the injuries sustained by him, from an

Dec. 10, 1891.
Campbell v.
A. & D. Mor-
rison.

No. 56. The defenders reclaimed, and argued;—(1) On the plea of bar.—The present case fell under the rule laid down by Erskine that “obligations founded solely upon damage cannot possibly continue after the damage ceaseth to exist,”¹ i.e., after a payment has been accepted as extinguishing it. In the language of the English law, “judgment against one of two tort-feasors is a bar to an action against the other for the same cause of action, even although the judgment be unsatisfied.”² The counsel for the pursuer having agreed that the argument on relevancy should now be taken without remitting the case to the Lord Ordinary, the defenders argued;—(2) On the plea of irrelevancy.—It followed necessarily from the pursuer’s averments that the defect in the gangway, if defect there were, was latent and unknown to the defenders, for it was not stated that any complaint had been stated in regard to its erection by those who were interested in it. If that were so, there could be no *culpa* in the defenders, and therefore they could not be liable.³ It appeared that Seath & Company were satisfied with the gangway, and, if that were so, no one else could complain,⁴ for this was a matter of contract; there was no delict. A delict or quasi-delict implied a right in the person who was the subject of the delict, and a duty on the person who committed it.⁵ What right had the pursuer against the defenders, or what duty did they owe him?

The pursuer argued;—(1) On the plea of bar.—The Lord Ordinary was right in his view of the transaction. The sums accepted could not be regarded as in full compensation for the serious damage suffered, and hence Erskine’s rule did not apply. It had been held that the compromise of an action with some of a body of alleged wrongdoers did not free the rest, and the action might proceed as against them.⁶ (2) On the question of relevancy.—The person employed to put up a gangway was bound

insurance company with whom his own employers, Messrs Kincaid & Company, were insured, ‘the sum of £40 or thereby in name of damages.’ It appeared to me that if the pursuer had actually accepted a sum in satisfaction of his claim, and as reparation for the injuries which he had received, he could not be allowed to proceed with the present action. . . . It is clear that the money paid by Seath & Company and by the insurance company was neither paid nor received as compensation to the pursuer for the injuries which he had received. The money was paid by the companies for the purpose of getting rid of a claim, which, however ill founded, might have resulted in expensive litigation with a man of no means, and was accepted by the pursuer as the consideration in respect of which he agreed not to press a claim for reparation against Messrs Seath & Company and Kincaid & Company. I think that it is impossible to hold that such a transaction precludes the pursuer from making a claim for reparation against anyone. He has not received any sum in name of damages, or as reparation for his injuries, and if the defenders are truly responsible for these injuries, I see no ground for holding that the pursuer is barred from suing them. The transactions with Seath & Company and Kincaid & Company cannot, I think, prejudice the defenders. Such transactions cannot make the defenders liable unless they would have been liable in any case, and a transaction to which they were not parties cannot prejudice any right of relief which they may have against Kincaid & Company or Seath & Company. I must therefore hold that the defenders have failed to establish the averments remitted to probation.”

¹ Erskine, iii. 1, 15; see also *Young v. Smarts*, Dec. 14, 1831, 10 S. 130, 4 Scot. Jur. 184.

² *Brinsmead v. Harrison*, 1872, L. R., 7 C. P. 547; see also *Pollock on Torts*, p. 178.

³ *Ovington, &c. v. M’Vicar*, May 12, 1864, 2 Macph. 1066, 36 Scot. Jur. 553.

⁴ *M’Gill v. Bowman & Co.*, Dec. 9, 1890, 18 R. 206.

⁵ *Pollock on Torts*, p. 1.

⁶ *Western Bank v. Bairds*, March 20, 1862, 24 D. 859, 34 Scot. Jur. 435.

to make it secure for its purpose, *i.e.*, the passage along it of all who had legitimate occasion to use it. He put himself in the position of one who was charged with the making and maintenance of a road; such a person was bound to do his work in a way that would answer the purpose in view, *i.e.*, the transit of passengers, and would be liable if he failed to do so.

No. 56.
Dec. 10, 1891.
Campbell v.
A. & D. Morrison.

At advising,—

LORD YOUNG.—The pursuer here states that he is an apprentice engineer, and that on the 12th September he was in the employment of Kincaid & Company, who were under a contract to put engines on board a certain ship, which was lying in the Garvel Graving Dock at Greenock. He says that on that day a gangway from the edge of the dock to the ship got displaced while he was upon it,—the gangway consisted of two or three loose planks,—and that he thus met with the accident in respect of which he sues.

He then brought an action in the Sheriff Court at Greenock, not only against his own employers, but also against Seath & Company, a firm of shipbuilders who had built this ship, which was in course of being finished. He also called as defenders Messrs A. & D. Morrison, who are a firm of ship-carpenters, whose connection with the ship consisted in this, that they had a contract with Seath & Company to dock the vessel, and who had placed the gangway between the ship and the edge of the dock.

An objection was taken to the jurisdiction of the Sheriff to entertain that action, it matters not on what grounds, and the action was dismissed because the Sheriff thought that he had no jurisdiction to entertain it.

It is stated that the pursuer then effected a settlement with Kincaid & Company and with Seath & Company, receiving from each of them a sum of money, and giving each of them a discharge. The discharge to Seath & Company dealt with expenses only. The sum which was accepted from Kincaid & Company, however, was accepted in full satisfaction of all claims in respect of injuries received by him in consequence of this accident.

Then the present action was brought against the present defenders, who had supplied the gangway, and two defences were stated to it. The first, which was repelled by the Lord Ordinary, was that the pursuer was barred by reason of the payments which he had received and the discharge which he had granted. The other defence was, that the action is irrelevant, *i.e.*, that the pursuer's statement does not set forth any sufficient ground of action against the defenders.

The Lord Ordinary repelled the former defence. He did not consider the other, but granted leave to reclaim against his interlocutor.

I propose to consider, first and chiefly, almost exclusively, the defence of irrelevancy. It appears to me that it is a good defence, and that we can dispose of it, and sustain it on grounds which are simpler and clearer than the considerations which are involved in the plea of bar.

The foundation of the action is an alleged imperfection in the gangway which was put up by the defenders. The first question is, under what contract, or how otherwise, did they put it up. It is explained by the pursuer in his record that the operations "in connection with the docking of the vessel were undertaken and performed by the defenders," and that the defenders "were employed to dock the vessel by Seath & Company, who had no connection whatever with pursuer's employers, but were employed by the owners of the vessel to paint her hull." That is a contract between the defenders and Seath & Company. In

No. 56.
 Dec. 10, 1891.
 Campbell v.
 A. & D. Morrison.

the course of that contract the planks were laid down between the vessel and the edge of the dock. That is, as I say, a contract between the defenders and Seath & Company, and they had no other concern with this matter except what the contract gave them. And it is explained by the pursuer very properly, because very candidly, that his employers had no connection whatever with Seath & Company. How shall there be an action at the pursuer's instance, any more than at the instance of his employers, against the defenders? Delict or quasi-delict is out of the question. Cases were quoted in argument of obstructions placed on public roads. These are cases of delict, and, generally, the acts complained of are police offences as well, but there is nothing of the kind here. The contract to supply a gangway between the edge of the dock and the ship is not in the same position at all. There is no obligation there to provide for the public safety. The contractor is liable under his contract and to the person with whom he contracted to supply what he contracted to supply. He is not liable *quasi ex delicto* to the public or anyone with whom he has not contracted because the gangway furnished by him gives way.

In the course of the argument I referred to a class of illustrations, which were very commonly used at one time, the case of a person travelling on a stage-coach who suffers some injury in consequence of a defect in the coach. He has no action against those who furnished the coach; he must go against the party with whom he contracted. Other illustrations might be given. Take the case,—I am not sure that it did not actually occur,—that a gun bursts in the hands of someone who has bought it and injures a companion who is shooting with him, but who had no contract relation with the gunmaker who sold the gun. The injured man will have no action against the gunmaker.

Now, that is sufficient for the decision of the case. We do not know what the defenders' contract with Seath & Company was. According to the views I have stated the pursuer is not the person who has any right to inquire. It may be, and this brings me to glance—and I shall only glance—at the effect of the discharge, it may be that it was the duty of Kincaid & Company to the pursuer, as their apprentice, to see that he got a good gangway. If he had a good claim against Kincaid & Company, he has discharged them. If they had a claim against Seath & Company they would be entitled to relief, as against Seath & Company, for the sum they had to pay. Seath & Company would then be entitled to their remedy against the present defenders, if the truth be that these defenders put down an insufficient gangway in breach of their contract with them. But, the action being irrelevant, it is superfluous to consider this question, and I have not considered it as it would be becoming to consider it if it were to be the turning point of our judgment. I am not to be held as approving—or as disapproving either—of the Lord Ordinary's view. I am of opinion that no good ground of action has been stated against these defenders, with whose contract the pursuer has no concern.

LORD RUTHERFURD CLARK.—It was stated for the pursuer that the contract with the defenders was completed before the accident took place, and that they had retired from the scene altogether. In these circumstances I concur in the proposed judgment.

LORD TRAYNER.—If it were necessary to decide the question which has been disposed of by the Lord Ordinary in the interlocutor reclaimed against, I should

be inclined, as at present advised, to agree with the view which the Lord Ordinary has taken. But it is not necessary to decide that question, because I think the pursuer's case fails on relevancy. The gangway in question—the alleged insufficiency of which is said to have been the cause of the injuries sustained by the pursuer—was fitted up and supplied by the defenders under a contract between them and Seath & Company, the builders of the vessel. It is not said that the gangway was in any respect other, or less sufficient, than the defenders had contracted to supply. On the contrary, the fair inference from the pursuer's averments is, that the gangway as supplied was taken off the hands of the defenders by Seath & Company, and it must be taken that, in doing so, they were satisfied that the gangway was conform to contract. In these circumstances, I fail to see how a claim can arise at the pursuer's instance against the defenders such as he here seeks to establish.

The defenders were under no obligation to the pursuer, there was no relation between them which could give rise to an obligation. The defenders having fulfilled their contract, as regards the gangway, to the satisfaction of their co-contractor, their obligation and duty concerning the gangway was at an end, for the pursuer does not aver that the defenders were bound to maintain the gangway during the time it was being used.

I could have understood a claim at the pursuer's instance against his employers for having failed in their duty to provide, or see provided, a safe access to the work which the pursuer was employed to perform. But I cannot see how any such duty could be said to lie on the defenders.

This is not, in my view, a claim arising out of a wrong done to the pursuer for which all concerned in the wrongdoing would be liable. The defenders committed no delict or quasi-delict. The most that is alleged against them is a breach of contract. For that, if true, they must answer to the person with whom the broken contract was made, but to no other. What the pursuer may have reason to complain of is, that Seath & Company having accepted from the defenders an insufficient gangway, the pursuer's employers were negligent of their duty in not seeing that that gangway was made sufficient before permitting or inviting their servants to use it. But this just comes to a claim against the pursuer's employers for failure to perform a duty incumbent on them, not to a claim as for a wrong done to the pursuer by the defenders.

The LORD JUSTICE-CLERK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and having, of consent of parties, heard counsel on the plea of relevancy, sustained the defenders' first plea in law, and dismissed the action.

CLARK & MACDONALD, S.S.C.—SMITH & MASON, S.S.C.—Agents.

JAMES BURNS, Appellant.—*J. C. Thomson—Craigie.*

MATTHEW CASSELLS, Respondent.—*Dickson—Pitman.*

No. 57.

Election Law—Franchise—Signature of claim for another by person having no mandate—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), sec. 36.—Held Burns v. Cassells.
that a claim to be enrolled on the register of voters, which was signed on

Dec. 10, 1891.*

No. 57. behalf of the claimant by a person who held no mandate, written or oral, from the claimant, was not valid.

Dec. 10, 1891.
Burns v.
Cassells.

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.
Sheriff of
Lanarkshire.

At a Registration Court for the North-eastern Division of Lanarkshire held at Motherwell on 5th October 1891, a claim was made to be enrolled upon the register of voters for the division on behalf of Matthew Cassells, in respect of his being joint tenant of minerals at Blackridge, in the parish of Shotts.

The claim form was signed thus :—"Matthew Cassells, per J. Jack Robertson."

James Burns, solicitor, Motherwell, objected that Cassells had not signed the claim nor authorised Robertson to sign for him, and that even though Robertson had a mandate, he did not sign as agent or mandatary, nor give his designation.

The Sheriff-substitute (Mair) admitted the claim, and Burns craved a case.

The case stated ;—"It was admitted that Mr Robertson had no written mandate to sign the claim, and it was not proved that he had authority to do so from the claimant and respondent ; but it was stated that he was authorised by the Unionist Association of the district to do so, and in most of the cases the claimants were aware that claims were being made for them. Mr Robertson, who is not a law-agent, is the recognised organising secretary for the Conservatives for said division of the county, and it was contended that he had a presumed mandate from the respondent and all parties for whom he signed claims."

The question of law for the opinion of the Court was,—“Whether a claim signed in the manner and in the circumstances above set forth is a valid claim under the Registration Statutes ?”

Argued for the appellant ;—Upon the facts stated by the Sheriff-substitute it was clear that the present claim was not valid under the 36th section of the Act of 1856 * (applied to counties by the Reform Act, 1884). Robertson had no mandate from the claimant, written or verbal, to sign the claim.

Argued for the respondent ;—When this objection (which was merely technical) was taken at the Registration Court Robertson was given no opportunity of proving his mandate *aliunde*.¹ The case should therefore be remitted back to the Sheriff-substitute for this purpose.² Further, the question of mandate was one between the assessor and the claimant and it was *jus tertii* of Burns to object.

LORD ADAM.—I think the case upon the merits is clear. The claim for the respondent was signed “Matthew Cassells, per J. Jack Robertson.” Now, it will be observed upon the face of it that that signature does not bear to be an agent or mandatary for Cassells.

When the case came before the Sheriff-substitute objection was taken to the claim in respect that Cassells had given no authority or mandate to Robertson to sign for him. That was a question of fact. The findings with which we have to deal are these,—“It was admitted that Mr Robertson had no written

* The Burgh Voters Act, 1856, sec. 36, enacts,—“Any claim, objection notice of appeal, or other writ, may be signed, and any proceedings under this Act may be prosecuted, by any person as agent or mandatary for the part thereto ; and any mandate bearing to be signed by such party shall be *prima facie* a sufficient mandate ; and every such mandate shall have all the privileges attaching to any judicial mandate.”

¹ Rutherford v. Lockie, Nov. 13, 1880, 8 R. 6.

² Representation of the People Act, 1868 (31 and 32 Vict. c. 48), sec. 22.

mandate to sign the claim, and it was not proved that he had authority to do so from the claimant and respondent." Now, upon that statement of facts we must assume that Mr Robertson had no authority or mandate from the claimant himself to sign the claim. That being so, the only question which remains is, whether that mandate which the Sheriff has sustained is sufficient. The statement in the case as to this mandate is—"It was stated that he was authorised by the Unionist Association of the district to do so, and in most of the cases the claimants were aware that claims were being made for them. Mr Robertson, who is not a law-agent, is the recognised organising secretary for the Conservatives for said division of the county, and it was contended that he had a presumed mandate from the respondent and all parties for whom he signed claims."

No. 57.

Dec. 10, 1891.
Burns v.
Cassella.

I understand that to mean that as organising secretary for a certain Unionist Association he had a presumed authority to sign for anybody he chose to consider either a Conservative or a Liberal Unionist. I cannot comprehend how the Sheriff-substitute made up his mind so to find. I am therefore of opinion that the appeal must be sustained.

LORD TRAYNER—I am of the same opinion. Under the statute the claim of anyone desiring to be put upon the roll of voters must be signed by him. The form in the schedule indicates that. But then it is provided that the claim shall be sufficiently signed if it is signed by an agent or mandatary for the party. Now, if Mr Robertson had been an agent or mandatary, his signature would have been sufficient, and I should not have been disposed to have taken objection to the fact that he did not so design himself in signing if it had been satisfactorily shewn to the Sheriff that he had authority. But in point of fact the Sheriff has held it established that there was no authority whatever granted by the claimant to Mr Robertson. It was admitted, he says, that Mr Robertson had no written mandate, and it was not proved that he had any mandate whatever. And it appears quite certain that the Sheriff thought he was exhausting the subject of mandate, because he goes on in effect to say that Mr Robertson did not pretend to have a direct mandate, written or verbal, but relied upon this, that he was authorised by the Unionist Association of the district to put in the claims, of which this was one, and it was contended that he had a presumed mandate for what he did. I think what the Sheriff means is that he contended that he presumed he had a mandate. That is not an authority which the Sheriff could recognise, or which in the very least degree proceeds from or is binding on the claimant, and therefore I agree that upon the statement of facts as found there was no claim validly signed presented for Mr Cassella.

LORD KINCAIRNEY.—I concur. I think the case is very plain.

THE COURT sustained the appeal, reversed the finding of the Sheriff-substitute, and remitted to him to expunge the name of the respondent from the roll.

R. J. GIBSON, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

No. 58.

ROBERT ARCHIBALD LINDSAY, Appellant.—*Dundas*—*C. N. Johnston*.JAMES FALCONER, Respondent.—*Asher*—*A. J. Young*.

Dec. 10, 1891.*

Lindsay v.
Falconer.

Election Law—Burgh Occupation Franchise—Nature of qualification—Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 5.—A person who claimed to be enrolled as a voter stated the nature of his qualification thus:—“Occupier. Occupied whole of the house last year. This year joint tenant (half and half) with J. A. L.”

Held that he had sufficiently specified the nature of his qualification.

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.
Sheriff of the
Lothians and
Peebles.

ROBERT ARCHIBALD LINDSAY, clerk, 17 Dundas Street, claimed to be enrolled on the register of voters for the West Division of Edinburgh.

In his claim, the “nature of his qualification” was stated to be “Occupier. Occupied whole of house last year. This year joint tenant (half and half) with J. A. Lindsay.”

James Falconer, W.S., objected to the entry of the claimant’s name in the list of voters on the ground that it did not specify the nature of the qualification in respect of which he claimed.

The Sheriff (Blair), on 10th October 1891, sustained the objection, and Lindsay craved a case, in which the following question of law was stated for the opinion of the Court,—“Whether the said claim sufficiently specifies the nature of the qualification founded on by the appellant, and the appellant is entitled to be put on the roll?”

Argued for the appellant;—His claim was stated with sufficient clearness, and was a claim to be enrolled as an “occupier” under section 5 of the Act of 1884. The additional statement that he was “joint tenant for the year” was a mere matter of history, and of no importance. In any case the claim contained a mere innocent inaccuracy which the Court had power to correct under section 46 of the Burgh Voters Act, 1856 (19 and 20 Vict. c. 58).

Argued for the respondent;—The Sheriff was right. The claimant said he was only joint tenant “this year,” sharply distinguishing between his occupation for this year and the past year. It was impossible to say from the claim whether he meant “this letting year” beginning Whitsunday last or the year 1891. In any case, if he meant that he was joint tenant for this current year, his allegation of qualification for the period before it was simply that he was “occupier.” Now, occupation *per se* was not recognised as a qualification. By section 7 (7) of the Act of 1884, the 11th section of the Reform Act, 1832 (2 and 3 Will. IV. c. 65), had been re-enacted, and under it the occupation must be “either as proprietor, tenant, or liferenter.” Although this 11th section had been in part repealed by the 12th section of the 1884 Act, the 12th section of the Act of 1832 was still in force, and manifestly referred to the kind of occupation contemplated by the 11th section of that latter Act.

In order to entitle the claimant to be enrolled, he must shew that he was occupier as tenant, liferenter, or owner of the premises upon which he claimed. He had failed so to describe himself.

LORD ADAM.—The only question raised in this case is a question as to the construction of the words used in the column headed “nature of qualification.” The Sheriff has found that these words do not sufficiently specify the nature of the qualification founded on, and the question, and the only one, is whether he is right. Now, if the qualification had been set forth as occupier and joint tenant, it is admitted that that would be a relevant statement. But according

to my reading that is the meaning of the words he uses. The claimant sets forth that he is an occupier, and then explains that he occupied the whole house last year, and that this year he is a joint tenant. That I consider to be equivalent to the statement of a qualification as occupier and joint tenant, and therefore I think the decision of the Sheriff was wrong.

No. 58.

Dec. 10, 1891.
Lindsay v.
Falconer.

LORD TRAYNER.—I agree. As your Lordship has pointed out, the one question we have to determine here is, whether or not the specification in the claim of the nature of the qualification in respect of which the claimant desires to be put upon the roll is sufficient. I find it to be amply sufficient without the necessity of referring to section 46 of the Act of 1856. I find that this claim sets forth beyond the possibility of doubt what this gentleman's qualification is. He is an occupier and joint tenant with another person. That he says that last year he occupied the whole house is a mere matter of history, and is of no importance.

LORD KINCAIRNEY.—If it be enough that the nature of the qualification in this case is the qualification of occupancy, I would think that the nature of the qualification is sufficiently stated. I am not prepared to say from what I have heard from the bar that it is insufficient. Your Lordships appear to decide on the ground that the claimant is an occupant as joint tenant. No doubt he says so, and in some sense that is the nature of his qualification, but he adds words which seem to indicate that he has not been occupant and joint tenant for twelve months. I think that history is part of the nature of the qualification, but as it might be enough to state that he was occupier I am not prepared to differ.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to put the name of the claimant and appellant upon the roll.

GEORGE INGLIS, S.S.C.—JAMES FALCONER, W.S.—Agents.

JAMES FALCONER, Appellant.—*Asher—A. J. Young.*

No. 59.

ROBERT CRAWFORD MACLEOD, Respondent.—*Dundas—C. N. Johnston.*

Dec. 10, 1891.*
Falconer v.
Macleod.

Election Law—Claim—Statement of qualification—Partner of firm—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58).—A person claiming to be enrolled as a voter in respect of certain subjects stated in his claim the nature of his qualification thus,—“Sole partner of M. Brothers, printers, in possession of said interest.”

Held that he was not entitled to be put upon the roll, in respect his claim did not sufficiently specify the nature of his qualification.

At a Registration Court for the burgh of Edinburgh, held on 2d October 1891, Robert Crawford Macleod, printer, residing at 8 Lauriston Place, Edinburgh, claimed to be enrolled on the register of voters for the West Division of Edinburgh in respect of premises at 13 Clyde Street.

In the column of his claim which was headed “nature of supposed qualification” he stated his qualification as “sole partner Macleod Brothers, printers, in possession of said interest prior to 31st July 1890.”

The claim was objected to by James Falconer, W.S., a voter on the roll, who maintained that it did not specify the nature of the qualification in respect of which the claimant claimed to be put upon the roll.

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.
Sheriff of the
Lothians and
Peebles.

No. 59.

Dec. 10, 1891.
Falconer v.
Macleod.

The Sheriff (Blair) admitted the claim, and the objector craved a case, in which the Sheriff stated as follows :—" I was informed by the Assessor that the method adopted by the claimant in filling up his claim was one which had previously been adopted and followed in the Burgh of Edinburgh Registration Court in the cases of partner claimants without objection. It was stated by the Assessor, and was not disputed, that the firm of Macleod Brothers appeared upon the Valuation-roll as the tenants and occupants of 13 Clyde Street, and that the value of the premises and the respondent's interest in the said firm were sufficient to entitle him to be enrolled as tenant and occupant for the parliamentary franchise."

The question of law for the opinion of the Court was,—“ Whether the said claim sufficiently specifies the nature of the qualification founded on by the respondent, and the respondent is entitled to be put on the roll ? ”

Argued for the appellant ;—The claim must be rejected. It contained no statement of Macleod's qualification as a voter, but merely a statement of his interest in a partnership.

Argued for the respondent ;—The nature of his qualification was stated in accordance with the usual practice in the Burgh of Edinburgh Registration Court. The Assessor must take the qualification from the Valuation-roll, and in it the firm of Macleod Brothers appeared as tenants and occupants of 13 Clyde Street. No one could suffer prejudice from this, because, under section 16 of the Burgh Voters Act, 1856, any member of the public had a right to inspect the Valuation-roll, and satisfy himself that the claim was a good one.

LORD TRAYNER.—I think the Sheriff has gone wrong here. The statute requires that the claimant shall give a notice to the Assessor containing the particulars of his qualification. The only qualification stated in the case before us is that the claimant represents himself as partner of a certain firm. That is no qualification.

LORD KINCAIRNEY.—I think the claim is bad, past correction.

LORD ADAM concurred.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to expunge the name of the claimant from the roll.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

No. 60.

Dec. 10, 1891.*
M'Kenzie v.
Comrie.JOHN M'KENZIE, Appellant.—*J. G. Millar.*JOHN SMITH COMRIE, Respondent.—*Pitman.*

Election Law—County Franchise—Sale of subjects on which claim based—Reform Act, 1832 (2 and 3 Will. IV. c. 65), sec. 7.—In order to support a claim for registration under section 7 of the Reform Act, 1832,† it is necessary

* Decided Nov. 24, 1891.

† The Reform Act, 1832, sec. 7, enacts,—“ Every person . . . shall be entitled to be registered . . . who when the Sheriff proceeds to consider his claim for registration . . . shall have been for a period of not less than six calendar months next previous to the last day of July . . . the owner . . . of any lands, houses, . . . provided the subject or subjects on which he so claims shall be of the yearly value of ten pounds, and shall actually yield or be capable of yielding that value to the claimant . . . provided he be by himself, his tenants, vassals, or others, in possession of the said sub-

that the claimant shall not have ceased to be proprietor of the subjects upon which he claims the franchise at the date at which the Sheriff proceeds to consider the claim in the Registration Court. No. 60.

Dec. 10, 1891.
M'Kenzie v.
Comrie.

At a Registration Court for the county of Bute, held on 12th October 1891, John Smith Comrie, civil engineer, London, claimed to be enrolled on the register of voters for the county as joint proprietor of a house, 36 Crichton Road, Rothesay. Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

John M'Kenzie, blacksmith, objected to the claim on the ground that the property upon which it was founded no longer belonged to the claimant, having been sold by him on 5th October 1891, with entry at that date.

It was admitted that the yearly value of the subjects and the claimant's interest in them were sufficient, that the claimant had held that interest for more than six calendar months prior to 31st July 1891, and that the subjects had, since the claim was lodged, been sold to a third party, with entry at 5th October 1891.

The Sheriff (Cheyne) admitted the claim, and M'Kenzie craved a case, in which the Sheriff, after a narrative of the foregoing facts, stated the following question for the opinion of the Court:—"Whether it is necessary, in order to support a claim under section 7 of 2 and 3 William IV. c. 65, that the claimant shall be still proprietor of the subjects at the date when the Sheriff proceeds to consider his claim?"

Argued for the appellant;—In order to entitle a person to the franchise under section 7 of the Act of 1832, it was necessary that he should not only have been owner of property of statutory value for six months prior to 31st July, but should be in "actual occupation or in receipt of the profits thereof" when the Sheriff came to consider his claim. In this view of the statute the respondent's name fell to be expunged from the roll, for at the date of the Registration Court he had parted with the subjects upon which he claimed.¹

Argued for the respondent;—Section 7 of the Act of 1832 was perfectly clear and unambiguous. Any person was entitled to the franchise who, when the Sheriff comes to consider his claim, "shall have been" for a period of not less than six calendar months next previous to the last day of July owner of the subjects upon which he claimed. There was nothing to indicate that the Legislature intended the ownership to continue after that date. This was made more clear by a comparison of the section with section 5, subsection 2, of the Representation of the People Act, 1868 (31 and 32 Vict. c. 48). This latter section reduced the ownership franchise in counties from £10 to £5, and contained an express enactment that the period of ownership should extend down to the date of the Sheriff's consideration of the claim, by the introduction for the first time of the words "is and has been" for a period of not less than six calendar months previous to the last day of July owner of the subject upon which the voter claimed. This intention of the Legislature to create an innovation in the later Act for the first time was also seen on comparing the sections as to burghs in the Acts 2 and 3 Will. IV. c. 65, sec. 11, and 31 and 32 Vict. c. 48, sec. 3, subsec. 2.

LORD ADAM.—It appears that this claim was made by the claimant as joint proprietor of certain subjects in Rothesay. The yearly value of the subjects

ject, and be either himself in the actual occupation, or in receipt of the profits and issues thereof to the extent above mentioned. . . ."

¹ *Latta v. Raeburn*, Dec. 19, 1868, 7 Macph. 298, 41 Scot. Jur. 177; *Smith v. McDonald*, Nov. 26, 1886, 14 R. 125.

No. 60.
Dec. 10, 1891.
M'Kenzie v.
Comrie.

was £70, and the claimant's interest more than £10 per annum, and he had possessed that interest for more than six months prior to 31st July. The subjects since the claim was lodged were sold to a third party, with entry at 5th October current. The question of law stated is,—“Whether it is necessary, to support a claim under section 7 of 2 and 3 William IV. c. 65, that the claimant shall be still proprietor of the subjects at the date when the Sheriff proceeds to consider his claim?” I have no doubt upon the point. The statute proceeds upon the footing that at the date when the claim comes to be considered the claimant shall still be proprietor of the subjects. The clause says,—“Every person . . . who when the Sheriff proceeds to consider his claim . . . shall have been for a period of six calendar months next previous . . . to the last day of July . . . the owner, &c.,” and goes on to say, “provided the subject or subjects on which he so claims shall be of the yearly value of ten pounds, and shall actually yield or be capable of yielding that value to the claimant,” and further, provided he be in possession, and either in actual occupation or in receipt of the profits and issues. I suppose it will not be said that after a person has parted with property it is capable of yielding yearly rent to him, or that a person who has sold subjects is in possession, in actual occupation, or in receipt of profits and issues.

LORD TRAYNER.—I agree, and without the slightest hesitation or doubt. I think the Sheriff has gone upon a narrow construction of three or four words in the 7th section of the Reform Act, without taking into account either the general scope of the Act or other parts of the same clause that he was considering. The Reform Act conferred the right to the franchise upon certain proprietors and occupiers, but it was the basis of the right to vote under the statute that the person claiming had the right of proprietor or of occupant, and it assumes that when he claims he has that right. The statute no doubt says that he shall have something more. He must have been proprietor for a period of not less than six calendar months prior to the 31st July. It is obvious I think that that merely means that he is not to be admitted because he is now proprietor, but that he must also have been proprietor during that period. I think your Lordship has demonstrated that that must be the meaning of the section when we come to consider the proviso which your Lordship has read.

LORD KINCAIRNEY.—I concur with your Lordship in the chair. I cannot help thinking that the attention of the Sheriff had been drawn solely to the primary clause, the clause conferring the qualification, and if the case had to be decided upon that clause alone I would have agreed with him, differing, I rather think, from the opinion expressed by Lord Trayner; but I think the proviso makes it very clear that the claimant must be in possession of the subjects at the time when the Sheriff holds his Registration Court.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to expunge the name of the said John Smith Comrie from the roll of voters for the county of Bute.

L. M'INTOSH, S.S.C.—COOPER & BRODIE, W.S.—Agents.

JAMES FALCONER (Objector), Appellant.—*Asher—A. J. Young.*

No. 61.

JAMES M'GUFFIE, Respondent.—*Dundas—Pitman.*

Dec. 10, 1891.*

Election Law—"Inhabitant occupier"—*Service Franchise—Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 3.*—A draper's warehouse consisted of a tenement of several flats, the ground flat being devoted to the business premises, while the upper flats were devoted to sitting-rooms and bed-rooms for the firm's servants. The manager occupied rooms on the second flat, and a butler occupied for his exclusive use a bedroom on an upper flat. The flats were all reached by a common stair. There was no other communication between the flat occupied by the manager and that occupied by the butler. The manager was entrusted with a general supervision of the whole domestic arrangements provided for the servants, and had power to dismiss the domestic servants, including the butler.

Held that the butler was entitled to be regarded as an "inhabitant occupier" of a dwelling-house in the sense of the 3d section of the Representation of the People Act, 1884, in respect (1) that the premises he occupied were not inhabited by the manager, and (2) that he did not serve under the manager in the sense of the Act.

Lord Kincairney reserved his opinion upon the second point.

At a Registration Court for the burgh of Edinburgh on 10th October 1891, James Falconer, W.S., objected to the entry upon the voters list for the burgh (West Division) of James M'Guffie, butler, as tenant and occupant, 8 South St David Street.

The ground of objection was that M'Guffie inhabited a dwelling-house in virtue of his employment which was also inhabited by a person under whom he served in this employment.

The Sheriff (Blair) repelled the objection, and Falconer craved a case, which was accordingly stated by the Sheriff.

These facts were set forth:—"The witnesses examined were Mr Kennedy, the senior partner of the firm of Charles Jenner & Company, and Mr Cormack, a manager or buyer and shop-walker in the employment of the said firm.

"It was proved that the said James M'Guffie is a butler in the employment of Charles Jenner & Company, drapers, Princes Street and South St David Street, Edinburgh, and that in virtue of his employment he occupies, and had occupied, for his exclusive use a bedroom in one of the two upper flats of the tenement 8 South St David Street aforesaid, for the period of twelve months prior to 31st July 1891. That the tenement 8 and 12 South St David Street had originally consisted of several houses, which had been altered to suit the business requirements of the said firm of Jenner & Company. That the first or street and sunk flats are occupied as part of their shop or warehouse; that the second flat, being the flat above the street flat, contains a dining-hall for the assistants in the employment of the firm, the rooms consisting of a dining-room, sitting-room, bedroom, and bath-room allotted to the said Mr Cormack, a sitting-room for the female assistants, and another room; that the third flat contains kitchens, servants' rooms, and bedrooms for the female assistants; that the fourth flat contains a library or reading-room, smoking-room, and other rooms; and that the fifth and attic flats, being the two upper flats, are entirely occupied by bedrooms for the assistants or employees of the firm, of which bedrooms Mr M'Guffie occupies one. That entrance is had to the whole tenement, including the shop flat, by the door 8 South St David Street, which gives access to a stair on which at each landing there is a

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.
Sheriff of the
Lothians and
Peebles.

No. 61.

Dec. 10, 1891.
Falconer v.
M'Guffie.

door opening into the corresponding flat; that this stair is the only access to the fourth and fifth and attic flats; that when the door is closed the flat is shut off from the rest of the tenement, except in the case of the second and third flats, between which there is an internal stair; that there is a stair from the second flat to the door entering at 12 South St David Street, but that this door is not used. That Mr Cormack is one of the managers in the employment of the firm of C. Jenner & Company, but acts under the direct supervision of the partners of the firm, who themselves manage the business; that in the shop he has charge of the fancy department of the business of C. Jenner & Company; that the assistants in his own department are subject to his orders; and that if shorthanded he can require assistance from other departments in the same way as the managers of these departments, but otherwise has no authority over the assistants in the other departments. That Mr Cormack has no power to engage or dismiss assistants, but in these matters reports to the firm; that Mr Cormack is, further, manager of the domestic establishment, and in this capacity has a general supervision of the whole of the domestic arrangements provided for the assistants in the said tenement 8 and 12 South St David Street. That he has charge of the keys of the shop and tenement; that he has power to engage and dismiss the domestic servants required for the establishment, including the said James M'Guffie; that he has access to every part of the tenement, and has power, in the event of grave misconduct, to expel an assistant from the tenement for the night, but must immediately report having done so to the firm; that when he pleases he can use the dining-hall and reading-room provided for the assistants, and has also the use of the kitchens and servants, as well as the exclusive use of the rooms allotted to him as aforesaid; but that he does not use or for his own purposes in any way occupy the fifth and attic flats of said tenement, or any part of them. That Mr Cormack is enrolled, under the service franchise, as tenant and occupant of 12 South St David Street. That house-duty is paid for the whole tenement, including the shop, as one subject.

"I held that whether Mr Cormack was or was not a person under whom the voter served in his employment, that he did not inhabit the same dwelling-house as the voter, and I repelled the objection."

The question of law for the decision of the Court was,—“Whether in respect of the foressaid facts the said James M'Guffie is entitled to be entered on the roll in respect of the qualification set forth in the 3d section of the Act 48 and 49 Vict. cap. 3?”

Argued for the objector;—The claimant was not an “inhabitant occupier” in the sense of the Representation of the People Act, 1884,* for the franchise intended by the Act was limited to cases where a house was not inhabited by the person under whom he served. Upon the facts as stated, (1) The claimant occupied the same premises as Cormack, who had access to every corner of the house; and (2) the claimant served under Cormack, who had power at his pleasure to dismiss any domestic servant employed in the warehouse.

Counsel for the claimant was not called upon.

LORD ADAM.—The question raised in this case is whether the claimant

* 48 and 49 Vict. c. 3, sec. 3.—“Where any man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant occupier of such dwelling-house as a tenant.”

M'Guffie, who is designed as a butler in the employment of Charles Jenner & Company occupies the premises in No. 8 South St David Street as tenant and occupant. Certain facts are set forth as to the premises, the employment of the claimant, and the employment of a manager called Cormack. Having set forth these facts, the Sheriff states that he held that Cormack did not inhabit the same dwelling-house as the voter, and therefore he admitted the claim. No. 61.
Dec. 10, 1891.
Falconer v. M'Guffie.

The question arises entirely under the 3d section of the Act of 1884. Under that section the house in respect of which the claim is made must not be inhabited by any person under whom the claimant serves. That involves the consideration of two questions. The first of these is, whether the claimant is in the service of Cormack? I am clearly of opinion that he is not. I think he is Messrs Jenner's butler, and in their service. Cormack's position is simply that of a manager for Jenner & Company. In that capacity he occupies a certain flat in this house, and has a power of superintendence over the persons in the house, including the claimant. That does not make the claimant a servant of Cormack in the sense of the Act. The appeal thus clearly fails upon the first ground.

That being so, the other question raised in the case does not require to be discussed. But I am equally clear with the Sheriff that Cormack occupies a different house in the sense of the Act from that occupied by the claimant. These appear to be large premises of four or five flats, and Cormack occupies the second flat, which constitutes his separate premises. In his character of manager he superintends the rest, but then the claimant has his premises in the fifth flat, which is entirely shut off from any other flat in the house.

LORD TRAYNER.—I also agree with the Sheriff. I think he has pronounced a sound judgment upon the ground on which he puts it. The statement of facts shews clearly that the claimant does not occupy the same house as Cormack. But apart from that, I agree also with your Lordship that M'Guffie is not employed in any office, service, or employment under Cormack in the sense of the statute.

LORD KINCAIRNEY.—I concur entirely in the judgment of the Sheriff, and I do not see any reason for going beyond it. I reserve my opinion upon the other question, but I would like to say that I cannot read the words "under whom such man serves in such office" as meaning nothing but employer.

THE COURT refused the appeal.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

JOHN M'KENZIE (Objector), Appellant.—*J. G. Millar.*

JOHN WATT, Respondent.—*Pitman.*

No. 62.

Dec. 10, 1891.

M'Kenzie v.

Watt.

Election Law—County Franchise—Property qualification—Absolute disposition qualified by back-bond—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 5.—Certain bankrupts who had entered into a composition arrangement with their creditors disposed certain subjects to the person who had become cautioner for the composition. By the disposition, which expressly proceeded upon a narrative of this fact, the bankrupts disposed the subjects in the cautioner's favour, "and his heirs and assignees whomsoever, heritably and irredeemably." The deed, which contained the usual clauses of assignation of rents and writs and of warrandice, then declared that the subjects

No. 62.

Dec. 10, 1891.
M'Kenzie v.
Watt.

were disposed to him in real security and for payment to him of all sums paid by him to the creditors, or in reference to such sequestration expenses, insuring the property and collecting the rents. Power of sale was also conferred on the disponent, and he was taken bound to account for his intromissions, and to pay over any balance to the bankrupts.

Held that the disponent, being in fact a security holder merely, was not entitled to be put upon the roll as "proprietor" of the subjects disposed, under section 5 of the Representation of the People (Scotland) Act, 1868.*

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

AT a Registration Court for the county of Bute, held at Rothesay on 12th October 1891, John Watt, net manufacturer, Kilbirnie, claimed to be enrolled on the register of voters for the county as proprietor of houses in Roslin Place, Mount Pleasant Road, Rothesay.

There was produced in support of the claim a disposition of the subjects in the claimant's favour, dated 14th, 15th, and 18th July 1879, and duly recorded. Its tenor, so far as material, was as follows:—
"We, John Thorburn and Thomas Thorburn, fishermen in Rothesay considering," &c. The deed here narrated the sequestration of the Thorburns and the acceptance by their creditors of the offer of composition, "and considering also that the said John Watt agreed to become cautioner for payment of the said composition on the distinct arrangement that we, the said John Thorburn and Thomas Thorburn, should convey and dispose to him our whole heritable property of every description, as after mentioned Therefore, in implement and pursuance of the said arrangement, we do hereby assign and dispose to and in favour of the said John Watt, and his heirs and assignees whomsoever, heritably and irredeemably,—First (here follows description of subject) . . . with entry at the term of Whitsunday last, notwithstanding the date hereof; and we all, with joint consent and assent, and taking burden as aforesaid, assign the writs, and have delivered the same according to inventory annexed and subscribed as relative hereto; and we all, with joint consent and assent, and taking burden as aforesaid, assign the rents; and we, with joint consent and assent, and taking burden as aforesaid, grant warrantice, but excepting always therefrom the bonds and dispositions in security existing over the said subjects at the date of said sequestration, amounting to £3680 or thereby: Declaring always that the said subjects are disposed, and this conveyance is granted, to the said John Watt and his foresaids in real security, and for payment to him and his foresaids of all sums of money he has advanced and may advance or pay to the said just and lawful creditors of the said John and Thomas Thorburn, of the debts due to them respectively in the event of our failing to pay the same, and also of all interest due thereon, and of all expenses of every kind and description which the said John Watt may incur in any manner of way also the expense of this conveyance and the completion of the said John Watt's title, insuring the subjects against loss by fire, the factor's commission for collecting the rents, and, generally, everything which the said John Watt may incur in relation to the premises: Declaring that an account thereof to be made up by the said John Watt, with his oath, if

* The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 5, enacts,—“Every man . . . shall be entitled to be registered as a voter . . . who when the Sheriff proceeds to consider his right to be inserted . . . in the register of voters is qualified as follows,—that is to say, . . . (2) is and has been for a period of not less than six calendar months next preceding the last day of July, the proprietor (whether he has made up his titles or is infert or not) of lands and heritages, the yearly value of which as appearing from the Valuation-roll of the county shall be £5 or upwards.”

required, as to the accuracy of the same, shall be conclusive as against us, and any one or more of us, to the exclusion of all other proof; and we, with joint consent and assent, and taking burden as aforesaid, do hereby authorise and empower the said John Watt immediately to sell the fore-
 said subjects: . . . Declaring always that purchasers and others shall have no concern with the application of the prices to be paid by them, and the simple discharge by the said John Watt or his fore-
 said subjects shall be sufficient, and be as binding as if granted by all of us; but declaring always that the said John Watt shall be bound to account to us for his intromissions in the premises, and in the event of there being any balance due by him, to be ascertained as before provided, the same shall be paid us, whose acceptance shall be a sufficient discharge to our said disponent for his whole intromissions in the premises; and we, with joint consent and assent, and taking burden as aforesaid, consent to registration hereof for preservation and execution."

No. 62.

Dec. 10, 1891.
M'Kenzie v. Watt.

John M'Kenzie, blacksmith, 60 High Street, Rothesay, objected to the claim being admitted, on the ground that the claimant was, *ex facie* of his title, not proprietor of the subjects, but merely a security holder.

The Sheriff (Cheyne) admitted the claim; whereupon M'Kenzie craved a case, in which the foregoing narrative appeared.

The question of law for the decision of the Court was,—“Whether the writ produced is sufficient to support a claim to be registered as proprietor?”

Argued for the appellant;—The deed here was tantamount to an absolute conveyance qualified by a back-bond declaring that the conveyance though in form absolute was really in security. The holder of such a disposition could not be regarded as a “proprietor” in the sense of section 5 of the Act of 1868.¹ The radical title and proper proprietorship lay in the bankrupts.

The respondent relied on *Anderson v. Niven*, Nov. 8, 1880, 8 R. 4.

At advising,—

LORD TRAYNER.—The question submitted to us is, whether the disposition produced is sufficient to support the respondent's claim?

The form of the deed in question appears to be somewhat unusual. [His Lordship here adverted to the peculiarity of the deed.] Notwithstanding the difficulties which the form of this conveyance undoubtedly suggests, its import and effect when taken as a whole seem to me to be sufficiently plain. It is an absolute conveyance with a qualifying back-bond, both given in the same deed instead of being separately executed as is commonly done. The question therefore comes to be, is the holder of an absolute conveyance qualified by a back-bond, duly recorded (for here the back-bond is recorded along with the conveyance), declaring that the conveyance, in form absolute, is really only a security, a proprietor in respect of such a title under the Act of 1868? That the holder of such a title is proprietor in some sense cannot be doubted. That is made very clear by the decision in the case of *The Scottish Heritable Security Company, Limited, v. Allan Campbell & Company*, Jan. 14, 1876, 3 R. 333. In that case the Court held that the holder of an absolute title, even although qualified by a back-bond, was not entitled to use a certain diligence competent only to a heritable creditor. The Court proceeded on the ground that the title which the pursuer relied on did not warrant the diligence he had used; and, dealing

¹ *Monteith v. Scott*, Dec. 19, 1868, 7 Macph. 300, 41 Scot. Jur. 178; *Jardine v. M'Culloch*, Dec. 2, 1865, 4 Macph. 138, 38 Scot. Jur. 80.

No. 62.

Dec. 10, 1891.
M'Kenzie v.
Watt.

with a question of diligence, regarded rather the nature and effect of the title than the reality of the transaction out of which that title sprang. Now, it appears to me, that questions arising under the Representation of the People (Scotland) Act, 1868, must be differently regarded. Under that Act (the provisions of which we are now administering) the fact of proprietorship rather than the state of the title is the leading and indeed only consideration. By section 5 it is provided that every man of full age and legal capacity shall be entitled to be registered as a voter who is "the proprietor" of lands of a certain value, "whether he has made up his title or is infest or not." The Sheriff must register as a voter any claimant who satisfies him that he is the proprietor in fact, although that may not be proved by the production of a formal or feudal title to the subjects. It is certain that the Sheriff could not in other cases proceed on the same ground. For example, in a petition for removing, the only title at which the Sheriff could look (where the pursuer's title was competently challenged) would be the pursuer's infestment; and no other title would be sufficient. Accordingly, what has to be ascertained here is, what in fact is the claimant's right to the subjects in question. The answer to that on the terms of the deed produced by him is, that he is only a holder of the subjects in security, and not proprietor. The radical title and the proper proprietorship is in the Thorburns. This question seems to have been thus regarded, and decided in accordance with this view by the Judges in the Registration Court. Perhaps the most direct authority on this point is the case of *Monteith v. Scott*, 7 Macph. 300, where the claimant was put on the roll as proprietor of a house which he had purchased, to which, however, he had never obtained a title, and the title to which stood at the time as an absolute title in the name of a property company, from whom the claimant had obtained the advances which enabled him to pay for the property. The claimant was held to be, as in fact he was, the proprietor, while the company's title, *ex facie* absolute, was regarded as only a security, which again it was in point of fact. In the case of *Jardine*, 4 Macph. 138, it was decided that a conveyance *ex facie* absolute could not be qualified as a mere security by the production of an unstamped back-letter so qualifying it, or by the oath of the disponee that the right was in fact a security only. This is only an authority on the point before us inferentially, but in that respect it may be regarded as an authority. For if the production of a duly stamped and recorded back-letter would not have prevailed to reduce the apparent right of proprietorship under an *ex facie* absolute conveyance to the level of a security merely, the case would probably have been so decided, and the decision on the competency of the proffered evidence would have been unnecessary. The decision in that case was followed in the subsequent case of *Skeete v. Stewart*, Nov. 7, 1879, 7 R. 12, where a voter on the roll was objected to on the ground that he had disposed the subjects to another by an absolute conveyance. The disponee under that conveyance deponed that the conveyance, although *ex facie* absolute, was only a security in fact. The Court held such evidence inadmissible to qualify the conveyance, and struck the voter off the roll as he had divested himself, so far as competently appeared, absolutely of the property. But in giving judgment Lord Mure observed, "If he (the voter) had at any time got a back-letter declaring that this was simply a trust, no question as to his right could have arisen." Following what I think has been decided by the cases I have referred to, and for the other reasons I have above given, I think the judgment of the Sheriff should be reversed.

LORD KINCAIRNEY.—I concur in thinking that this claim ought not to be admitted. I have never met with a deed like that on which the claim is founded. It is anomalous and self-contradictory, and I abstain from expressing an opinion as to its precise legal effects. The title may in form and to some effect be a proprietary title, but I think that the right conferred is not a full proprietary right, but is more of the character of a right constituted by an absolute disposition and back-bond or other form of security, which has never been held to confer a qualification.

No. 62.

Dec. 10, 1891.
M'Kenzie v.
Watt.

LORD ADAM concurred.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to remove the name of the claimant from the roll of voters for the county of Bute.

L. M'INTOSH, S.S.C.—COOPER & BRODIE, W.S.—Agents.

JOHN NEILSON, Appellant.—*Comrie Thomson—Craigie.*
JOHN JACK ROBERTSON, Respondent.—*Dickson—Pitman.*

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

Election Law—County Franchise—Notice of objection—Time—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), secs. 4 and 9—Representation of the People Act, 1868 (31 and 32 Vict. c. 48), sec. 20.—The Burgh Voters Act, 1856, sec. 4, as amended by the Representation of the People Act, 1868, and applied to counties by the Reform Act, 1884, sec. 8 (6), provides, that every person objecting to any entry on the roll shall, "on or before the 21st day of September, give or cause to be given to the person so objected to, or leave or cause to be left at his place of abode as described in such list, a notice . . ." Sec. 9 provides that "it shall be sufficient if such notice be sent by the post, postage paid, addressed with a sufficient direction, to the person to whom the same ought to be given at his usual place of abode."

A notice of objection, addressed to the person objected to at his residence at Shotts, was posted at Motherwell on the evening of 21st September after the last despatch for that day.

Held (diss. Lord Adam) that the notice was not timeously given.

Observations per curiam on M'Creath v. Smith, Oct. 22, 1869, 8 Macph. 15, 42 Scot. Jur. 20.

Election Law—County Franchise—Notice of objection sent to the Assessor—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), sec. 4 and Schedule No. 4.—*Held* that a notice of an objection sent to the Assessor under sec. 4 of the Burgh Voters Act, 1856, which omitted to state the qualification of the person objected to as appearing in the Assessor's list of voters, was not disconform to the statute.

Election Law—Representation of the People Act, 1868 (31 and 32 Vict. c. 48), sec. 22—Appending to special case names of persons objected to.—*Held* that the regulations of this clause regarding the appending to a special case the names of persons whose cases depend upon the same question of law as is stated in the special case are applicable to cases raising questions as to qualifications by new claimants, and not to objections to those already on the roll.

At a Registration Court for the North-Eastern Division of Lanarkshire, held at Motherwell on 5th October 1891, John Jack Robertson, Calder Street, Motherwell, objected to the Assessor's entry upon the voters list of the name of John Neilson, miner, as tenant of a house in High Street, Shotts.

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

Neilson objected (1) that Robertson was not entitled to object to any person whose name was on the list of voters then being revised, as Robertson was not on the register of voters for the year 1890-91; (2)

No. 59.

Dec. 10, 1891.
Falconer v.
Macleod.

The Sheriff (Blair) admitted the claim, and the objector craved a case, in which the Sheriff stated as follows:—"I was informed by the Assessor that the method adopted by the claimant in filling up his claim was one which had previously been adopted and followed in the Burgh of Edinburgh Registration Court in the cases of partner claimants without objection. It was stated by the Assessor, and was not disputed, that the firm of Macleod Brothers appeared upon the Valuation-roll as the tenants and occupants of 13 Clyde Street, and that the value of the premises and the respondent's interest in the said firm were sufficient to entitle him to be enrolled as tenant and occupant for the parliamentary franchise."

The question of law for the opinion of the Court was,—“Whether the said claim sufficiently specifies the nature of the qualification founded on by the respondent, and the respondent is entitled to be put on the roll?”

Argued for the appellant;—The claim must be rejected. It contained no statement of Macleod's qualification as a voter, but merely a statement of his interest in a partnership.

Argued for the respondent;—The nature of his qualification was stated in accordance with the usual practice in the Burgh of Edinburgh Registration Court. The Assessor must take the qualification from the Valuation-roll, and in it the firm of Macleod Brothers appeared as tenants and occupants of 13 Clyde Street. No one could suffer prejudice from this, because, under section 16 of the Burgh Voters Act, 1856, any member of the public had a right to inspect the Valuation-roll, and satisfy himself that the claim was a good one.

LORD TRAYNER.—I think the Sheriff has gone wrong here. The statute requires that the claimant shall give a notice to the Assessor containing the particulars of his qualification. The only qualification stated in the case before us is that the claimant represents himself as partner of a certain firm. That is no qualification.

LORD KINCAIRNEY.—I think the claim is bad, past correction.

LORD ADAM concurred.

THE COURT sustained the appeal, reversed the finding of the Sheriff and remitted to him to expunge the name of the claimant from the roll.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

No. 60.

Dec. 10, 1891.*
M'Kenzie v.
Comrie.

JOHN M'KENZIE, Appellant.—*J. G. Millar.*

JOHN SMITH COMRIE, Respondent.—*Pitman.*

Election Law—County Franchise—Sale of subjects on which claim based. Reform Act, 1832 (2 and 3 Will. IV. c. 65), sec. 7.—In order to support claim for registration under section 7 of the Reform Act, 1832,† it is necessary

* Decided Nov. 24, 1891.

† The Reform Act, 1832, sec. 7, enacts,—“Every person . . . shall be entitled to be registered . . . who when the Sheriff proceeds to consider his claim for registration . . . shall have been for a period of not less than six calendar months next previous to the last day of July . . . the owner . . . of any lands, houses, . . . provided the subject or subjects which he so claims shall be of the yearly value of ten pounds, and shall actually yield or be capable of yielding that value to the claimant . . . provided he be by himself, his tenants, vassals, or others, in possession of the said s

that the claimant shall not have ceased to be proprietor of the subjects upon which he claims the franchise at the date at which the Sheriff proceeds to consider the claim in the Registration Court. No. 60.

Dec. 10, 1891.
M'Kenzie v.
Comrie.

AT a Registration Court for the county of Bute, held on 12th October 1891, John Smith Comrie, civil engineer, London, claimed to be enrolled on the register of voters for the county as joint proprietor of a house, 36 Crichton Road, Rothesay. Registration
Appeal Court.

John M'Kenzie, blacksmith, objected to the claim on the ground that the property upon which it was founded no longer belonged to the claimant, having been sold by him on 5th October 1891, with entry at that date. Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

It was admitted that the yearly value of the subjects and the claimant's interest in them were sufficient, that the claimant had held that interest for more than six calendar months prior to 31st July 1891, and that the subjects had, since the claim was lodged, been sold to a third party, with entry at 5th October 1891.

The Sheriff (Cheyne) admitted the claim, and M'Kenzie craved a case, in which the Sheriff, after a narrative of the foregoing facts, stated the following question for the opinion of the Court:—"Whether it is necessary, in order to support a claim under section 7 of 2 and 3 William IV. c. 65, that the claimant shall be still proprietor of the subjects at the date when the Sheriff proceeds to consider his claim?"

Argued for the appellant;—In order to entitle a person to the franchise under section 7 of the Act of 1832, it was necessary that he should not only have been owner of property of statutory value for six months prior to 31st July, but should be in "actual occupation or in receipt of the profits thereof" when the Sheriff came to consider his claim. In this view of the statute the respondent's name fell to be expunged from the roll, for at the date of the Registration Court he had parted with the subjects upon which he claimed.¹

Argued for the respondent;—Section 7 of the Act of 1832 was perfectly clear and unambiguous. Any person was entitled to the franchise who, when the Sheriff comes to consider his claim, "shall have been" for a period of not less than six calendar months next previous to the last day of July owner of the subjects upon which he claimed. There was nothing to indicate that the Legislature intended the ownership to continue after that date. This was made more clear by a comparison of the section with section 5, subsection 2, of the Representation of the People Act, 1868 (31 and 32 Vict. c. 48). This latter section reduced the ownership franchise in counties from £10 to £5, and contained an express enactment that the period of ownership should extend down to the date of the Sheriff's consideration of the claim, by the introduction for the first time of the words "is and has been" for a period of not less than six calendar months previous to the last day of July owner of the subject upon which the voter claimed. This intention of the Legislature to create an innovation in the later Act for the first time was also seen on comparing the sections as to burghs in the Acts 2 and 3 Will. IV. c. 65, sec. 11, and 31 and 32 Vict. c. 48, sec. 3, subsec. 2.

LORD ADAM.—It appears that this claim was made by the claimant as joint proprietor of certain subjects in Rothesay. The yearly value of the subjects

ject, and be either himself in the actual occupation, or in receipt of the profits and issues thereof to the extent above mentioned. . . ."

¹ Latta v. Raeburn, Dec. 19, 1868, 7 Macph. 298, 41 Scot. Jur. 177; Smith v. M'Donald, Nov. 26, 1886, 14 R. 125.

No. 60.
Dec. 10, 1891.
M'Kenzie v.
Comrie.

was £70, and the claimant's interest more than £10 per annum, and he had possessed that interest for more than six months prior to 31st July. The subjects since the claim was lodged were sold to a third party, with entry at 5th October current. The question of law stated is,—“Whether it is necessary, to support a claim under section 7 of 2 and 3 William IV. c. 65, that the claimant shall be still proprietor of the subjects at the date when the Sheriff proceeds to consider his claim?” I have no doubt upon the point. The statute proceeds upon the footing that at the date when the claim comes to be considered the claimant shall still be proprietor of the subjects. The clause says,—“Every person . . . who when the Sheriff proceeds to consider his claim . . . shall have been for a period of six calendar months next previous . . . to the last day of July . . . the owner, &c.,” and goes on to say, “provided the subject or subjects on which he so claims shall be of the yearly value of ten pounds, and shall actually yield or be capable of yielding that value to the claimant,” and further, provided he be in possession, and either in actual occupation or in receipt of the profits and issues. I suppose it will not be said that after a person has parted with property it is capable of yielding yearly rent to him, or that a person who has sold subjects is in possession, in actual occupation, or in receipt of profits and issues.

LORD TRAYNER.—I agree, and without the slightest hesitation or doubt. I think the Sheriff has gone upon a narrow construction of three or four words in the 7th section of the Reform Act, without taking into account either the general scope of the Act or other parts of the same clause that he was considering. The Reform Act conferred the right to the franchise upon certain proprietors and occupiers, but it was the basis of the right to vote under the statute that the person claiming had the right of proprietor or of occupant, and it assumes that when he claims he has that right. The statute no doubt says that he shall have something more. He must have been proprietor for a period of not less than six calendar months prior to the 31st July. It is obvious I think that that merely means that he is not to be admitted because he is now proprietor, but that he must also have been proprietor during that period. I think your Lordship has demonstrated that that must be the meaning of the section when we come to consider the proviso which your Lordship has read.

LORD KINCAIRNEY.—I concur with your Lordship in the chair. I cannot help thinking that the attention of the Sheriff had been drawn solely to the primary clause, the clause conferring the qualification, and if the case had to be decided upon that clause alone I would have agreed with him, differing, I rather think, from the opinion expressed by Lord Trayner; but I think the proviso makes it very clear that the claimant must be in possession of the subjects at the time when the Sheriff holds his Registration Court.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to expunge the name of the said John Smith Comrie from the roll of voters for the county of Bute.

L. M'INTOSH, S.S.C.—COOPER & BRODIE, W.S.—Agents.

JAMES FALCONER (Objector), Appellant.—*Asher*—*A. J. Young*.

JAMES M'GUFFIE, Respondent.—*Dundas*—*Pitman*.

No. 61.

Dec. 10, 1891.*

Election Law—"Inhabitant occupier"—*Service Franchise*—*Representation of the People Act, 1884* (48 and 49 Vict. c. 3), sec. 3.—A draper's warehouse consisted of a tenement of several flats, the ground flat being devoted to the business premises, while the upper flats were devoted to sitting-rooms and bed-rooms for the firm's servants. The manager occupied rooms on the second flat, and a butler occupied for his exclusive use a bedroom on an upper flat. The flats were all reached by a common stair. There was no other communication between the flat occupied by the manager and that occupied by the butler. The manager was entrusted with a general supervision of the whole domestic arrangements provided for the servants, and had power to dismiss the domestic servants, including the butler.

Held that the butler was entitled to be regarded as an "inhabitant occupier" of a dwelling-house in the sense of the 3d section of the Representation of the People Act, 1884, in respect (1) that the premises he occupied were not inhabited by the manager, and (2) that he did not serve under the manager in the sense of the Act.

Lord Kincairney reserved his opinion upon the second point.

At a Registration Court for the burgh of Edinburgh on 10th October 1891, James Falconer, W.S., objected to the entry upon the voters list for the burgh (West Division) of James M'Guffie, butler, as tenant and occupant, 8 South St David Street.

The ground of objection was that M'Guffie inhabited a dwelling-house in virtue of his employment which was also inhabited by a person under whom he served in this employment.

The Sheriff (Blair) repelled the objection, and Falconer craved a case, which was accordingly stated by the Sheriff.

These facts were set forth:—"The witnesses examined were Mr Kennedy, the senior partner of the firm of Charles Jenner & Company, and Mr Cormack, a manager or buyer and shop-walker in the employment of the said firm.

"It was proved that the said James M'Guffie is a butler in the employment of Charles Jenner & Company, drapers, Princes Street and South St David Street, Edinburgh, and that in virtue of his employment he occupies, and had occupied, for his exclusive use a bedroom in one of the two upper flats of the tenement 8 South St David Street aforesaid, for the period of twelve months prior to 31st July 1891. That the tenement 8 and 12 South St David Street had originally consisted of several houses, which had been altered to suit the business requirements of the said firm of Jenner & Company. That the first or street and sunk flats are occupied as part of their shop or warehouse; that the second flat, being the flat above the street flat, contains a dining-hall for the assistants in the employment of the firm, the rooms consisting of a dining-room, sitting-room, bedroom, and bath-room allotted to the said Mr Cormack, a sitting-room for the female assistants, and another room; that the third flat contains kitchens, servants' rooms, and bedrooms for the female assistants; that the fourth flat contains a library or reading-room, smoking-room, and other rooms; and that the fifth and attic flats, being the two upper flats, are entirely occupied by bedrooms for the assistants or employees of the firm, of which bedrooms Mr M'Guffie occupies one. That entrance is had to the whole tenement, including the shop flat, by the door 8 South St David Street, which gives access to a stair on which at each landing there is a

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.
Sheriff of the
Lothians and
Peebles.

No. 61.

Dec. 10, 1891.
Falconer v.
M'Guffie.

door opening into the corresponding flat; that this stair is the only access to the fourth and fifth and attic flats; that when the door is closed the flat is shut off from the rest of the tenement, except in the case of the second and third flats, between which there is an internal stair; that there is a stair from the second flat to the door entering at 12 South St David Street, but that this door is not used. That Mr Cormack is one of the managers in the employment of the firm of C. Jenner & Company, but acts under the direct supervision of the partners of the firm, who themselves manage the business; that in the shop he has charge of the fancy department of the business of C. Jenner & Company; that the assistants in his own department are subject to his orders; and that if shorthanded he can require assistance from other departments in the same way as the managers of these departments, but otherwise has no authority over the assistants in the other departments. That Mr Cormack has no power to engage or dismiss assistants, but in these matters reports to the firm; that Mr Cormack is, further, manager of the domestic establishment, and in this capacity has a general supervision of the whole of the domestic arrangements provided for the assistants in the said tenement 8 and 12 South St David Street. That he has charge of the keys of the shop and tenement; that he has power to engage and dismiss the domestic servants required for the establishment, including the said James M'Guffie; that he has access to every part of the tenement, and has power, in the event of grave misconduct, to expel an assistant from the tenement for the night, but must immediately report having done so to the firm; that when he pleases he can use the dining-hall and reading-room provided for the assistants, and has also the use of the kitchens and servants, as well as the exclusive use of the rooms allotted to him as aforesaid; but that he does not use or for his own purposes in any way occupy the fifth and attic flats of said tenement, or any part of them. That Mr Cormack is enrolled, under the service franchise, as tenant and occupant of 12 South St David Street. That house-duty is paid for the whole tenement, including the shop, as one subject.

"I held that whether Mr Cormack was or was not a person under whom the voter served in his employment, that he did not inhabit the same dwelling-house as the voter, and I repelled the objection."

The question of law for the decision of the Court was,—“Whether in respect of the foresaid facts the said James M'Guffie is entitled to be entered on the roll in respect of the qualification set forth in the 3d section of the Act 48 and 49 Vict. cap. 3?”

Argued for the objector;—The claimant was not an “inhabitant occupier” in the sense of the Representation of the People Act, 1884,* for the franchise intended by the Act was limited to cases where a house was not inhabited by the person under whom he served. Upon the facts as stated, (1) The claimant occupied the same premises as Cormack, who had access to every corner of the house; and (2) the claimant served under Cormack, who had power at his pleasure to dismiss any domestic servant employed in the warehouse.

Counsel for the claimant was not called upon.

LORD ADAM.—The question raised in this case is whether the claimant

* 48 and 49 Vict. c. 3, sec. 3.—“Where any man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant occupier of such dwelling-house as a tenant.”

M'Guffie, who is designed as a butler in the employment of Charles Jenner & Company occupies the premises in No. 8 South St David Street as tenant and occupant. Certain facts are set forth as to the premises, the employment of the claimant, and the employment of a manager called Cormack. Having set forth these facts, the Sheriff states that he held that Cormack did not inhabit the same dwelling-house as the voter, and therefore he admitted the claim. No. 61.
Dec. 10, 1891.
Falconer v. M'Guffie.

The question arises entirely under the 3d section of the Act of 1884. Under that section the house in respect of which the claim is made must not be inhabited by any person under whom the claimant serves. That involves the consideration of two questions. The first of these is, whether the claimant is in the service of Cormack? I am clearly of opinion that he is not. I think he is Messrs Jenner's butler, and in their service. Cormack's position is simply that of a manager for Jenner & Company. In that capacity he occupies a certain flat in this house, and has a power of superintendence over the persons in the house, including the claimant. That does not make the claimant a servant of Cormack in the sense of the Act. The appeal thus clearly fails upon the first ground.

That being so, the other question raised in the case does not require to be discussed. But I am equally clear with the Sheriff that Cormack occupies a different house in the sense of the Act from that occupied by the claimant. These appear to be large premises of four or five flats, and Cormack occupies the second flat, which constitutes his separate premises. In his character of manager he superintends the rest, but then the claimant has his premises in the fifth flat, which is entirely shut off from any other flat in the house.

LORD TRAYNER.—I also agree with the Sheriff. I think he has pronounced a sound judgment upon the ground on which he puts it. The statement of facts shews clearly that the claimant does not occupy the same house as Cormack. But apart from that, I agree also with your Lordship that M'Guffie is not employed in any office, service, or employment under Cormack in the sense of the statute.

LORD KINCAIRNEY.—I concur entirely in the judgment of the Sheriff, and I do not see any reason for going beyond it. I reserve my opinion upon the other question, but I would like to say that I cannot read the words "under whom such man serves in such office" as meaning nothing but employer.

THE COURT refused the appeal.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

JOHN M'KENZIE (Objector), Appellant.—*J. G. Millar.*

JOHN WATT, Respondent.—*Pitman.*

No. 62.

Election Law—County Franchise—Property qualification—Absolute disposition qualified by back-bond—Representation of the People (Scotland) Act, 1868 Dec. 10, 1891.
M'Kenzie v. Watt.
(31 and 32 Vict. c. 48), sec. 5.—Certain bankrupts who had entered into a composition arrangement with their creditors disposed certain subjects to the person who had become cautioner for the composition. By the disposition, which expressly proceeded upon a narrative of this fact, the bankrupts disposed the subjects in the cautioner's favour, "and his heirs and assignees whomsoever, heritably and irredeemably." The deed, which contained the usual clauses of assignation of rents and writs and of warrandice, then declared that the subjects

No. 62.

Dec. 10, 1891.
M'Kenzie v.
Watt.

were disposed to him in real security and for payment to him of all sums paid by him to the creditors, or in reference to such sequestration expenses, insuring the property and collecting the rents. Power of sale was also conferred on the disponee, and he was taken bound to account for his intromissions, and to pay over any balance to the bankrupts.

Held that the disponee, being in fact a security holder merely, was not entitled to be put upon the roll as "proprietor" of the subjects disposed, under section 5 of the Representation of the People (Scotland) Act, 1868.*

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

At a Registration Court for the county of Bute, held at Rothesay on 12th October 1891, John Watt, net manufacturer, Kilbirnie, claimed to be enrolled on the register of voters for the county as proprietor of houses in Roslin Place, Mount Pleasant Road, Rothesay.

There was produced in support of the claim a disposition of the subjects in the claimant's favour, dated 14th, 15th, and 18th July 1879, and duly recorded. Its tenor, so far as material, was as follows:—
"We, John Thorburn and Thomas Thorburn, fishermen in Rothesay considering," &c. The deed here narrated the sequestration of the Thorburns and the acceptance by their creditors of the offer of composition, "and considering also that the said John Watt agreed to become cautioner for payment of the said composition on the distinct arrangement that we, the said John Thorburn and Thomas Thorburn, should convey and dispoise to him our whole heritable property of every description, as after mentioned Therefore, in implement and pursuance of the said arrangement, we do hereby assign and dispoise to and in favour of the said John Watt, and his heirs and assignees whomsoever, heritably and irredeemably,—First (here follows description of subject) . . . with entry at the term of Whitsunday last, notwithstanding the date hereof; and we all, with joint consent and assent, and taking burden as aforesaid, assign the writs, and have delivered the same according to inventory annexed and subscribed as relative hereto; and we all, with joint consent and assent, and taking burden as aforesaid, assign the rents; and we, with joint consent and assent, and taking burden as aforesaid, grant warrandice, but excepting always therefrom the bonds and dispositions in security existing over the said subjects at the date of said sequestration, amounting to £3680 or thereby: Declaring always that the said subjects are disposed, and this conveyance is granted, to the said John Watt and his foresaids in real security, and for payment to him and his foresaids of all sums of money he has advanced and may advance or pay to the said just and lawful creditors of the said John and Thomas Thorburn, of the debts due to them respectively in the event of our failing to pay the same, and also of all interest due thereon, and of all expenses of every kind and description which the said John Watt may incur in any manner of way also the expense of this conveyance and the completion of the said John Watt's title, insuring the subjects against loss by fire, the factor's commission for collecting the rents, and, generally, everything which the said John Watt may incur in relation to the premises: Declaring that an account thereof to be made up by the said John Watt, with his oath, if

* The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), sec. 5, enacts,—“Every man . . . shall be entitled to be registered as a voter . . . who when the Sheriff proceeds to consider his right to be inserted . . . in the register of voters is qualified as follows,—that is to say, . . . (2) is and has been for a period of not less than six calendar months next preceding the last day of July, the proprietor (whether he has made up his titles or is infeft or not) of lands and heritages, the yearly value of which as appearing from the Valuation-roll of the county shall be £5 or upwards.”

required, as to the accuracy of the same, shall be conclusive as against us, No. 62.
and any one or more of us, to the exclusion of all other proof; and we, with joint consent and assent, and taking burden as aforesaid, do hereby ^{Dec. 10, 1891.}
authorise and empower the said John Watt immediately to sell the fore- ^{M'Kenzie v.}
said subjects: . . . Declaring always that purchasers and others
shall have no concern with the application of the prices to be paid by
them, and the simple discharge by the said John Watt or his foresaids
shall be sufficient, and be as binding as if granted by all of us; but declar-
ing always that the said John Watt shall be bound to account to us for
his intromissions in the premises, and in the event of there being any
balance due by him, to be ascertained as before provided, the same shall
be paid us, whose acceptance shall be a sufficient discharge to our said
disponsee for his whole intromissions in the premises; and we, with joint
consent and assent, and taking burden as aforesaid, consent to registration
hereof for preservation and execution."

John M'Kenzie, blacksmith, 60 High Street, Rothesay, objected to the
claim being admitted, on the ground that the claimant was, *ex facie* of his
title, not proprietor of the subjects, but merely a security holder.

The Sheriff (Cheyne) admitted the claim; whereupon M'Kenzie craved
a case, in which the foregoing narrative appeared.

The question of law for the decision of the Court was,—“Whether the
writ produced is sufficient to support a claim to be registered as pro-
prietor?”

Argued for the appellant;—The deed here was tantamount to an abso-
lute conveyance qualified by a back-bond declaring that the conveyance
though in form absolute was really in security. The holder of such a
disposition could not be regarded as a “proprietor” in the sense of section
5 of the Act of 1868.¹ The radical title and proper proprietorship lay in
the bankrupts.

The respondent relied on *Anderson v. Niven*, Nov. 8, 1880, 8 R. 4.

At advising,—

LORD TRAYNER.—The question submitted to us is, whether the disposition
produced is sufficient to support the respondent's claim?

The form of the deed in question appears to be somewhat unusual. [His
Lordship here adverted to the peculiarity of the deed.] Notwithstanding the
difficulties which the form of this conveyance undoubtedly suggests, its import
and effect when taken as a whole seem to me to be sufficiently plain. It is an
absolute conveyance with a qualifying back-bond, both given in the same deed
instead of being separately executed as is commonly done. The question there-
fore comes to be, is the holder of an absolute conveyance qualified by a back-
bond, duly recorded (for here the back-bond is recorded along with the convey-
ance), declaring that the conveyance, in form absolute, is really only a security,
a proprietor in respect of such a title under the Act of 1868? That the holder
of such a title is proprietor in some sense cannot be doubted. That is made
very clear by the decision in the case of *The Scottish Heritable Security Com-
pany, Limited, v. Allan Campbell & Company*, Jan. 14, 1876, 3 R. 333. In
that case the Court held that the holder of an absolute title, even although quali-
fied by a back-bond, was not entitled to use a certain diligence competent only
to a heritable creditor. The Court proceeded on the ground that the title which
the pursuer relied on did not warrant the diligence he had used; and, dealing

¹ *Monteith v. Scott*, Dec. 19, 1868, 7 Macph. 300, 41 Scot. Jur. 178; *Jardine
v. McCulloch*, Dec. 2, 1865, 4 Macph. 138, 38 Scot. Jur. 80.

No. 62.

Dec. 10, 1891.
M'Kenzie v.
Watt.

with a question of diligence, regarded rather the nature and effect of the title than the reality of the transaction out of which that title sprang. Now, it appears to me, that questions arising under the Representation of the People (Scotland) Act, 1868, must be differently regarded. Under that Act (the provisions of which we are now administering) the fact of proprietorship rather than the state of the title is the leading and indeed only consideration. By section 5 it is provided that every man of full age and legal capacity shall be entitled to be registered as a voter who is "the proprietor" of lands of a certain value, "whether he has made up his title or is infeft or not." The Sheriff must register as a voter any claimant who satisfies him that he is the proprietor in fact, although that may not be proved by the production of a formal or feudal title to the subjects. It is certain that the Sheriff could not in other cases proceed on the same ground. For example, in a petition for removing, the only title at which the Sheriff could look (where the pursuer's title was competently challenged) would be the pursuer's infeftment; and no other title would be sufficient. Accordingly, what has to be ascertained here is, what in fact is the claimant's right to the subjects in question. The answer to that on the terms of the deed produced by him is, that he is only a holder of the subjects in security, and not proprietor. The radical title and the proper proprietorship is in the Thorburns. This question seems to have been thus regarded, and decided in accordance with this view by the Judges in the Registration Court. Perhaps the most direct authority on this point is the case of *Monteith v. Scott*, 7 Macph. 300, where the claimant was put on the roll as proprietor of a house which he had purchased, to which, however, he had never obtained a title, and the title to which stood at the time as an absolute title in the name of a property company, from whom the claimant had obtained the advances which enabled him to pay for the property. The claimant was held to be, as in fact he was, the proprietor, while the company's title, *ex facie* absolute, was regarded as only a security, which again it was in point of fact. In the case of *Jardine*, 4 Macph. 138, it was decided that a conveyance *ex facie* absolute could not be qualified as a mere security by the production of an unstamped back-letter so qualifying it, or by the oath of the disponee that the right was in fact a security only. This is only an authority on the point before us inferentially, but in that respect it may be regarded as an authority. For if the production of a duly stamped and recorded back-letter would not have prevailed to reduce the apparent right of proprietorship under an *ex facie* absolute conveyance to the level of a security merely, the case would probably have been so decided, and the decision on the competency of the proffered evidence would have been unnecessary. The decision in that case was followed in the subsequent case of *Skeets v. Stewart*, Nov. 7, 1879, 7 R. 12, where a voter on the roll was objected to on the ground that he had disposed the subjects to another by an absolute conveyance. The disponee under that conveyance deponed that the conveyance, although *ex facie* absolute, was only a security in fact. The Court held such evidence inadmissible to qualify the conveyance, and struck the voter off the roll as he had divested himself, so far as competently appeared, absolutely of the property. But in giving judgment Lord Mure observed, "If he (the voter) had at any time got a back-letter declaring that this was simply a trust, no question as to his right could have arisen." Following what I think has been decided by the cases I have referred to, and for the other reasons I have above given, I think the judgment of the Sheriff should be reversed.

LORD KINCAIRNEY.—I concur in thinking that this claim ought not to be admitted. I have never met with a deed like that on which the claim is founded. It is anomalous and self-contradictory, and I abstain from expressing an opinion as to its precise legal effects. The title may in form and to some effect be a proprietary title, but I think that the right conferred is not a full proprietary right, but is more of the character of a right constituted by an absolute disposition and back-bond or other form of security, which has never been held to confer a qualification.

LORD ADAM concurred.

THE COURT sustained the appeal, reversed the finding of the Sheriff, and remitted to him to remove the name of the claimant from the roll of voters for the county of Bute.

L. M'INTOSH, S.S.C.—COOPER & BRODIE, W.S.—Agents.

JOHN NEILSON, Appellant.—*Comrie Thomson—Craigie.*

JOHN JACK ROBERTSON, Respondent.—*Dickson—Pitman.*

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

Election Law—County Franchise—Notice of objection—Time—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), secs. 4 and 9—Representation of the People Act, 1868 (31 and 32 Vict. c. 48), sec. 20.—The Burgh Voters Act, 1856, sec. 4, as amended by the Representation of the People Act, 1868, and applied to counties by the Reform Act, 1884, sec. 8 (6), provides, that every person objecting to any entry on the roll shall, “on or before the 21st day of September, give or cause to be given to the person so objected to, or leave or cause to be left at his place of abode as described in such list, a notice . . .” Sec. 9 provides that “it shall be sufficient if such notice be sent by the post, postage paid, addressed with a sufficient direction, to the person to whom the same ought to be given at his usual place of abode.”

A notice of objection, addressed to the person objected to at his residence at Shotts, was posted at Motherwell on the evening of 21st September after the last despatch for that day.

Held (*disc.* Lord Adam) that the notice was not timeously given.

Observations per curiam on *M'Creath v. Smith*, Oct. 22, 1869, 8 Macph. 15, 42 Scot. Jur. 20.

Election Law—County Franchise—Notice of objection sent to the Assessor—Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), sec. 4 and Schedule No. 4.—

Held that a notice of an objection sent to the Assessor under sec. 4 of the Burgh Voters Act, 1856, which omitted to state the qualification of the person objected to as appearing in the Assessor's list of voters, was not disconform to the statute.

Election Law—Representation of the People Act, 1868 (31 and 32 Vict. c. 48), sec. 22—Appending to special case names of persons objected to.—Held that the regulations of this clause regarding the appending to a special case the names of persons whose cases depend upon the same question of law as is stated in the special case are applicable to cases raising questions as to qualifications by new claimants, and not to objections to those already on the roll.

At a Registration Court for the North-Eastern Division of Lanarkshire, held at Motherwell on 5th October 1891, John Jack Robertson, Calder Street, Motherwell, objected to the Assessor's entry upon the voters list of the name of John Neilson, miner, as tenant of a house in High Street, Shotts.

Neilson objected (1) that Robertson was not entitled to object to any person whose name was on the list of voters then being revised, as Robertson was not on the register of voters for the year 1890-91; (2)

Registration
Appeal Court.
Lord Adam.
Lord Trayner.
Lord Kin-
cairney.

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

that the notice of objection was not timeously given to the appellant; and (3) that the notice of objection given to the Assessor did not comply with the statutes, the nature of the qualification, or supposed qualification, of the person objected to not having been stated therein.

The following facts were admitted:—That Robertson was not on the current register of voters (1890-91) for the North-Eastern Division of Lanarkshire, but was on the Assessor's list of voters for the year 1891-92 then being revised, and was not objected to; that the notice of objection to Neilson was posted at Motherwell on 21st September 1891, about 11.30 P.M., after the last despatch for that day; that the notice of objection to the Assessor did not contain the qualification, or supposed qualification, of Neilson as appearing in the Assessor's list of voters, the column in the Assessor's list headed "Nature of the supposed qualification" being left blank.

The Sheriff-substitute (Mair) repelled Neilson's preliminary objections, and on the merits sustained Robertson's objections, and deleted Neilson's name from the roll.

Neilson thereupon craved a case, which contained the above narrative, and in which the following questions of law were stated for the opinion of the Court:—“(1) Whether in a county a person whose name is not on the register of voters, but is on the list of voters then being revised, and not objected to, is entitled to object to the name of any person being retained on the list of voters? (2) Whether a notice of objection is timeously posted to the person objected to in the circumstances above stated? and (3) Whether a notice of objection to the Assessor must state the qualification of the person objected to as appearing in the Assessor's list of voters?”

The case further stated,—“Appeals were also taken against my decisions in sustaining the respondent's objections to the retention on the roll of the persons whose names are appended hereto” (seventeen in number) “in circumstances similar to those above set forth, in each case the nature of qualification stated in the Assessor's list being omitted to be stated in the notice of objection sent to the Assessor.”

Argued for the appellant;—(1) The notice of objection was not given, delivered, or left for the appellant “on or before the 21st September.” Indeed, from the nature of the postal arrangements at Motherwell it was physically impossible that it could be. It was not then timeously given in terms of secs. 4 and 9 of the Burgh Voters Act of 1856,* as amended

* The Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), sec. 4 (as amended by section 20 of the Representation of the People Act, 1868, and applied to counties by section 8 (6) of the Reform Act of 1884), enacts,—“In every year every person whose name shall have been inserted in any list of voters for any burgh may object to any other person as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for such burgh, and every person so objecting shall, on or before the 21st day of September in such year, give or cause to be given to the Assessor of such burgh a notice according to the form No. 4 of the said Schedule A, or to the like effect, and shall also, on or before such 21st day of September, give or cause to be given to the person so objected to, or leave or cause to be left at his place of abode as described in such list, a notice according to the form No. 5 of the said Schedule A, or to the like effect. . . .”

Section 9 of the Act enacts,—“Whenever any notice is by this Act required to be given to the Assessor it shall be sufficient if such notice shall be delivered to him or left or sent to him by post, postage paid, at his place of abode, or at his place for transacting his official business; and wherever by this Act any notice is required to be given to any other person, it shall be sufficient if such

by the Acts of 1868 and 1884. The case of *M'Creath v. Smith*¹ relied on by the respondent fell to be reconsidered. It unduly relaxed the requirements of the statute. In any case it could not rule the present case, for (1) it was decided upon a construction of the County Voters Act, 1861 (24 and 25 Vict. c. 83), the words of which were not identical with the Act of 1856; and (2) the judgment, which was given in face of a strong dissent by Lord Benholme, was rested upon a fancied distinction between the requirements of the County Voters Act, 1861, as regarded a notice of an objection to the assessor, and a notice to the person objected to. (2) The notice of objection was disconform to Schedule No. 4 of the Act of 1856, as it omitted to state the qualification of the person objected to as appearing in the Assessor's list of voters.² (3) The Sheriff was entitled to append the names of the different persons in the same position as the appellant under sec. 22 of the Reform Act, 1868.*

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

Argued for the respondent;—The case of *M'Creath v. Smith* was an authoritative judgment following upon a series of cases,³ and it ruled the present case. Although it was decided upon a construction of the County Voters Act of 1861, there was really no distinction between that statute and the present statute, and the principle to be applied in both was the same. So long as the letter was posted upon the 21st of September, properly addressed to the person objected to, the notice was timeous. It did not matter whether that person received it personally on the 21st, for the post-office fell to be regarded as his agent. (2) The notice was sufficiently stated to identify the entry, and in any case the Sheriff might have amended it under section 46 of the Act of 1856. (3) The appeal could not be competently used by other persons struck off the roll. The regulations of sec. 22 of the Act of 1868 were only applicable where the qualifications of different claimants were rested upon the same point.⁴

At the close of the opening speeches for the appellant and respondent Lord Adam said,—“ We are of opinion that the respondent's objection to the appending to the special case of the names of other persons than the appellant is well founded. Section 22 of the Act of 1868 applies only to the case of claimants, and questions affecting their qualifications. The present case relates to neither of these.”

At advising,—

LORD TRAYNER.—In this case the Assessor placed the appellant's name on his list of voters, which I presume was published as required by statute. The respondent objected to the appellant being put upon the list of voters, and this

notice be sent by the post, postage paid, addressed, with a sufficient direction, to the person to whom the same ought to be given, at his usual place of abode.”

¹ *M'Creath v. Smith*, Oct. 22, 1869, 8 Macph. 15, 42 Scot. Jur. 20.

² *Muir v. Patterson*, Dec. 19, 1868, 7 Macph. 293, 41 Scot. Jur. 175; *Lamont v. Richardson*, Nov. 12, 1879, 7 R. 32; *Freeman v. Newman*, 1883, L. R., 12 Q. B. D. 373.

* The Reform Act, 1868 (31 and 32 Vict. c. 48), sec. 22, enacts,—“ . . . And if it shall appear to the Sheriff that his judgments respecting the qualifications of any two or more persons depend on the same questions of law, he shall append to such special case the names of all such persons who have appealed against his judgment on their respective claims.”

³ *Mackenzie v. Cameron*, decided Oct. 26, 1868, reported Dec. 19, 1868, 7 Macph. 291, 41 Scot. Jur. 174; *Rose v. Farquhar*, decided Oct. 27, 1868, reported Dec. 19, 1868, 7 Macph. 286, 41 Scot. Jur. 171.

⁴ *M'Gowan v. Mather*, Nov. 15, 1879, 7 R. 46.

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

objection the Sheriff sustained. But the appellant maintained as preliminary that the respondent's objection could not be heard nor given effect to upon these grounds, viz., (1) that the respondent was not a person who by statute had any title to object; (2) that the statutory notice of objection was not timeously given to the appellant; and (3) that the notice given to the assessor was defective, and not conform to the statutory requirements. The Sheriff repelled the appellant's preliminary objections, and on the appellant's request stated the present case.

The first of the appellant's preliminary objections was not insisted in. With regard to the third, I am of opinion that it is unsound, and was rightly repelled, because in my opinion the notice sent to the Assessor was substantially conform to the statutory requirement, and because the alleged defect was one which the Sheriff, if he had thought proper, could have amended under the 46th section of the Act of 1856. The appellant has suffered no prejudice from the alleged defect in the notice, which was certainly not of a character to mislead or deceive the Assessor. The only objection therefore which remains for consideration is the second. It was maintained for the respondent that the objection was unsound in principle, and that it had already been settled to be so by decision. This makes it necessary to consider the special circumstances out of which the objection has arisen, the statutory provisions regarding notices of the kind in question, and the decisions on the point to which we have been referred. It will be convenient, first, to state what the statutory provisions are which affect this question. By section 4 of the Act of 1856 (as amended by sec. 20 of the Act of 1868) it is provided that anyone objecting to the name of another being inserted on the list of voters "shall, on or before the 21st day of September in such year, give or cause to be given to the Assessor of such burgh a notice according to the form No. 4 of the said Schedule (A), or to the like effect, and shall also, on or before such 21st day of September, give or cause to be given to the person so objected to, or leave or cause to be left at his place of abode as described in such list, a notice according to the form No. 5 of the said Schedule (A), or to the like effect." By this clause therefore it is provided that notice (in a specified form) is to be given by the objector of an objection to a certain name being entered on the list of voters both to the Assessor and to the person whose name is objected to. The notice to the Assessor is to be given or caused to be given to him, while the notice to the person objected to is to be given or caused to be given to him, or left "or caused to be left at his place of abode" as described in such list.

I do not stop here to inquire what may be the precise effect of the difference in the mode or form of service of the notice—given or caused to be given to the Assessor, left or caused to be left at the residence of the person objected to. There may or may not be importance in this distinction, but it is not important here, for the question now before us relates, not to the mode in which the notice was served, but to the time when this was done. Now, as regards the time of giving notice, there is no distinction between the Assessor and the person objected to: the notice is to be served or given, one way or other, to both and each "on or before the 21st day of September." In the present case it is stated by the Sheriff that this was not done so far as the appellant is concerned. The case sets forth that the "notice of objection to the appellant was posted at Motherwell on 21st September 1891 about 11.30 P.M. after the last despatch for that day." Accordingly, a notice posted at Motherwell at 11.30 P.M. of the 21st September

"after the last despatch for that day" could not be given to the appellant or left at his residence in High Street, Shotts, on the 21st September. Apart therefore from decision it would appear to me that the statutory requirements as to notice had not been complied with. The notice which the statute says shall be given to a person in the position of the appellant, or left at his place of abode "as described in such list" on or before 21st September, could not reach him, and did not reach him until the 22d September. Delivery of the notice to the appellant, or leaving it at his residence on the 22d September, was no better than if it had been given or left on the 29th—that is, a week later; or on the 22d October—that is, a month later. It is not the notice required by statute if it is not given or left "on or before 21st September."

The remaining question is, has the view I have just expressed been overruled or determined otherwise by authority? We were referred to three cases, and I shall notice them shortly. The first is *Mackenzie v. Cameron*, decided on 26th October 1868, 7 Macph. 291, and the facts were shortly these,—The notice sent to the Assessor was posted by the objector at Dingwall, addressed to the Assessor at Inverness, in time for transmission to Inverness by the latest post on the 21st. It reached Inverness that night, as the postmark proved, but was not delivered to the Assessor till the morning of the 22d. The Sheriff in these circumstances held that the notice was duly sent, and all that is said further in the report is that "the Court affirmed the judgment of the Sheriff." I think that case can scarcely be regarded as an authority where no reason is given for the judgment of the Sheriff or its affirmance by the Court. The Registration Court of that day did not consider it authoritative, for the same question was again discussed and decided the following day, when one of the Judges dissented.

The second case, decided on 27th October 1868, was *Rose v. Farquhar*, 7 Macph. 286, and in it the facts were almost the same as in the preceding case. A claim was posted at Tain on the 21st September, addressed to the Assessor at Inverness, where it arrived "about half-past seven the same evening." There was no delivery of letters by letter-carriers after 4 P.M., "but persons could have letters by applying at the post-office up to 9 P.M." The claim was delivered to the Assessor on the morning of the 22d. That it was a claim to be registered, and not a notice of objection, does not in my judgment affect the point now under consideration, for by the 19th section of the Act of 1868 a claim is required to be delivered to the Assessor "on or before the 21st day of September in any year." It was objected in this case that the claim had not been timeously delivered. The Sheriff admitted the claim, and his judgment was affirmed by a majority of the Court, consisting of Lords Ardmillan and Manor, Lord Benholme dissenting. The grounds on which the majority of the Court proceeded were, that the claim had reached Inverness on the 21st September, and that the Assessor should have sent to the post-office for it. Lord Ardmillan said,—“The claimant has fulfilled his duty in placing the claim before the expiry of the time within reach of the Assessor. The post-office contained the letter, and was open and accessible. On this special ground I think we should affirm the Sheriff's judgment.” Lord Manor concurred. Lord Benholme, dissenting from the judgment, said,—“The specialty on which your Lordships are disposed to rest this case, that the Assessor was bound to send to the post-office in order to put himself in possession of any claims possibly lying there, does not commend itself to my judgment. I am not prepared to hold that there was any such duty incumbent on the Assessor. Apart from that alleged specialty the case could not be

No. 63.

Dec. 10, 1891.

Neilson v.
Robertson.

No. 63. maintained, and I am unable to regard that specialty as it is viewed by your Lordships."

Dec. 10, 1891.
Neilson v.
Robertson.

Now, I must say, with the greatest respect, that the specialty on which Lord Ardmillan proceeded in that case commends itself no more to my mind than it did to Lord Benholme's. The statute required a claimant to deliver his claim to the Assessor on or before the 21st September, and it was held that this was sufficiently fulfilled if the claimant delivered his claim at a place where the Assessor could have got it if he had asked for it—that is, had asked for a thing of the existence of which at the time he had no knowledge. I could not assent to that proposition. But taking the case as it stands, and assuming its authority for the moment, it does not appear to me to be of any avail to the respondent here. Assuming that the appellant had the power of foreseeing that an objection to his name being entered on list of voters was coming—an objection of which he had never previously heard—he could not have got the statutory notice of that objection at the post-office at Shotts at any hour on the 21st September even if he had applied for it. That notice had not then left Motherwell. It cannot be supposed that the learned Judges who decided the cases of *Mackenzie and Rose* would have decided as they did if it had appeared that the claims had not left the places at which they were posted before the 22d September. This, however, is not left to conjecture, for I find this very point decided by the same Court at (I suppose) the same sitting in a case not cited at the bar. The case is that of *Bruce v. Rose*, Dec. 19, 1868, reported on the same page with *Rose v. Farquhar*. There William Bruce claimed to be entered on the roll as a voter, and posted at Tain his claim addressed to the Assessor at Inverness on 21st September, about 10 P.M., the latest mail from Tain to Inverness leaving Tain at 5.25 A.M. The claim therefore did not leave Tain on the 21st, but was delivered to the Assessor at Inverness on the morning of the 22d. It was held, affirming the judgment of the Sheriff, that the claim not having been posted in time to reach the Assessor within the statutory period, had not been timeously transmitted. There was no inconsistency in these judgments. *Rose v. Farquhar* was decided on the specialty that the claim was put by the claimant "within reach of the Assessor" within the statutory period; it was not so in *Bruce v. Rose*. But the specialty in the former case does not exist here, while *Bruce v. Rose* is exactly the same as the present case, and is a direct authority in favour of the appellant's contention.

The third case cited by the respondent is that of *McCreath*, 8 Macph. 15, where it was held that a notice of objection was timeously given to the person objected to if posted on or before 4th September (the statutory period in that case), although it might not reach its destination until after that day. In that case Lord Benholme again dissented. Lord Ardmillan's judgment (with which Lord Ormidale agreed) proceeds entirely upon a distinction between the case of a claim to be registered and an objection to a claim. He says, referring to the previous decisions,—“We must assume, in considering this case, that notice of a claim sent to the Assessor by post is too late unless it be posted so that in the course of post it would reach the Assessor on the 4th of September. The case now before us has reference to notice of objection sent to a voter. If there be no distinction between the two cases, we must of course arrive at the same conclusion.” He then goes on to point out a distinction which he thinks may fairly be drawn between the two cases. The distinction he draws seems to be this,—that the statute confers on objectors the “right of searching for objections”

to and including the specified day, and that to require that notice of objection should be given so as to reach the person objected to on that day would be practically to diminish the statutory time given to objectors by the number of days which the course of post may take to reach the voter, whereas in the case of notice to the Assessor, he being a person occupying a public position, with a known office or residence in the county, and near the place where the list lies, there can be no difficulty in giving him the notice "without encroaching upon the time allowed by statute for examining the lists." In view of this distinction, which I have given almost in Lord Ardmillan's own words, he reaches the conclusion that in the case of notices either of claim or objection sent to the Assessor, the notice must be one "which can reach him" on the day specified in the statute, while with regard to the notice sent to the person objected to, it is sufficient if it "be posted" on or before that day.

No. 63.

Dec. 10, 1891.

Nelson v.
Robertson.

Now, is this distinction one which is warranted by the statutory provision? I think not. In the first place, the statute, as I read it, does not allow an objector the whole time between the publication of the Assessor's list and the specified day for giving notice of objection as a period for searching for objections only. On the contrary, it provides that within that period the search must not only be made, but the objections resulting from the search, if any, must be intimated. If the search is to be continued up till the last moment of the day specified, how is the objection when discovered to be intimated (as the statute provides, and Lord Ardmillan thinks) to the Assessor on that day? If not posted so as to reach the Assessor on that day, it is not in time. But if the intimation can be made to the Assessor so as to reach him on that day, why not also to the voter objected to? Lord Ardmillan says because the voter may be at a distance. But the statute has provided for that. It does not require that the notice shall reach the hands of the voter objected to on that day, but shall be given or left at the voter's residence as described in the Assessor's list, and what that is comes to the objector's knowledge at the same time as he learns that it is proposed to put the name objected to on the list of voters, for the Assessor's list gives both the name and the address at the same time. The objector has no concern with the time when the notice of objection reaches the voter; the statute does not require the objector to find the voter objected to or his place of residence, but only to send notice to the place described in the Assessor's list, whether that is the voter's ordinary place of abode or not. In the second place, the statute makes no difference or distinction whatever between the Assessor and the voter objected to in so far as regards the time within which the notice of objection is to be given, delivered, or left. The words used are the same in reference to both,—the notice in each case is to be given "on or before" the specified day. I dissent therefore from the view that there is any such distinction as that on which the judgment of the majority of the Court in *M'Creath's* case proceeded. If the distinction fails, then, as Lord Ardmillan says, the same conclusion must be reached in the case of notice of objection sent to the voter as in the case of notice sent to the Assessor, and that conclusion is, that such notice will not be held to be timeously given unless it reaches the place to which it is addressed on or before the day specified by the statute.

The respondent maintained further that, on a fair construction of the 9th section of the Act, 1856, the posting of the notice of objection was fulfilment of the requirements of section 4. I cannot agree with him. The 9th section

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

merely provides that where notice is required to be given, it shall be sufficient "if such notice be sent by the post," &c. This, however, is nothing more than saying that posting the notice shall be sufficient compliance with the direction to give, or deliver, or leave the notice. It does not extend the time within which that must be done. Accordingly, if the notice must be given, delivered, or left on or before a fixed day, it must, to fulfil the statutory requirement, reach the place to which it is addressed "on or before" that day, whatever mode is adopted of conveying or communicating the notice. "I wish," said Lord Ardmillan in *Rose v. Farquhar*, "to guard against being thought to indicate any opinion that the mere posting of a claim on the day mentioned in the statute is in all cases sufficient. I do not think it is."

Nor can I agree with the respondent's view that the postmaster is the agent of the Assessor or voter, to the effect of making delivery of the notice to him equivalent to the delivery of notice to the Assessor or voter himself. I can find no authority for such a view. But I do find an authority against it—indirect authority I admit—in the case of *Childs v. Cox*, 20 Q. B. D. 290.

For the reasons I have stated, I am of opinion that the question now raised has not hitherto been settled by authority, and dealing with that question as still an open one, I think the objection stated by the appellant to the notice of objection sent to him by the respondent was a good objection, and should have been sustained by the Sheriff. The notice was not given, delivered, or left for the appellant "on or before the 21st September"; it was not therefore the statutory notice, and not being so, the objection which it intimated should not have been heard or given effect to by the Sheriff.

On the point raised by the respondent as to the incompetency of using this case to settle a similar question raised in reference to other voters than the appellant, I agree with the respondent. That course is only allowed by the statute where the point decided affects a claimant's or voter's qualification.

LORD KINCAIRNEY.—I concur in the opinion of Lord Trayner, and substantially in the reasons for his judgment. Objection has been taken to the entry of the name of John Neilson on the list of voters. The objection, I understand, is admittedly good, and it is not disputed that Neilson's name ought not to be on the roll. But it is maintained that the objection cannot receive effect because it was not intimated to Neilson within the time allowed by the statute.

Neilson's place of abode is stated in the entry to be Shotts. The notice was posted at Motherwell on 21st September about 11.30 p.m. after the last despatch of the mail for that day. So that it could not, and did not, reach Neilson until the 22d.

The question depends on the 3d, 4th, and 9th sections of the Burgh Voters Act (19 and 20 Vict. cap. 58), as amended and made applicable to counties by subsequent statutes.

The third section has reference to claims, and requires the claimant to give notice to the Assessor on or before 21st September.

The fourth section has reference to objections, and provides that an objector shall, on or before the 21st September, give or cause to be given a notice to the Assessor, and shall also, on or before such 21st September, give or cause to be given a notice to the person objected to, or leave it or cause it to be left at the place of his abode as described in the list.

These sections provide for the forms of notice and the day on which they

are to be given. As regards the time of notice, the provisions are the same in reference to notices of claims and objections; and also in reference to notices to the Assessor, and to the person objected to, I cannot find the smallest difference.

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

The 9th section applies equally to all these notices, and provides for the manner in which they are to be given. It provides that it shall be sufficient if a notice to the Assessor be delivered to him or left or sent to him by post at his place of residence or at his office for transacting his official business, and that it shall be sufficient if a notice to any other person be sent by post, with a sufficient direction to the person to whom the same ought to be given, at his usual place of residence.

I thought that a question might possibly be raised whether, construing these clauses together, it was not possible to hold that delivery at the post-office was made equivalent to delivery to the person. Such a construction, if admissible, might be convenient, as it would avoid questions as to delay in delivery caused by weather or otherwise, and not provided for by section 14, which are not easily solved in accordance with a strict reading of the statute. But in whatever way the statutory provisions as to notices may be construed, they must, I think, be applied indifferently to notices of claims and of objections and to notices to the Assessor, and notices to the person objected to.

I cannot find that the view that delivery to the post-office is made equivalent to delivery to the person has ever been adopted. It is not so in England, where, however, the question is excluded by the express provision of the Statute 6 Vict. cap. 18, sec. 100.

It was negatived in the case of *Bruce v. Rose*, December 19, 1868, 7 Macph. 267, where it was decided that a notice of a claim to the Assessor in Inverness was not well given by posting it at Tain on 21st September after the last mail for Inverness had left.

In *Rose v. Farquhar*, it was decided by Lords Ardmillan and Manor, Lord Benholme dissenting, that a claim posted at Tain which reached Inverness on the 21st September after the latest delivery of letters, and was therefore not received by the Assessor until the 22d, was sent in sufficient time.

In *Mackenzie v. Cameron*, 7 Macph. 291, a judgment to the same effect was pronounced in regard to a notice to the Assessor of an objection. I am not able to reconcile these cases with *Bruce v. Rose*.

The objector relied chiefly on *M'Creath v. Smith*, October 22, 1869, 8 Macph. 15, where a notice of objection was held to be timeously given to the person objected to which was posted on the day fixed by the statute, although it did not and could not reach him until the day following.

These cases were decided on the construction of sections 9, 15, and 21 of the County Voters Act (24 and 25 Vict. cap. 83), and therefore the exact questions which they decided cannot occur again. On that account the case of *M'Creath v. Smith* is not technically in point. The words of the two statutes are not exactly the same. But it must be admitted that it is difficult to find any material distinction between them, and if the case of *M'Creath* had been decided on the ground that the statute made delivery at the post-office equivalent to delivery to the person, I should have been inclined to accept that construction of the statute, and to follow that decision. But the judgment is not rested on that view at all, but on a supposed distinction between the requirements of the County Voters Act regarding a notice of a claim or objection to

No. 63.

Dec. 10, 1891.
Neilson v.
Robertson.

the Assessor and a notice to the person objected to. I am certainly unable to find any ground for that distinction in the provisions of the County Voters Act, and I am satisfied that there is none in the provisions of the Burgh Voters Act, which is the statute applicable in the present case, and the statute which now regulates the service of notices. I think that we are bound to decide in accordance with what we conceive to be the sound construction of that Act, although we may be forced to question the reasons for a previous judgment in reference to the County Voters Act.

With regard to the other question, I concur with Lord Trayner.

LORD ADAM.—I concur with your Lordships except upon one point, and that is as to whether the notice of objection in this case was timeously posted. My opinion on that matter is that this very question was raised and decided in the case of *M'Creath*, and I do not see any reason why that decision should not be followed in this case. I therefore think that we ought to hold that notice was timeously given.

THE COURT sustained the appeal, reversed the finding of the Sheriff-substitute, and remitted to him to restore the name of the appellant to the roll.

R. J. GIBSON, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

No. 64.

Dec. 10, 1891.
Stewart v.
Stewart.

MRS MARY ANGUS OR STEWART, Pursuer.—*Rhind*—A. S. D. Thomson.
MRS JEANIE PATERSON OR STEWART (Stewart's Executor), Defender.—*Mackay*.

Succession—Legacy—Special legacy—Right in security.—Held per Lord Kyllachy (Ordinary) that the legatee of a specific moveable subject must take it cum onere, and redeem it for himself if it has been pledged or assigned in security by the testator subsequent to the date of the bequest.

OUTER-HOUSE
Id. Kyllachy.

THE pursuer in this case was Mrs Stewart, the mother of the late John Stewart, a farmer in Aberdeenshire, and the defender was the deceased's widow and executrix. By a mutual disposition and settlement, executed by the deceased and his wife some years before his death, he left to his mother, the pursuer, the contents of a certain policy of assurance upon his life. By assignation, dated within a few months of his death, he assigned this policy to his bankers in security of an overdraft; and at the time of his death the sum due to the bank exceeded the value both of the said policy and of another policy to which the bank also held an assignation.

The pursuer in these circumstances sued the widow and executrix for the amount of the policy. She pleaded the provisions of the settlement, and further;—(4) The said assignation not in any way altering or affecting the provisions of the settlement, the pursuer is entitled to payment as concluded for.

The defender pleaded;—(1) The contents of both the said policies having been assigned by the deceased John Stewart junior to the Town and County Bank, and uplifted by the said bank in respect of the debt due to it by him, are not payable to the pursuer under the provisions of the said mutual disposition and settlement.

The Lord Ordinary (Kyllachy), on 10th December 1891, pronounced this interlocutor:—"Finds that the policy in question was, subsequent to the date of the truster's settlement, assigned by the testator to the Town and County Bank in security of an overdraft due by him to the said bank. Finds in these circumstances that the pursuer is not entitled to the contents of the said policy, except subject to the claims of the bank, and

that the defender, as executrix of the deceased, is not bound to free the policy from these claims out of the general estate: Therefore assoilzies the defender from the conclusions of the summons, and decerns." * No. 64.

Dec. 10, 1891.
Stewart v.
Stewart.

The pursuer reclaimed, but the case was afterwards compromised.

WILLIAM OFFICER, S.S.C.—MACKENZIE & KERMACK, W.S.—Agents.

MRS SARAH M'CLURE OR NELSON, Pursuer (Appellant).—*A. J. Young—* No. 65.
A. S. D. Thomson.

DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF THE LOWER WARD OF
LANARKSHIRE, Defenders (Respondents).—*Jameson—Dundas.*

Dec. 11, 1891.
Nelson v.
County
Council of
Lower Ward
of Lanark.

Reparation—Road—Precautions for safety.—A road authority in charge of a suburban road had in winter weather collected heaps of road-scrappings, 2 feet long, 18 inches wide, and 8 inches high, at the side of the footway, where it ran in front of cottages. On the opposite side there was a footway but no houses. The heaps were allowed to remain several days before they were removed. A woman coming out of one of the cottages in a dark night, and proceeding to cross the road, tripped upon one of these heaps as she stepped from the footway on to the road, fell, and broke her arm. *Held* that, in the circumstances, the road authority were in fault, and therefore liable in damages.

THE Crow Road, leading from the Great Western Road to Partick, is one of the roads within the district of the District Committee of the County Council of the Lower Ward of Lanarkshire. ^{2D DIVISION.} Sheriff of Lanarkshire.

In the course of this road there are on the east side of it various rows

* "OPINION.—The pursuer claims that the widow and executrix shall pay the amount of the bank's debt, so as to free the policy, and make the same available to the pursuer. The defender, on the other hand, maintains that the legacy was deemed by the assignation; or otherwise that the policy must be held to have been bequeathed *cum onere*, and so to be ultimately, as well as primarily, liable for the charge upon it.

"Curiously enough the point of law which is thus raised is one upon which there is no direct authority in the law of Scotland,—at least none was cited, and I have found none.

"According to English law a specific legatee is entitled to have his legacy redeemed at the expense of the testator's general estate from charges created by the testator—*Bothamley*, L. R., 20 Eq. 304; *Ashburner*, 2 Brown's Chan. Reports, 113; *Williams on Executors*, 1332; and although the rule as regards bequests of real estate appears to be altered by the Act 17 and 18 Vict. cap. 113, I do not find that there has been any alteration by statute with regard to specific legacies of moveable subjects. As expressed by Lord Thurlow in the case of *Ashburner*, 2 Brown's Chancery Reports, p. 113,—'If a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem.'

"The rule seems to be the same in the civil law. At all events it seems to have been so settled by the time of Justinian (*Institutes*, ii. 20, 12), when the various forms of bequest (*per vindicationem*, *per damnationem*, *sinendi modo*, *per precceptionem*) had been abolished.

"But it rather appears to me that on this matter the law of Scotland has not followed either the civil law or the English law. It certainly holds—contrary to the English rule—that when a particular landed estate is disposed to a particular disponee, the latter takes it subject to any debts by which it is burdened, or with which it may be burdened by the testator—*Stair*, iii. 5, 17; *M'Laren on Wills*, 2, 488. And, while this is not perhaps necessarily conclusive as between a specific legatee in moveables and an executor or residuary legatee, I am not able to see that there is any distinction in principle. In the absence of authority, I think the analogy applicable to burdens on heritable estate must be followed, and, therefore, I am on the whole of opinion that the pursuer's claim must be repelled."

No. 65.

Dec. 11, 1891.
Nelson v.
County
Council of
Lower Ward
of Lanark.

of cottages, one of which is called Rose Cottages. There are pathways on both sides of the road, but there are no houses on the west side of the road immediately opposite Rose Cottages. At some distance to the north there are houses on that side of the road, one of which is a shop. On Monday and Tuesday in the second week of February 1890 the roadmen employed on the road, following their usual practice, had scraped the mud off the road and piled it on the east side of the road close to the footpath, in heaps about 2 feet long, 18 inches broad, and 8 inches high. There had been frost some days before, which had broken up on the Saturday, and in consequence there was a large quantity of mud on the road.

On the evening of Wednesday Mrs Nelson, a woman of fifty-one years of age, who lived in one of the Rose Cottages, left her house to go to the shop for medicine. In stepping off the pathway on to the road, she caught her foot on one of the heaps, fell, and broke her arm. At this time it was eight o'clock, and quite dark.

She raised an action of damages in the Sheriff Court of Lanarkshire against the District Committee, concluding for £250 of damages, pleading that she had been injured through the fault or negligence of the defenders.

The defenders stated,—“Explained that the pursuer was and ought to have been aware that a heap of road scrapings was or might be on the road at the place alleged, such heaps being customarily and necessarily left on the road when cleaning it, and that if an accident occurred through her falling over such a heap, it was owing to her negligence in failing to avoid it.”

The defenders pleaded;—(4) The injuries of the pursuer not having been due to fault on the part of the defenders, or those for whom they are responsible, and, *separatim*, the same having been caused, or materially contributed to, by the fault of the pursuer, the defenders should be assoilzied, with expenses.

At a proof the facts already narrated were proved. As regards general practice, the only evidence was that of Robert Drummond, a road surveyor for the county of Renfrew, who had for four years been surveyor of roads in the Calder district of Midlothian, and for three years before that again had served in the surveyor's head office in Edinburgh. He deposed,—“The usual mode of cleaning roads of that kind is to draw the mud to the side, and to put it in heaps at the side of the road, and then they are removed later on by carts. These mud heaps have, as a rule, to lie for two or three days, till they are ready for removal. . . . B the Court.—(Q.) Do you give any instructions to your workmen as to the side on which they are to put mud heaps? (A.) Their general instructions are to put it on the side which will less inconvenience the public. We leave them to their own discretion as to which side will not inconvenience the public.”

The Sheriff-substitute (Erskine Murray), on 12th February 1891, pronounced an interlocutor, in which, after findings in fact to the effect already narrated, he found in law,—“(1) That in the circumstances the defenders or those for whom they are responsible, were in fault in allowing an obstruction of the nature of the heap in question to remain in the position in which it was on the night in question unlighted and unguarded, and that this was the main cause of the accident: (2) That no contributory negligence has been proved.” He decerned for £30 of damages.

On 8th August 1891 the Sheriff-depute (Berry) pronounced this interlocutor:—“Finds that it is not proved that there was fault on the part of the defenders, or any of their servants, for which they can be held liable in damages: Therefore assoilzies the defenders from the conclusion of the petition, and decerns.”

The pursuer appealed, and argued;—Road trustees were liable for accidents of this kind caused by acts of negligence such as this, *e.g.*, heaps of stones left on the roadway,¹ a stone left on the roadway,² a trestle left there,³ or a heap of rubbish.⁴ The obvious remedy was to send carts every afternoon or evening to remove what was collected during the day. But if it was necessary to make heaps here, they should have been made on the opposite side, where there were no houses. Persons using the road were entitled to expect that it would be in a proper state, hence there was no contributory negligence in the pursuer.

No. 65.

Dec. 11, 1891.
Nelson v.
County
Council of
Lower Ward
of Lanark.

Argued for the defenders;—They had done nothing that was not necessary and usual,—nothing that was not familiar to everyone who walked along a country road. That being so, the case was altogether outside the authority of the cases cited, where the obstacles were unusual, and such as should not have been left on a road. If there was any negligence it was in the pursuer herself. To adopt the remedy suggested in argument for the pursuer would involve enormous expense to the ratepayers, to meet an imaginary danger. Heaps on the other side of the road would have presented just the same danger.

At advising,—

LORD JUSTICE-CLERK.—I am not prepared to lay down any general rule for the conduct of road-scraping, or to say that the scrapings must be taken away from the side of the road immediately. But those whose duty it is to scrape the roads must act reasonably in view of the character of the particular road and of the season of the year. It is not desirable that a heap of stiff mud, which is getting harder day by day, should be left in front of a row of cottages larger than is necessary. If there are such heaps made in front of houses, they should not be so large as to tend to throw down a person coming out of one of the houses on to the road after dark.

As regards the particular case on hand, I think it would have been much safer to have had the heaps at this place on the other side of the road; and the road authorities have made it plain that there is nothing to prevent that being done, by the fact that, since the accident, they have put them on that other side.

In these circumstances, I think that there was fault on the part of the defenders, and that the pursuer is therefore entitled to recover damages from them for her injuries. The Sheriff-substitute allowed £30, and this seems to be a reasonable sum in the circumstances.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I concur, but simply on the ground that, in the way in which this case is presented to us, I think the defenders were in fault.

LORD TRAYNER was absent.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff-depute, repeated the findings in fact of the Sheriff-substitute, and of new decreed for £30.

ROBERT JOHN CALVER, S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

¹ Findlater v. Duncan, July 18, 1837, 15 S. 1304, June 19, 1838, 16 S. 1150, 10 Scot. Jur. 507, H. L. 1839, M'L. and Rob. 911, 12 Scot. Jur. 135.

² Dargie v. Magistrates of Forfar, March 10, 1855, 17 D. 730, 27 Scot. Jur. 311.

³ Virtue v. Commissioners of Police of Alloa, Dec. 12, 1873, 1 R. 285.

⁴ Stephen v. Police Commissioners of Thurso, March 3, 1876, 3 R. 535.

No. 66.

SIR CHARLES H. A. F. L. ROSS, Pursuer (Respondent).—

*Sol.-Gen. Murray—Pitman.*Dec. 11, 1891.
Ross v. Powrie
& Pitcaithley.

POWRIE & PITCAITHLEY AND ANOTHER, Defendants (Appellants).—

*G. R. Gillespie—Dundas—Fleming.**River—Tidal and navigable—Foreshore—Obstruction in alveo—Fishings.—*

The proprietor of the lands of S had a Crown grant of the salmon-fishings *ex adverso* of his lands in a tidal navigable river, the banks of which at ebb tide consisted of low mud flats, covered at every tide. The tenant of the fishings erected, with the sanction of the proprietor, a platform, based on shingle and piles, to facilitate his fishing. The foundations of the platform were in part, at least, in the *alveus* of the river.

In an action brought by the proprietor of lands and fishings on the other side of the river for removal of the platform, it was proved that a substantial part of the erection was *in alveo*, and that it was injurious to the pursuer's fishings. Held that the pursuer was entitled to have the whole erection removed.

Opinion (per the Lord Justice-Clerk) that a riparian proprietor upon a private or tidal river is entitled to prevent an opposite proprietor from making any alteration *in alveo*, or where an alteration has been made to insist on restoration without proving that the operation has caused or must cause damage to his side of the river.

2D DIVISION.
Sheriff of Ross
and Suther-
land.

SIR CHARLES H. A. F. L. ROSS was heir of entail in possession of the lands and barony of Balnagown, including the lands of Bonar and the salmon-fishings "in the Kyle of Sutherland *ex adverso* of said lands. The lands of Bonar are situated on the right shore of the Kyle of Sutherland, below the point where it is entered by the River Carron, and extend for a considerable distance along the said shore *ex adverso* of the lands pertaining to Mr G. A. Jamieson, C.A., as trustee on the estate of Evan Charles Sutherland, of Skibo." The salmon-fishings on the left bank, belonging to Skibo, were let to Messrs Powrie & Pitcaithley, salmon-fishers.

The Kyle of Sutherland is the estuary of the River Carron, and is navigated by small vessels. At low tide the river finds its way to the sea by a channel about 150 feet wide, bounded by low banks of mud sand, and shingle, which are covered by the rising tide, and constitute the foreshore of the Kyle. On the south or Bonar side the bank of this channel was nearly continuous, but on the north or Skibo side the mud banks were much broken into by water channels, in which there was water at all states of the tide. The banks on the north side and the channels running through them were not of a constant shape or size, but varied in the course of years as the river or the tide deposited shingle or sand about them, or cut new passages for itself.

At the edge of the river channel, as that existed at low-water, and on the north side of it, the tenants of the Skibo fishings in May 1890 constructed a platform, that they might be able to draw their nets longer than they could otherwise have done as the tide rose. The platform was placed upon a line of piles about 150 feet long and about 2 feet in height. The piles were originally fastened together by boards, but these were subsequently removed. There was also some shingle or gravel shovelled up at the foot of the piles to support them. The direction of this line of piles was parallel to the flow of the water in the river channel.

The River Carron from Bonar Bridge, where it enters the Kyle, downwards flows from north to south, but at a point immediately above the point where the foregoing operation was executed it turns eastward, and flows into the sea in that direction. The lands of Skibo to the north were thus on the inside of the angle of the course of the river. On the Bonar side the river had, after 1876, been fenced in for some distance

immediately above the erection by an embankment or breakwater to retain it in the channel above described. No. 66.

As soon as Sir Charles Ross became aware of the operations above described he raised an action in the Sheriff Court at Dornoch against Messrs Powrie & Pitcaithley and Mr Jamieson to have them interdicted "from encroaching on the *alveus* of the Kyle of Sutherland, and driving in piles, laying down stones, shingle, gravel, or sand or other material, erecting or extending embankments in the same, or along or in the channel of the Kyle of Sutherland, and narrowing and altering the same, or diverting the stream thereof *ex adverso* of the lands and estate of Skibo aforesaid, and of the pursuer's lands and estates of Bonar and Balnagown, in the parish of Kincardine and county of Ross and Cromarty, . . . and from artificially elevating the *alveus* and obstructing, narrowing, or deviating the stream of the Kyle at or near said part thereof." The petition prayed also for removal of what had been erected.

Dec. 11, 1891.
Ross v. Powrie
& Pitcaithley.

The pursuer averred that the works constructed by Powrie & Pitcaithley, "form an obstruction in the *alveus* of the Kyle. They have shut up the stream in parts which were open beyond the memory of man, narrowed the main channel, and diverted the flow and weight of the stream so as to bear unequally upon the south side, and are certain to cause great damage to pursuer's said fishing banks, both above and below the spot in question." This averment was denied by the respondents.

There were also averments to the effect that these works obstructed navigation and the passage of salmon.

Neither party alleged any title to the foreshores.

The pursuer pleaded;—(3) The defenders, in making the encroachments and raising such obstructions, have acted illegally, and are bound to restore the river to its former course, and to restore the *alveus* to its natural condition, and failing their doing so, the Court should grant warrant for the purpose as craved.

The defenders pleaded;—(1) The averments of the pursuer, so far as material, being unfounded in fact, the interim interdict ought to be recalled, and the prayer of the petition otherwise refused. (2) The structure or erection complained of being in itself a legal erection, and being no obstruction or impediment to the passage of salmon or navigation, the interim interdict ought to be recalled, and the defenders assoilized, with expenses.

After various procedure a proof was led in May 1891. It was chiefly directed to the questions whether certain narrow water channels which pierced and passed through the Bonar mudbanks at a point immediately opposite the erection had or had not been caused, or aggravated by that erection. The pursuer's evidence went to shew that the water as the tide fell found its way over or round the isolated banks on the Skibo side, and that this tendency had been checked by the erection, with the result that the river, held in on the north, had burst its banks on the south and caused, or at least increased the channels complained of, which would, if they went on increasing, divert the stream from valuable salmon shots belonging to the pursuer further seaward. It was, further, one of the points made by the pursuer's witnesses that the piles were, to a large part of their extent, within the *alveus* of the river.

The defenders endeavoured to shew that the erection, if in the *alveus* at all, was so to a trifling extent only. They also directed their proof to shew that the channels complained of were not the result of the erection, but were only a new manifestation of a tendency which the river had always shewed to change its course. In proof of this they shewed that Sir Charles had found it necessary in 1876 to bank up part of his side,

No. 66. and they contended that his remedy now was to continue that embankment. They also adduced evidence to shew that the channels complained of had not increased in the course of the year during which the erection had existed.

Dec. 11, 1891.
Ross v. Powrie
& Pitcaithley.

It was proved that the main current of the stream as it passed the erection ran at the rate of $9\frac{1}{2}$ miles an hour, but that close by and for a distance of four or five feet outside the erection, the current was, comparatively speaking, inappreciable, being only at the rate of about $1\frac{1}{2}$ miles.

The evidence is fully referred to in the opinion of the Lord Justice-Clerk.

On 16th June 1891 the Sheriff-substitute (T. Mackenzie) pronounced this interlocutor, viz. :—" Finds that said erection is on ground below low-water mark, is an encroachment on the bed or *alveus* of the river (which is a tidal one, with varying currents and levels), and is situated *ex adverso* of the property of the pursuer on the south bank of the river : Finds that the effect of said erection has been to heighten the north bank, and thus to prevent and obstruct a considerable natural flow of water over the same to the north, and to throw the weight of water on to the south bank, with the result that a new channel of the river is being formed, or is in imminent danger of being formed, through the said south bank : Finds that the pursuer's rights of property there have thus been, or are in course of being, injuriously affected, and that he is in consequence entitled to have the defenders interdicted from proceeding farther with or completing the said embankment, and to have the same removed : Therefore continues the interdict already granted, and declares the same to be perpetual : Finds farther that the said embankment so far as begun and completed is illegal and injurious to the rights of the pursuer, as proprietor foresaid, and must be removed : Therefore ordains the defenders within ten days from this date to remove the same," &c.

The defenders appealed, and argued ;—(1) On the facts, the erection was *in suo*, and was *innocue utilitatis*. It could not cause the channels complained of, which were directly opposite, for with a current flowing so fast as this, if it impinged at all upon the erection it must be driven back upon the southern shore at a point much lower down ; besides there was interposed between the true current of the stream and the erection a *strata* or cushion of water which was quite quiet, shewing that, as a matter of fact, the current did not strike against it. The erection was *in suo*, for the proprietor was grantee of the Crown in the salmon-fishings, and had therefore from the Crown a grant of all rights in the foreshore or *alveus* necessary to facilitate these fishings, unless the exercise of navigation was thereby impeded,¹ which it was not. (2) On the law of the case, the doctrine of *Bicket v. Morris*² had been a good deal qualified by the late decision of the House of Lords in *Colquhoun's case*,³ as Lord Trayner had pointed out in a recent judgment.⁴ The question now was very much a question of circumstances whether damage had actually been caused or not. These cases had, at all events, settled this, that while a proprietor might complain of any encroachment on his property by diversion of stream by his opposite neighbour, and would succeed, even without proof of serious damage, because his property had been invaded against his wi-

¹ Per Lord Deas, at p. 527 of *Mather, &c., v. Macbraire, &c.*, March 1873, 11 Macph. 522, 45 Scot. Jur. 337.

² May 20, 1864, 2 Macph. 1082, 36 Scot. Jur. 529, aff. July 13, 1866, Macph. (H. L.) 44, 38 Scot. Jur. 547.

³ Jan. 26, 1877, 4 R. 348, rev. July 30, 1877, *ibid.* (H. L.) 116.

⁴ *McGavin v. McIntyre Brothers*, May 30, 1890, 17 R. at p. 824.

a person standing up to vindicate a subordinate right, such as a right of passage (*Colquhoun's* case), or a right of salmon-fishing without property in the stream (the present case), must shew substantial damage to that right, which had not been done here. The cases subsequent to *Colquhoun's* & *Pitcaithley*.
 Dec. 11, 1891.
Ross v. Powrie

case were cases of proprietors *ex adverso* of one another.¹

The complainer argued;—On the facts, the channels were caused, or at least aggravated, by the erection complained of. The stream undoubtedly had a tendency to cut its way straight south to the sea, and for that very reason a slight obstruction to its easterly course would be all the more serious. It was not suggested that the channels were made by a direct diversion of the stream from one side to the other; the suggestion rather was that the bursting of the southern bank was the result of compression in a channel which had become artificially compressed. The evidence shewed that, but for the erection, the water would find its way northward over the Skibo banks. Again, the erection was almost altogether, at all events to a substantial extent, *in alveo* of the river. In no event was it *in suo* of the respondents, for they were not in right of the proprietor of the foreshore, *i.e.*, the Crown. If so, then (2) as a matter of law, the rule of *Bicket v. Morris* applied, a rule which cases subsequent even to the case of *Colquhoun*,¹ shewed to be still the rule of the law of Scotland. Nor was there any reason for a difference because the *alveus* was the property of the Crown; indeed, that being so, the defenders were in all the worse position, for they were not operating *in suo*. The suggestion that because of the fact that the complainer had not a right of property, but only a right of fishing, the law was different, was negatived by the *Duke of Roxburghe's* case. The Duke had, on the part of the water in dispute there, which was beyond the *medium filum*, a mere right of fishing. Again, the respondents said that the erection, if on the bank, was *in suo*, the bank being theirs as part and pertinent of their grant of fishings; but the complainer must be allowed to put his right to his bank on the same footing, and then the attempted distinction was gone. A proprietor was entitled *munire ripam* as the complainer had done here, but not so to do it as to throw an unfair burden on his opposite neighbour.²

At advising,—

LORD JUSTICE-CLERK.—The pursuer in this case is the proprietor of the salmon-fisheries on the south bank of the Kyle in Ross-shire; the river is a tidal river at the point in question. The action is against the tenants of the salmon-fishery on the opposite side of the river, and is raised for the purpose of interdicting them from placing obstructions in the *alveus*, and having them ordained to remove an obstruction they have already placed there, which, it is alleged, has or will have the effect of throwing more pressure of water against the complainer's bank, and so injuring his fishings. On the pursuer's side the bank, as it at present subsists, practically holds in the water in the channel at all times of the tide with certain small exceptions, to which I shall afterwards allude. On the defenders' side the case is different. As the tide falls, a number of low shore flats divided by channels more or less at an angle to the general direction of the stream are exposed on that side. The stream then practically flows between parallel banks, its width at and near the place in question being, roughly speaking, about 150 feet wide, and only a small quantity of

¹ Foote v. Robertson, July 16, 1879, 6 R. 1290; Duke of Roxburghe v. Waldie's Trustees, Feb. 18, 1879, 6 R. 663.

² Menzies v. Earl of Breadalbane, July 4, 1826, 4 S. 783 (N. E. 791), rev. July 4, 1828, 3 W. and S. 235.

No. 66. water flowing by the channels between the shore flats on the north. In this
 Dec. 11, 1891. channel the stream flows at that part of the channel where the bulk of the water
 Ross v. Powrie is with very great rapidity, the evidence putting it at more than nine miles an
 & Pitcaithley. hour. This stream flows in a curve from right to left, and therefore its pressure
 is against the south bank. The water has a tendency opposite the point at
 which the respondent's operations complained of were executed to make its way
 through the bank southwards in small streams, tending to cut off a peninsula
 which is formed by the river and the Firth of Dornoch beyond, and to convert
 the peninsula into an island, thereby of course diminishing the flow of water
 round the north side of the peninsula.

These were the circumstances of the case before the operations of the respon-
 dents, which are now complained of. The objections consisted in driving a
 series of piles into the ground for about 150 feet, and placing a platform
 on them to aid the fishermen in working their nets at certain states of the
 tide. At the bottom the piles are banked up to a certain height with shingle.
 At first boards were fastened along them, but these were afterwards removed.
 The line of the piles is practically parallel to the opposite, or complainer's bank.
 The piles are partly driven into one of the shore flats, and partly into the *alveus*
 covered with water at low water, even when the river is in summer flow. The
 whole erection is covered when the tide rises, and a substantial part of it is under
 water at low tide, when the river is sending down more water than it does in
 the driest part of the year.

The pursuer's case is that this erection is absolutely illegal, in so far as it
 is in the *alveus*, and that it is open to challenge, because it has the effect, or may
 have the effect, of compressing the stream, by preventing the free spread of the
 water to the northward, and thus does or may cause erosion on the south bank,
 with the effect that the water will break out more and more across the neck of
 the peninsula, and thus deprive the complainers of the flow of the river past
 the peninsula as they now enjoy it, and so injure their fishery at the mouth
 of the estuary.

The respondents on the other hand maintain, that the erection is not truly to
 any extent *in alveo*, that in any case it is plainly *innocue utilitatis*, and that
 the complainers have no ground for objecting to its being left where it is. I have
 considered this case with anxious care, the interests involved being so serious, and
 the possible results of any judgment to be pronounced upon fisheries in similar
 estuaries being so important. I have come to the conclusion that the Court
 ought not to interfere with the judgment given by the Sheriff-substitute. It
 appears to me that the evidence adduced for the complainer proves satisfactorily
 that the erection made by the respondents does interfere with the natural flow
 of the water. This is shewn by the fact that the water flows through the
 respondents' banked-up shingle and piles in a northerly direction when the tide
 is out and there is no flood water in the river. That is therefore plainly a
 natural direction for the water to take, even at the ebb of the tide,—I mean the
 water which comes down the river proper as distinguished from tidal water.

This point seems to me so important that I think it necessary to refer to the
 evidence. Mr Stevenson, the engineer, states that he examined the defenders'
 erection at "low tide" and when, "there was no fresh in the water." At that
 time he says, that "60 feet of this obstruction at its lower or eastern end, was in
 the water, and therefore in the *alveus* of the stream. There was water flowing
 through the shingle bed at the west end of the piling." He also says, that such

an erection "would have the tendency to collect gravel at and around it." He also expresses his opinion that at the part of the erection, where the piles are not in water at low tide, the *alveus* has been "artificially raised." This means that part at least of the embankment put up round the piles by the defenders is placed in the *alveus* of the stream. Mr Black also examined the erection at low water. He says that at low water "there was water flowing between the piling at the east end, and percolating through the shingle along the whole land to an extent which convinced me that if said obstruction or embankment were removed there would be a clear flow of water northwards over the side of the present embankment and obstruction." He also says, that it tends "to accumulate deposits." He estimates that the shingle at the piles is from ten inches to a foot "above the natural unfixed shingle of the bed of the river," and that he is "convinced that the ground into which the piling was driven was on a level with low-water mark." James Bethune, a pilot, states that there is now "shingle along the line of them, where formerly no shingle used to be. Before these piles and shingle were put there the water had a free run northwards." The pilot Munro says, that at low water "there was about five inches of water along the front of the piles. Once the bank gets dry, the river water runs against the piles, and if they were not there it would run towards the Skibo side." William Bethune proves that when a net is shot at the place in question, it swings "round to the left bank near where the middle of the present obstruction now is." He also says, "At low water the whole of the piling of the defenders' obstruction appeared above water. At this time I could not see the base in which the piles were fixed, as it was below water. The piles were driven into the ground and banked up with stones. . . . The bank where the piling now is was never dry during the time I fished for Mr Marshall." That was in 1887. Peter Scott says the piles are driven within low-water mark; "my reason for believing this is that I saw the water run about the posts and over the gravel. When the nets are drawn there, they are drawn in the water and not on dry land. Before the piling was put up the water ran over the place towards the Skibo side, and it still does so at the bottom end of the piling where the boarding has been taken off." It is right to say that in cross-examination this witness says that six only of the piles were driven into ground which was "not dry at low water." Mr Manners, an engineer, says that "along the line of this row of piles there is a bank of shingle, evidently artificial. . . . At the lower end of this obstruction I noticed that the water flows over the top of this artificial shingle bank, and that for the remainder of its length the water percolates through the bank towards the Skibo side. . . . The artificial bank about the base of the piles obstructs the natural flow of the water towards the Skibo side." In cross-examination he says, "From my examination of the piling I concluded that if the artificial embankment were away the piling would all have been into ground below low-water mark."

The evidence for the defence upon this matter is of course not so strong, and is indeed in some respects contradictory of the complainer's evidence. It tends to prove that at the upper end of the defenders' erection there is dry ground, when the river is low, between it and the water. But it appears to me that, when the evidence is sifted, the true result is that the defenders' banking up of the piles with shingle is truly the cause of there being uncovered ground to the south of the piles at low water. Thus John Powrie admits that "water from the main stream trickles through the embankment on to the Skibo side." George Main

No. 66. admits that "if the embankment were removed from the ground on which it is built, a very little of that ground would be above low-water level. Were the embankment and piling removed, the water from the river would then flow towards the Skibo side." Then Mr Westland, the engineer, proves that the bottom of the respondents' erection is two feet lower than the opposite bank. He also found that at low water only one half of the defenders' erection was uncovered. Mr Gordon, the engineer, found the water at low tide about a foot up the piles at the lower end, and this witness expresses his belief that a quantity of shingle had not been deposited on the ground at the place, while there is no doubt that there was. This witness also admits that, if the banks on the Skibo side are raised by artificial means "the stream would not get relief, and if such relief were stopped the tendency of the stream would be to break over the Balnagown bank." Mr Young, the engineer, when the water was very low, found six of the piles, where they shew above the shingle under water, and he says that "assuming that the river gets lower in summer, then these piles would be above low-water mark." It is to be noted that it was in March when Mr Westland and Mr Young were at the place. Mr Calder says that some of the piles are in the water at low tide and that he "saw water trickling through the shingle bank, but I cannot be sure if it was low tide."

Now, that body of evidence convinces me that the whole, or a very substantial part of the respondents' erection is in the *alveus* of the stream. It is true that some of the witnesses for the respondents say that the defenders' erection is altogether above low-water mark, but their evidence cannot in my judgment overcome the great body of evidence to which I have referred. It is remarkable that the workmen who actually drove the piles and banked them up with shingle are not called as witnesses. It is not conceivable that if they, when they drove the piles, drove them into ground above the water at ebb tide, they should not have been put in the box to prove that fact. They must have known best, as they dealt with the ground as it was before any piles or shingle were placed there.

I have therefore come to the conclusion that it is proved that the respondents' erection is, to a substantial extent, indeed in my opinion practically to its whole extent, an encroachment on the *alveus* of the river. It seems to me, that, if that be so, then the embankment and piles must be to a greater or less degree an obstruction to the natural course of the water at that point. But if the water is obstructed, then the tendency must be, to some extent at least, to compress the flow of the water in the channel between the respondents' erection and the complainant's bank. In so far as there is increased difficulty presented to the water in going in the direction in which it naturally inclines to go at the place where the respondents have made their erection, in that degree must the water exercise more force elsewhere.

Now, the pursuer says that the practical effect is that the quantity of water which finds its way out to the southward opposite the respondents' erection is greater than the quantity which passed out there in the period before it was placed there. They produce a considerable body of evidence to prove this, and there is no counter evidence. They prove that while formerly the streams breaking out there were not more than an inch or two in depth, they are now as much as eleven inches in depth. This can only be the result either of the erosion of the bank by increased pressure, or by the level of the water being forced up by the diminution of the freedom of escape for the water in a northerly direction at the opposite side.

Dec. 11, 1891.
 Ross v. Powrie
 & Pitcaithley.

Such being my view of the facts of the case, it only remains to consider what is the law applicable to them. I take it to be settled law that no proprietor is entitled to place any obstruction upon the *alveus* of a stream, even although the stream is not tidal and he has the right of property in the *solum* up to the *medium filum*. The case of a tidal stream is *a fortiori* of an ordinary stream. The rights of the riparian proprietor are more limited, as he cannot have a right of property in the *solum*. He may obtain right to foreshore by grant from the Crown, but he cannot obtain a grant beyond low-water mark. The *solum* of the *alveus* is in the Crown, as one of the *regalia majora*, for public uses, and cannot be alienated. The law as regards the *alveus* of a river was very fully gone into in the case of *Bicket v. Morris*, and fully justifies, in my judgment, the statement that a riparian proprietor cannot by himself and his tenants maintain a right to alter the *alveus* of a river. Of course there are many unimportant things done by proprietors and tenants which are technically interferences with the *alveus*, such as driving in a stake or two to project the end of a fence, and prevent stock passing out of a field, or the like. These no one objects to, and they would probably not be held ground for an interdict if challenged, on the principle "*de minimis non curat pretor*." But wherever there is any definite alteration of the condition of matters as regards the *alveus*, the law is that an opposite proprietor may insist on stopping what is being done, and having matters restored. The only exception which has been made to this is the case of those having right to salmon-fisheries, who are held entitled to maintain their fisheries in the condition in which they have been occupied. For example, if heavy boulders are swept down in flood on to a salmon shot, these may be removed on the ground that they interfere with the use and prevent the beneficial use of a right of franchise in salmon-fishing. That was decided in the case of *Macbraire*. It was held to be no interference with the rights of an opposite proprietor, although it was truly an interference with the *alveus*, which could injure the complainer, being only a maintenance of the *status quo*, and only done to prevent destruction of a valuable right. But that case went only to a right of preservation and restoration, it had no bearing upon the question whether an *opus manufactum*, a new erection, may be placed in the stream. The law appears to me to be distinctly settled on that question, to the effect that, if the *alveus* is altered by the act of the opposite proprietor, or those in his right, the other proprietor can *first* stop his proceedings, and *second* insist upon restoration, and this without the complainer being required to prove that the operation has caused, or must cause, damage on his side of the river. Such was the law laid down in *Bicket v. Morris*, and it is well expressed in Lord Benholme's judgment, which is approved by the House of Lords "as being perfectly sound in principle," when he says,—“Without my consent you are not to put up your building in the channel of the river, for that in some degree must affect the natural flow of the water. What may be the result no human being with certainty knows, but it is my right to prevent your doing it, and when you do it, you do me an injury, whether I qualify damage or not.”

Lord Cranworth expresses this in other words, viz:—“The owners of the land on the banks are not bound to obtain or to be guided by the opinions of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in water in which they have a common interest. There is in that case, and in all such cases there must ever be, a conflict of evidence as to the probable result of what is done. The law does not enforce upon riparian proprietors the duty of scanning the accuracy or appreciating the weight of such

No. 66. testimony. They are allowed to say: 'We have a common interest in the unobstructed flow of the water, and we forbid any interference with it.' This
 Dec. 11, 1891. is a plain, intelligible rule, easily understood and easily followed, from which I
 Ross v. Powrie & Pitcaithley. think your Lordships should not allow any departure."

Applying these views to the present case, I think your Lordships can have no hesitation in holding that this erection, if to any substantial extent *in alveo*, may be objected to by the complainer, on the footing that it may cause changes in the flow of the stream, which may cause injury to his property, and, if so, that its removal must be ordered.

One question remains. This erection it is said is, if *in alveo* at all, not altogether *in alveo*. My own view upon the evidence is that it is substantially all *in alveo*. I am inclined to hold that, where a substantial part of such an erection is certainly *in alveo*, even when a river is at its very lowest, it is not proper to deal with the matter by attempting to define the exact line of low water of the river. The line of low water of a river at the extreme time of drought is not truly the line of low water. The true line is that at which the flow will run in the dry season of an ordinary year. But if that be the sound view, as I think it is, then I have no doubt that practically the whole of this erection has its base within low-water mark. I therefore hold that it is all liable to be removed. But even were it otherwise, it is beyond doubt that a substantial part of the erection is below the line. If this is so, then it is certain that it is only a question of inches as regards the whole erection being in the water flow. And as it undoubtedly checks the flow of water towards the Skibo side, it is an erection which, if it tends to injure the interests of the opposite proprietor, cannot be allowed to remain. This is, I think, the logical result of the case of *Menzies v. Breadalbane*. A proprietor may protect his bank, but not in such a way as to cure his own injury by injuring his opposite neighbour. If then the respondents' erection tends to injure the complainer's property, as on the evidence I hold it does, I am of opinion that, although part of the erection be slightly above the low-water mark in part of its length, yet still the whole erection is open to the complaint made against it.

I may say further, that, even if the law were not as I have stated as regards erections on the bank, I should still be inclined to hold that the whole erection should be ordered to be removed. It is a *unum quid*, and even upon the respondents' own shewing it is to a substantial extent in the *alveus*, the rest of it being on a shore-flat close to the line, and tending, as the evidence shews, to collect sand and gravel on the ground below low-water mark, immediately in front of it.

But I feel bound to say that my own opinion is that the complainer has proved the erection to be *in alveo*, and that therefore it is in its entirety illegal.

I therefore move your Lordships to find substantially in terms of the judgment of the Sheriff-substitute.

LORD YOUNG.—This case is difficult and doubtful, and it is so with respect to every point which arises in it. But on the whole matter, and after giving my best attention to the very able argument we have heard, I am not satisfied that there are satisfactory grounds on which to set aside the judgment of the Sheriff-substitute.

LORD RUTHERFURD CLARK.—I think the complainer is entitled to prevail. I proceed on the ground that it is sufficiently established by the evidence that

the works constructed by the respondents are injurious to the complainer's salmon-fishings. No. 66.

Dec. 11, 1891.
Ross v. Powrie
& Pitcaithley.

LORD TRAYNER.—The pursuer in this case complains that the defenders have recently erected an embankment in the Kyle of Sutherland, and in the river which flows through it, which injures the pursuer's fishings *ex adverso* thereof, or which, at the least, threatens to injure these fishings very seriously. The defenders admit that they have erected the embankment complained of, but justify their action on the grounds (1) that their embankment is erected *in suo*, and (2) that it is *innocue utilitatis*. Looking to the fact that the embankment is a *novum opus*, confessedly for the purpose of improving the defenders' fishings, and not for the purpose of fortifying their bank, it seems to me that it lies upon the defenders to shew that they are entitled to do what is now complained of.

On a careful consideration of the proof, I am satisfied that they have failed to do so.

In the first place, I think the defenders have failed to shew that the erection complained of is *in suo*. Some witnesses give evidence to the effect that the embankment is altogether *in alveo* of the river; others describe it as to a considerable extent *in alveo* of the river, and as to the remainder on the *alveus* or foreshore of the Kyle; others again say that the embankment is erected on ground that is dry at low water. Whichever of these views be correct, the embankment cannot be said to be erected *in suo* of the defenders or their landlord. The *alveus* of the river (it being tidal and navigable) is vested in the Crown, and the foreshore of the Kyle is vested in the Crown also—at least, I must so presume in the absence of any averment that the proprietor of Skibo has any proprietary right therein. Now, if the embankment is entirely within the *alveus* of the river, and injures or threatens to injure the rights of the pursuer, it is quite clear that it is illegal and must be removed. If, on the other hand, it is erected partly on the *alveus* of the river, and partly on the foreshore of the Kyle, I think that the same result follows. I regard the embankment as a *unum quid*, and if part of it is illegal I think the entire removal must be ordered. I do not think that the pursuer is required to shew that every yard of the embankment is an illegal encroachment on his right in order to obtain the remedy he here seeks. It being clear that part—a substantial part—of the embankment is undoubtedly illegal, it follows, in my opinion, that the embankment must be removed.

Again, if the embankment is entirely on the foreshore, that is, above low-water mark, I think the pursuer is still entitled to insist on its removal, because it affects the ordinary flow of the water, both in the Kyle and in the river, to his prejudice, and may, if allowed to remain, prejudice his rights more than it has yet done. This view is, I think, in accordance with the principle of the decision in *Morris v. Bicket*, and in the earlier case of *Menzies v. Earl of Breadalbane's Trustees*. In expressing myself as I have done, I am not to be taken as entertaining any opinion against the view that the preponderance of the evidence is to the effect that the whole embankment is erected *in alveo*.

In the second place, I think it is not established that the embankment is *innocue utilitatis*. On the contrary I think it is established, and established beyond doubt, that the embankment now does injury to the pursuer's rights, and will do serious injury to those rights if allowed to remain where it is. It may not be proved—I do not think it is proved—that the embankment has caused the channels, shewn on the plan produced, running from A and C to B, but it is

No. 66. distinctly proved that, since the erection of the embankment, these channels have increased both in width and depth, and that such increase has been caused by the embankment. The pursuer's apprehension that the whole body of the river might or would be diverted to these channels within a comparatively short time is, in my view, by no means imaginary or fanciful. I think the pursuer has good ground for apprehending such an event if the embankment remains where it is. If such an event happened, it would cut off the pursuer's fishing at the Black Scalps altogether, an injury to his rights which he certainly has both title and interest to prevent.

I do not go further into the details of the case, as your Lordship in the chair has already done so fully. I am of opinion that the pursuer is entitled to prevail, and that the judgment appealed against should be affirmed.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-substitute of 16th June 1891: Of new ordain the defenders, on or before the 20th day of January 1892, to remove the embankment complained of, and remit," &c.

J. & F. ANDERSON, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 67. MITCHELL & BAXTER AND ANOTHER, Pursuers (Reclaimers).—
Guthrie Smith—C. K. Mackenzie.
 Dec. 12, 1891. HARRY CHEYNE (Curator Bonis to A B), Defender (Respondent).—
Johnston.
 Mitchell & Baxter v. Cheyne. THE BANK OF SCOTLAND, Defender (Respondent).—*Pitman.*
 HARRY CHEYNE (Curator Bonis to A B), Petitioner.—*Johnston.*
 MITCHELL & BAXTER AND ANOTHER, Respondents.—*Guthrie Smith—C. K. Mackenzie.*

Judicial Factor—Curator Bonis—Bank cheque granted by incapax.—Held (1) that an incapax to whom a curator bonis had been appointed was not entitled to grant a cheque in payment of expenses incurred to his law-agent in opposing the petition; and (2) that a reclaiming note against the interlocutor making the appointment had not the effect of suspending the appointment so as to validate the cheque.

Judicial Factor—Curator Bonis—Expenses of opposing appointment.—The Court, in affirming an interlocutor of the Lord Ordinary on the Bills making the appointment of a curator bonis on the ground of mental incapacity, pronounced no order as to expenses. On appeal the House of Lords affirmed the interlocutor on the merits, and found the law-agents who acted for the incapax entitled to their expenses in the House out of the estate. The Court, on a note by the curator bonis, held that the law-agents were also entitled to their expenses in the Court of Session out of the estate.

Judicial Factor—Curator Bonis—Expenses.—Law-agents, who had acted for an alleged incapax in unsuccessfully opposing the appointment of a curator bonis, held not entitled to claim against the estate for expenses incurred in prosecuting an action in a Sheriff Court for delivery of documents belonging to the alleged incapax in the hands of the curator bonis, the action having been raised after the appointment of the curator bonis by the Lord Ordinary, but before the hearing on a reclaiming note.

1ST DIVISION. (SEE *ante*, A B v. C B, 18 R. 90, and 18 R. (H. L.) 40.

Ld. Wellwood.

On 15th August 1890 the Lord Ordinary on the Bills (Kincairney) appointed Mr Harry Cheyne, W.S., to be curator bonis to A B, then an inmate of Saughton Hall Asylum. A B reclaimed, but on 8th Novem-

ber 1890 the First Division adhered to the Lord Ordinary's interlocutor, No. 67. and on 10th December, pending an appeal by A B to the House of Lords, the Court authorised execution to proceed to the effect of enabling Mr Cheyne to extract his appointment, and act as curator bonis. The Court did not pronounce any order regarding expenses.

Dec. 12, 1891.
Mitchell &
Baxter v.
Cheyne.

Pending these proceedings, on 23d October and 6th December 1890 A B granted two cheques drawn on the Bank of Scotland, with which he had an account, for £300 and £700 respectively, in favour of Messrs Mitchell & Baxter, the law-agents who were acting on his behalf in the curatory proceedings. These cheques the bank declined to honour, except with the authority of Mr Cheyne, as curator bonis, and this authority he declined to give, and accordingly, on 13th January 1891, A B and Messrs Mitchell & Baxter brought an action against the bank and Mr Cheyne as curator bonis for payment of the cheques, alleging that they had been granted to meet the expenses incurred and to be incurred in conducting A B's case in the curatory proceedings.

The pursuers pleaded;—(1) The defenders the Bank of Scotland having had in their hands funds belonging to A B available for payment of the cheques libelled, the same operated as an assignment of the sums for which they were respectively drawn in favour of the pursuers Mitchell & Baxter, from the time when the cheques were respectively presented to the said bank; and decree for the sums therein, with dues of protest, interest and expenses, ought to be granted as concluded for. (2) The pursuer A B was entitled to oppose the application for the appointment of a curator bonis, and the expense thereby incurred, so far as reasonable and proper, being a legal charge on the estate whether the opposition was successful or not, he was entitled to provide the necessary funds by cheques on his bank account in favour of the solicitors employed to attend to his interests. (3) The said cheques having been granted with full understanding of their meaning and object at a time when A B was free to operate on his bank account, they are valid and binding. (4) As A B is subject to no hallucination or delusion affecting his capacity for business, and has not been found by a jury incapable of managing his affairs, the defences ought to be repelled and decree pronounced in terms of the conclusions of the summons.

The defender Cheyne pleaded;—(1) No title to sue. (2) The statements of the pursuers are not relevant and sufficient to support the conclusions of the summons. (3) The pursuers Messrs Mitchell & Baxter, when they obtained the said cheques from A B, being aware that he was incapable of managing his own affairs, and that the matter of the appointment of a curator bonis to him was pending in Court, are barred, *personal exceptione*, from recovering on said cheques. (4) This defender's appointment as curator bonis having been made by the Court of Session, and extract pending appeal allowed, this action, as a means of recovering the account of expenses alleged to have been incurred by A B to the pursuers Messrs Mitchell & Baxter is incompetent, and ought to be dismissed. (5) The cheques founded on having been granted while the drawer was not of sound mind, are invalid.

The pleas for the bank were substantially to the same effect.

On 24th March 1891 the Lord Ordinary (Wellwood) sustained the second plea in law for the defenders, and dismissed the action as laid, finding the defenders entitled generally to expenses.*

* "OPINION.—. . . This action is raised by A B 'and Mitchell & Baxter, law-agents and conveyancers in Edinburgh, his solicitors,' to have the defenders the Bank of Scotland and Mr Cheyne ordained to make payment to the pursuers of the two sums of £300 and £700 contained in the said two

No. 67.

Dec. 12, 1891.
 Mitchell &
 Baxter v.
 Cheyne.

The pursuers reclaimed, but on 9th June, before the hearing on the reclaiming note, the curator bonis presented a note for special powers to

cheques, together with the expenses of protesting and noting the cheques. The summons does not contain any alternative conclusions for damages, or for payment to Messrs Mitchell & Baxter of money properly and necessarily expended by them for A B. It is framed, no doubt advisedly, on the footing that A B was capable of granting the cheques, and that on presentation they operated as an assignation of the sums contained in them in favour of the holders, Mitchell & Baxter—Bills of Exchange Act, 1882, sec. 53.

"It was at first contended for the pursuers that it must be held that A B, not having been cognosced, was and is capable of managing his own affairs, or at least that it must be so held until it is finally decided by the Court of last resort that he is not. It was maintained that it lies upon any person denying his capacity to contract or dispose of his means to prove this in each case before a jury. I am unable to take this view. I am of opinion that although the appointment of a curator bonis is not permanent in this sense, that it falls on the nearest agnate coming forward and claiming the office of tutor, or on the reconvalence of the ward, it has while it lasts the same effect as cognition following on a brieve from Chancery and the verdict of a jury in so far as regards the ward's estate. Now, the effect of cognition is, that, until a declarator of reconvalence is brought, it is conclusive of the incapacity of the lunatic during the period which the verdict covers. It was keenly maintained in the case of *Bryce v. Graham*, 6 Sh. 428, affd. 3 W. and S. 323, that it was beyond the powers of the Court, without proceeding on the verdict of a jury, to deprive a man of the management of his own affairs, but it was solemnly decided by the House of Lords, after a remit to the Court of Session (the proceedings in which are reported in 6 Sh. 425), that in respect of a practice of above 100 years such appointments are competent. The effect of an appointment by the Court of a curator bonis is, therefore, as regards the estate while it lasts, practically the same as cognition following upon a verdict of a jury—that is to say, the ward is held to be as incapable as a pupil of alone managing his own affairs or disposing of his property.

"I am therefore of opinion that the effect of the judgment of the Court was to establish that at the dates when the cheques were granted A B was incapable of effectually dealing with his means and estate. Therefore the bank and the curator bonis are relieved of the burden which would otherwise have been upon them to prove A B's incapacity by other evidence. Any other view would lead to the result that it would be possible for a person of unsound mind, pending appeal from Court to Court, to dispose of the whole of his estate, and thus defeat the very object of the appointment of a curator bonis.

"In the concluding argument for the pursuers it was strongly urged that at least the pursuers are entitled in this process to prove that the sums sued for were in whole or part properly and necessarily expended for behoof of A B, and that they are entitled to recover such sums, as may have been instructed to have been properly expended, from the curator bonis. If this had been practicable I should have been glad to utilise the action for such a purpose. But the defenders do not consent to this course, and I cannot in the absence of consent adopt it. In the first place, the action is framed upon another footing. A B himself is made the leading pursuer, and the action is laid on the cheque alone. As I have indicated, this shape of action was no doubt intentionally adopted for this reason, that the cheques were not granted exclusively for expenses already incurred, but also in great part for expenses to be incurred in carrying the opposition further; and therefore the action, at least in so far as regards the sum of £700, could not have been laid on the footing of disbursements and expenses already made and incurred on behalf of the ward. There was also perhaps this consideration, that if the cheques are good no question as to the amount expended or required need arise. The bank must pay to the extent of the funds in their hands.

"I therefore feel that I have no alternative but to dismiss the action.

the Junior Lord Ordinary, in which he prayed for authority “(1) to pay the expenses incurred to the said Messrs Mitchell & Baxter, which relate solely to opposing the petition for appointment of curator bonis to the ward before the Lord Ordinary and in the Inner-House, as the same shall be taxed by the Auditor of Court, and to remit to the Auditor to tax the same accordingly; and (2) to make a payment or advance to the said Messrs Mitchell & Baxter on account of expenses incurred or to be incurred in connection with the said appeal to the House of Lords, but on condition that they find caution to repeat such payment or advance in the event of the House of Lords not allowing the expenses of the appeal to form a charge against the ward.” * No. 67.
Dec. 12, 1891.
Mitchell &
Baxter v.
Cheyne.

The curator objected to payment being made out of the estate of expenses incurred by Messrs Mitchell & Baxter in prosecuting an action in the Sheriff Court of Edinburgh against Mrs A B and the curator bonis for delivery of the securities and other documents belonging to A B in their hands. This action was raised on 4th September 1890, and was dismissed by the Sheriff, and an appeal against his interlocutor was dismissed by the First Division on 8th November 1890.

On 25th June 1891 the House of Lords affirmed the interlocutor of the Court of Session appointing the curator bonis, and found Messrs Mitchell & Baxter entitled to their expenses in that House.

Thereafter the reclaiming note and the note for special powers came before the Inner-House together, the Junior Lord Ordinary having reported the note.¹

curator bonis having now been appointed, who is administering the ward's estate, the proper course is to apply to him for repayment of past expenses, and an advance of any further expenses which may be required to prosecute the defence. If he does not think fit to pay at his own hand, or to apply for special powers to the Court, it is open to the pursuers themselves to apply to the Court for special powers or instructions to the curator bonis to repay or advance the necessary funds. I think it right to say that I have little doubt that on proper application being made to the Court the curator bonis will be empowered or ordered to pay out of the ward's funds the proper expenses connected with his opposition to the application for appointment in this Court. An advance to meet the expenses of an appeal to the House of Lords is in a different position; that will be a matter for the equitable consideration of the Court, having regard to the whole circumstances of the case, with which they are familiar. No doubt in disposing of the application they will give due weight to the serious importance of the question to A B, the conflict of medical opinion, and the fact that A B's estate, out of which the expenses must come, is so substantial.”

* The note set forth a report by the Accountant of Court, concluding thus:—“In the circumstances as detailed, the Accountant is of opinion—(1) That authority may be granted to the curator bonis to pay the expenses incurred to Messrs Mitchell & Baxter, W.S., which relate solely to opposing the petition for appointment of curator bonis to the ward before the Lord Ordinary and in the Inner-House, as the same shall be taxed by the Auditor of Court; (2) That authority should not be granted to pay the expenses relating to the endeavour to obtain delivery of the ward's securities, as such expenses ought not to have been incurred while the petition for appointment was undisposed of by the Court; and (3) That payment may be made on account of the expenses incurred, or to be incurred, in connection with the appeal to the House of Lords, but only upon condition,” &c., as in the prayer of the note.

¹ *Authority for Curator Bonis*.—Bryce v. Graham, 6 S. 428, affd. 3 W. & S. 323.

Authorities for Mitchell & Baxter.—Rhodes v. Rhodes, L. R., 44 Ch. Div. 94; Wentworth v. Tubb, 2 Younge & Collier, Ch. Rep. 537.

No. 67.

Dec. 12, 1891.
Mitchell &
Baxter v.
Cheyne.

LORD PRESIDENT.—We have here to consider certain questions relating to the expenses incurred in proceedings with reference to the appointment of this curator bonis.

I am, in the first place, of opinion that the decision of the House of Lords in dealing with the costs in that House carries with it as a necessary consequence that the expenses of the opposition in this Court are to be dealt with in the same way.

As regards the action on the two cheques, it is important to observe that the first of these cheques is dated after the judgment of the Lord Ordinary making the appointment of the curator bonis, and that the second is dated after the judgment of this Division refusing a reclaiming note against the Lord Ordinary's interlocutor, while the action was not raised till 13th January 1891, after interim extract of the curator's appointment had been allowed to go out. Now, the question is, whether the expenses incurred in this action were expenses incurred for the benefit of the ward's estate. Mr Smith cited some English cases, but I do not think that they have much bearing on this question, for they related to the case of necessities supplied to the ward. We have here to deal with a much more specific legal problem, as to the effect of taking a document of debt from a person whom the Court have superseded in the management of his affairs. It appears to me that an action founded on such a document is an action which ought never to have been brought. I think it is an action which from the first was doomed to failure, and which consequently could not possibly prove of benefit to the ward's estate. I think, therefore, that Messrs Mitchell & Baxter not only are not entitled to their expenses out of the estate, but must also relieve the estate of the expenses to which they have put it by bringing the action; or, in other words, that they must be found liable in expenses.

In the Sheriff Court action also I am not for allowing any part of the expenses to fall on the estate. That action was raised after the appointment of the curator bonis had been made; and that being so, while it would of course have been quite competent to come to this Court with any question as to the custody of the ward's papers, for the ward and Messrs Mitchell & Baxter to go to the Sheriff Court was practically to assert, contrary to the determination of the Court, that the ward remained *dominus* of his own affairs.

LORD ADAM.—With reference to the first point, I should have thought that the most proper and convenient time for disposing of the expenses incurred in opposing the curator's appointment in this Court would have been when the whole facts were before the Court. We are told the practice is otherwise, and that this practice was recognised and acted on in the present case, and consequently that there was no finding as to expenses when the appointment was made. That being so, I concur that as the House of Lords thought right to allow the expenses of the opposition in that House, it is *a fortiori* that the expenses of the opposition here should be allowed.

In the Sheriff Court action expenses cannot be allowed as a charge on the estate. It appears to me that that action was an entirely unnecessary and useless proceeding. If it was thought necessary to regulate the custody of the ward's papers, the proper course would have been to have made a motion in the petition, when the matter would have been at once disposed of.

In the action on the cheques I concur. A more unfounded action I have scarcely ever seen. The pursuers ought to have gone to the curator, and they

would then have received payment of their just expenses. They, however, rendered no account to him, but instead, after receiving these cheques, they proceeded to bring this action. I think that there was no hope of their succeeding in the action, and that being so, I think the estate cannot be made liable in the expenses of it.

No. 67.
Dec. 12, 1891.
Mitchell & Baxter v. Cheyna.

LORD M'LAREN.—It must often happen in the case of persons having property to be managed, and afflicted with disease affecting their capacity, that a diversity of opinion exists as to whether it is for their benefit that the management of their affairs should be put into other hands. When a difficulty exists, or the afflicted person has capacity sufficient to give instructions to agents to oppose, it is usual for the Lord Ordinary to make a remit to skilled men of his own selection, instead of merely accepting the formal medical certificates which are lodged with the petition, and in all such cases the claim for the expenses of the opposition would be considered in a liberal and indulgent spirit. But when a judgment has been given by a Court of first instance the presumption is changed, and the right of the agent to have his costs out of the estate will depend on the circumstances of the particular case. Here, as the House of Lords have allowed the expenses of both parties to the appeal to be charged against the estate, it follows that those incurred here must be so allowed. If that had not been so, I might have had doubts whether this action should have gone beyond the Lord Ordinary's Court. On the other two actions I concur with your Lordships.

LORD KINNEAR concurred.

THE COURT pronounced the following interlocutors:—

In note for curator:—"Having resumed consideration of the petition and whole process, with the note for the curator bonis, and answers thereto for Messrs Mitchell & Baxter, also report by the Accountant of Court referred to in said note, and the judgment of the House of Lords in the appeal by the ward against the petitioner Mrs D., and heard counsel for the parties, authorise and empower the curator bonis, in terms of said judgment of the House of Lords, to make payment out of the funds of the ward in his hands of the expenses incurred by both parties in respect of said appeal to the House of Lords, as the same shall be certified by the Clerk of Parliaments: Further, authorise and empower the curator bonis to make payment out of said funds of the expenses incurred by Messrs Mitchell & Baxter which relate solely to opposing the petition for the appointment of a curator bonis before the Lord Ordinary and in the Inner-House: Further also approve of the second (2) head of the conclusions of the opinion of the Accountant of Court, dated 2d June 1891, relating to the expenses of the proceedings to obtain delivery of the ward's securities, and decern; remit the accounts of expenses other than the accounts of expenses incurred in respect of the appeal to the House of Lords, to the Auditor to tax and to report."

In the reclaiming note:—"Refuse the reclaiming note, and decern: Find Messrs Mitchell & Baxter liable in expenses generally to both defenders, the Bank of Scotland and Harry Cheyna, the curator bonis, and remit the accounts of expenses to the Auditor to tax and report."

MITCHELL & BAXTER, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 68. THE GALLOWAY SALOON STEAM PACKET COMPANY, Pursuers (Reclaimers).

—*D.-F. Balfour—Salvesen.*

Dec. 12, 1891.
The Galloway
Saloon Steam
Packet Co. v.
Wallace.

ANDREW WALLACE, Defender (Respondent).—*Lord-Adv. Pearson—Dickson.*

Company—Directors' qualification—Register—Beneficial interest—Companies Act, 1862 (25 and 26 Vict. c. 89).—In an action by a company registered under the Companies Acts, 1862-86, against a shareholder for payment of a call, the defender pleaded that the call had not been validly made, on the ground that the directors who made the call had not the requisite qualification, in respect that their shares, although registered in their own names, were truly held in trust for another. *Held* that the defence was *irrelevant*, inasmuch as the directors were *ex facie* of the register the holders of the shares, and must be held entitled to all the privileges of shareholders, as they were liable to all the obligations.

Company—Directors' qualification—Articles of association—Construction—"Ostensible holder."—The 6th article of association of a company registered under the Companies Acts, 1862-86, provided that any two of the directors should be a quorum, and that any member holding ten shares should be eligible as a director. The 4th article provided that "in case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy, . . . whose name shall be entered in the books of the company as the ostensible holder."

Held that the 4th article did not apply to the case of persons registered as individual shareholders, although they held in trust for a company.

2D DIVISION.
Ld. Wellwood.

THE GALLOWAY SALOON STEAM PACKET COMPANY was, upon 8th June 1886, registered under the Companies Acts, 1862-86, as an unlimited company, with a nominal capital finally fixed at £44,000, in shares of £10 each. The number of shares issued was 4316, and £6, 17s. 6d. was paid on each of them.

Upon 7th July 1891 the directors of the company, at a meeting attended by two (being a quorum*) of their number, Messrs Aitken and Jordan, resolved to make a call upon the shareholders of £1 each, payable upon 1st August.

Andrew Wallace, solicitor, Leith, who held 804 shares, and was a director of the company, declined to pay the call, and the company on 21st August raised an action to enforce payment of the amount payable by him upon his shares.

The defender averred, and the pursuers admitted, that the two directors who made the call were registered in 1891, Mr Aitken as holder of 40 shares and Mr Jordan as holder of 100 shares.

The defender further averred,—(Stat. 14) "The defender has recently learned . . . that none of those claiming to be directors, with the exception of the defender, are qualified to be directors. The whole shares standing in the said other directors' names truly belong to the said North British Packet Company or the North British Railway Company, and the said so-called directors have no beneficial interest therein, and are merely the nominees of the said North British Packet Company or the said North British Railway Company. The shares belonging to the said North British

* The 6th article of association of the company was as follows:—"The business of the company shall, as aforesaid, be conducted under the superintendence of the directors before named, any two of whom shall be a quorum, and thereafter of the directors who shall be named and elected by the company as hereinafter directed at the aforesaid stated general meetings, to be held annually on the last Monday of November, and every member holding ten shares of the stock of the company shall be eligible and may be elected a director. . . ."

Packet Company or the said North British Railway Company are registered in separate names in order to enable the said companies to evade the provisions of article 4* of the Galloway Company's articles of association, so as to allow them to control the management and administration of the latter company. The North British Railway Company has put forward the North British Packet Company as nominal holders of said shares, because the North British Railway Company is not entitled to hold such shares. The North British Packet Company is entirely composed of partners who are shareholders in and nominated by the North British Railway Company, and the whole capital of said Packet Company is found and contributed by the North British Railway Company."

No. 68.

Dec. 12, 1891.
The Galloway
Saloon Steam
Packet Co. v.
Wallace.

The pursuers denied that there was any evasion of article 4, or that the directors were not qualified to act.

The pursuers pleaded;—(1) The defender, in respect of the shares held by him and of the call thereon, is liable to the pursuers in the sum concluded for. (2) The defences are irrelevant, and should be repelled.

The defender pleaded;—(2) The call in question not having been validly made, the defender should be assoilzied. (3) The directors who claim to have made the said call not being qualified to act as directors or to make the call, the defender should be assoilzied. (4) The pursuers' material averments being unfounded in fact, the defender should be assoilzied.

On 24th November the Lord Ordinary (Wellwood), before answer, allowed the defender a proof of his averments in his statement of facts so far as not admitted, and to the pursuers a conjunct probation.

The pursuers reclaimed, and argued;—The defences were irrelevant. They contained no relevant allegations of any such disqualification of the directors as could invalidate the call. In the first place, the directors who made it were duly elected to the office, and each of them was admittedly entered on the register as the holder of more than ten shares. Being thus registered they must according to the 23d section of the Act of 1862 be deemed "members of the company" holding more than ten shares each, and they were thus duly qualified to act as directors under the 6th article of association. It was irrelevant to inquire whether they were beneficial owners of these shares or not. The register was conclusive on the matter, and it was incompetent to look behind it.¹ Being

* The 4th article of association was as follows:—"A general meeting of the partners shall be held upon the last Monday in November 1886, and a general meeting shall also be held upon the last Monday of November every year thereafter during the subsistence of this copartnery, for the purpose of electing directors as after mentioned, and for considering and adopting such measures as may be submitted to them tending to promote the welfare and prosperity of the company. At all general meetings the members shall have a right to vote in person or by proxy, such proxy being always a member of the company, and empowered by a proper mandate holograph of the granter, or duly attested according to the rules of the law of Scotland; and the votes of the members at said meetings shall be counted and valued not *per capita*, but according to the number of shares held by each voter respectively, and a majority in point of value shall decide and determine every matter or question. In case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as aforesaid, whose name shall be entered in the books of the company as the ostensible holder, and no trustee on the bankrupt estate of a partner shall be entitled as such to attend any meetings or to vote by proxy at the same."

¹ *Pulbrook v. Richmond Consolidated Mining Co.*, 1878, L. R., 9 Ch. Div. 610; *Bainbridge v. Smith*, 1889, L. R., 41 Ch. Div. 482; *Muir et al. v. City of Glasgow Bank*, Dec. 20, 1878, 6 R. 392.

No. 68.

Dec. 12, 1891.
The Galloway
Saloon Steam
Packet Co. v.
Wallace.

then registered individually, they were liable for all the obligations of a shareholder, and in equity must also be entitled to all the privileges arising from the fact of being a registered shareholder. In the second place, it was said that both the directors were holders of the shares in trust for a company, who were the real holders, and that under the 4th article of association only one could vote for the company, and that having regard to the 6th article the call made by the other director was bad, as it required two directors to make a quorum. Now, on this point the defender had attempted to shew that a limited company like the railway company could not have been registered as a shareholder in an unlimited company like the Galloway Packet Company. That, however, was quite erroneous. As long as the memorandum and articles of the latter company did not forbid it, there was no legal impediment in the matter. While in *Muir's* case it was established that trustees could not become shareholders "as trustees," so as to limit their liability to the trust-estate, the opinion of the Court proceeded on the footing that if it could have been shewn that in Scots law the trustees were a corporation, the result would have been different. The limited company in the present case was not a partnership at common law, but a corporation whose stock was divided into shares legally vendible in the market, and duly registered under the Companies Acts. The clause relied on in article 4 by the defender had nothing to do with a director's qualification. It did not mean that a company must name an "ostensible holder" to be registered as owner, but merely one to vote at general meetings, just as in private trusts one trustee was frequently nominated to represent the trust.

Argued for the defender;—He was entitled to a proof of his averments, which were that the directors who made the call were not qualified to do so. Both of them were nominees of and held in trust for the railway company, who were the real holders of the shares, and the purpose of this was to get behind the stipulation in the 4th article of association. Under that article the railway company were only entitled (if entitled to be registered in this company at all) to be represented by a single nominee, and under the 6th article two directors were required to make a quorum. Now, to begin with, it was anomalous that an unlimited company could ever come to consist of one or more companies limited by shares. Certainly there was no direct authority for the proposition. But assuming that the railway company could be registered as a holder of shares, one person had to be put on the register as its nominee, and he was the "ostensible owner" of the shares in the sense of article 4. No doubt a private individual could hold a number of shares in a company, and divide them among a number of his friends, so as to increase his voting power without the assignees having any beneficial interest in the shares, but the 4th article of association had guarded against a company acquiring shares and doing the same thing.

At advising,—

LORD TRAYNER.—The pursuers' company is registered under the Companies Acts as an unlimited company, and the defender is a member thereof and holder of 804 shares. At a meeting of the directors of the company held on 7th July last, at which two and a quorum of directors were present, a call was made on the capital of the company of £1 per share. Under that call the defender became liable for the sum of £804 in respect of the shares held by him but as he refused to pay the same this action has been brought against him to enforce payment. The defender has stated in defence some objection to the validity of the call, but the only objection now maintained is that the call is

No. 68.

invalid in respect the directors who made the same were not qualified to act as directors. By the articles of association of the company it is provided that "every member holding ten shares" shall be eligible and may be elected a director. Now, no question is raised as to the fact of the two directors in question having been elected to the office of director, and the regularity of this election is not impugned. The question therefore is, have they the requisite qualification? It is admitted that those directors are entered on the register as holders, each of them, of more than ten shares in the company. Being so registered they must, according to the 23d section of the Act of 1862 be deemed to be "members of the company" in respect and to the extent of the shares entered in the register as held by them. The two directors, therefore, according to the criterion furnished by the Act of 1862, are members of this company holding more than ten shares each; and if so, then they have the qualification for the office of director specified by the articles of association.

Dec. 12, 1891.
The Galloway
Saloon Steam
Packet Co. v.
Wallace.

It is said, however, that the shares held by these directors are held by them in trust for the North British Railway or North British Packet Company, and that they have no beneficial right or interest in the shares which are registered in their names. I think this is a matter which is quite irrelevant to any question affecting the rights or obligations of persons who are registered as shareholders.

The statute forbids the entry on the register of any company registered under its provisions, of the notice of any trust, expressed, implied, or constructive, and I think we cannot in such a case as this go behind the register to inquire into alleged facts which are forbidden to appear there. This appears to have been the view taken in the English cases to which we were referred, and I am prepared to follow that view here. It is obviously a reasonable view. The absence of any notice of trust in the register prevents the person registered from pleading that he holds in trust as against the company or its creditors in any question which may arise inferring liability on him (the registered shareholder) for fulfilment of the whole obligations imposed on him by his being a member and holding shares. He is registered individually, and individually he is liable for all the obligations of a shareholder. I think the converse of this must equally obtain. He is registered individually, and individually he must be entitled to all the privileges or benefits arising from the fact of his being a registered shareholder.

The defender, however, relies more on the special terms of the articles of association of this company than on the terms of the statute, in support of his defence. He pleads that both of the directors in question being nominees or holders of shares in trust for a company, itself the real holder, only one of them could act or vote as for the company, and that one director could not validly make the call. I think he is right in saying that any one director could not have made the call. It required at least a quorum of the directors to make the call, and it is provided by the article that two of the directors shall be a quorum. But the articles to which the defender refers appear to me to have no reference either to the qualification of a director or to anything done at a directors' meeting.

That article is the 4th, and the important part of it is the last clause, which provides—"In case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy as

No. 68. aforesaid, whose name shall be entered in the books of the company as the ostensible holder."

Dec. 12, 1891.
The Galloway
Saloon Steam
Packet Co. v.
Wallace.

I think that provision has no application or bearing whatever on the present question. In the first place, the words, "any share or interest . . . held in the name of a company or firm," must, in my opinion, be held to mean any share or interest registered in the name of a firm, and if that be the meaning of the words, they have no application to the case where the shares are not registered in the name of a firm but in the names of individuals. Secondly, the two directors in question are certainly not entered on the register as the "ostensible holders" for behoof of any firm, and therefore any restriction in acting or voting imposed on such "ostensible holders," registered as such, does not affect them. But, thirdly (and this is of itself a complete answer to the argument maintained by the defender), the article now under consideration provides a certain regulation to be observed in voting at general meetings of the company, and at such meetings only. The meeting of 7th July last was not a general meeting, and therefore the 4th article can have no bearing upon what was then done.

I think the defence maintained here is irrelevant, and therefore the proof allowed by the Lord Ordinary is unnecessary. The defences being irrelevant, the pursuer, in my opinion, is entitled to decree as concluded for.

LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the defences, and decerned against the defenders in terms of the conclusions of the summons.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—ANDREW WALLACE, Solicitor—Agents.

No. 69.

Dec. 16, 1891.
Birnie v.
Christie.

MRS CATHERINE PENNY OR BIRNIE AND OTHERS, Petitioners (Reclaimers).—*Comrie Thomson—W. Campbell.*

MRS MARGARET PENNY OR CHRISTIE AND OTHERS, Respondents.—*Jameson—F. T. Cooper.*

WILLIAM PENNY CRAIK AND SPOUSE, Respondents.—*D.-F. Balfour—Guthrie—Crabb Watt.*

Executor—Removal—Agreement by executor adverse to executry estate—Judicial Factor.—Where a majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate, the Court, in a petition at the instance of certain of the next of kin of the deceased (including the minority of the executors), sequestrated the estate and appointed a judicial factor.

1ST DIVISION.
Lord Low.

ANDREW PENNY, of Park, Aberdeenshire, died intestate in Bolivia on 18th May 1890, leaving a considerable amount of property in Bolivia and in Scotland.

On 10th October 1890 four sisters of the deceased—Mrs Birnie, Mrs Christie, Mrs Mennie, and Mrs M'Intosh—were decerned executors-dative to him *qua* four of his next of kin.

About £36,000 of the moveable estate belonging to the deceased in Great Britain was in the hands of his London agents, Messrs Antony Gibbs & Sons, and this sum was claimed by the executors, and also by Senora Maria Galindo Penny, who stated that she was the widow of the deceased and that he had died domiciled in Bolivia, by the laws of which country she was entitled to his whole heritable estate there, and to his whole moveable estate wherever situated. She further stated, that she

had obtained the administration of his estates in Bolivia. The executors denied these averments regarding the marriage and domicile of the deceased. In consequence of these claims Messrs Gibbs raised a multiplicity, in which they consigned the sum in their hands in Court.

On 11th September 1891 two of the executors, Mrs Christie and Mrs Mennie, together with the representatives of another, Mrs M'Intosh, who had died, abandoned their opposition to Senora Galindo Penny's claim, and entered into the agreement quoted below with William Penny Craik, to whom Senora Galindo Penny had been married on 20th August 1891, and who claimed to be in right of her whole estate under their marriage-contract.*

No. 69.
Dec. 16, 1891.
Birnie v.
Christie.

* The agreement bore to be between William Penny Craik of the first part, and Alexander Wilson and Alexander Milne, solicitors in Aberdeen, as mandataries for the other parties named above of the second part, and proceeded on the narrative that the said Andrew Penny died intestate at Huanchaca, in Bolivia, on 18th May 1890, survived by his widow Maria Galindo V. de Penny, now wife of the said William Penny Craik, the first party, and that he was possessed at his death, *inter alia*, of houses, lands, mines, shares of mines, and others in Bolivia (to which the said Maria Galindo V. de Penny succeeded as his widow, according to Bolivian law), and of personal or moveable property both in Bolivia and Great Britain, to the whole of which the said Maria Galindo V. de Penny succeeded if his domicile were Bolivian, but to half of which only she succeeded if his domicile were Scottish, the other half in that event descending to his next of kin; that the said Maria Galindo V. de Penny disputed the decerniture and confirmation of the executrices-dative on the ground that the said Andrew Penny was domiciled in Bolivia at the time of his death, and that she was therefore entitled, as aforesaid, to the whole of his personal or moveable estate; that certain allegations had been made to the effect that the said Maria Galindo V. de Penny was not the lawful wife of the said Andrew Penny, and was therefore not entitled to any part of his estates; but that the second party's constituents were satisfied that the said allegations were unfounded, and that the said Maria Galindo V. de Penny was entitled to succeed, as before stated, to the real or heritable estates in Bolivia; and further, that the first party, as the husband of the said Maria Galindo V. de Penny, is now, in terms of their marriage-contract, in right of all estate, rights, claims, and interests belonging to and vested in her; and that the first party and the second parties' constituents have recently been negotiating for a settlement of all questions which have been or may be raised touching the succession to the said Andrew Penny's whole estates, and that without making any admission on either side as to the place of his domicile, they have now resolved on an amicable settlement as follows: Therefore the said parties agreed as follows:—"First, That there shall be paid out of the personal estate of the said Andrew Penny, but only if and when the said personal estate is effectually vested in the first party as after mentioned, to the said next of kin and representatives of deceased next of kin of the said Andrew Penny, exclusive of the said James Penny (the heir-at-law and so entitled to the Scots heritage), a sum of £25,000, divisible among the said next of kin and representatives foresaid in equal shares *per stirpes*. Second, That this payment of £25,000 shall be made by the first party and accepted by the said next of kin and representatives foresaid as in full satisfaction and discharge of all claims, rights, and pretensions, by way of succession or otherwise, which the said next of kin or representatives foresaid, or any of them, may have in, to, or against any part of the estate, heritable or moveable, real or personal, wheresoever situated, of the said Andrew Penny. Third, That this agreement shall be operative, and the said sum shall become payable, only upon the second parties or their constituents procuring the consents hereto of the said Mrs Catherine Penny or Birnie, and of the children of the said deceased Charles Penny, which consents the second parties bind their constituents (the trustees of the said Mrs Isabella Penny or M'Intosh being bound only to the extent of

No. 69.

Dec. 16, 1891.
Birnie v.
Christie.

Thereafter Mrs Birnie and Mrs Christie brought an action in the Sheriff Court at Aberdeen against Messrs Collie, advocates there, the agents of the executors, for delivery of the whole documents in their hands belonging to the executry estate.

On 19th October 1891, Mrs Birnie, the executrix who had not acceded to the agreement above narrated, together with the representatives of the late Charles Penny, a brother of the deceased, presented a petition for the sequestration of the estate, and the appointment of a judicial factor. The petitioners, after setting forth the foregoing facts and proceedings, stated ;—" In these circumstances the petitioners respectfully submit that it is essential that the administration should be taken out of the hands of the majority of the executrices and entrusted to a judicial factor. By

the trust-estate under their administration) to procure not later than 1st December 1891 ; declaring always, however, that, in the event of failure to procure said consents by the date specified, or within a reasonable time thereafter (of which the first party shall be the sole judge, and the extension of which he shall indicate by letter to the second parties, delivered by said 1st December), it shall be in the option of the said first party to declare this agreement operative *quoad* the second parties' constituents, and any one or more of the said Mrs Catherine Penny or Birnie, and the children of the said Charles Penny, who may timeously signify their consent, in which event the first party shall pay to the second parties' constituents, and such consenter or consenters (if any), their respective shares of said £25,000. *Fourth*, To enable the said first party to be vested in the foresaid personal estate *quam primum*, the second parties bind and oblige their constituents (the said Mrs M'Intosh's trustees being bound only to the extent foresaid) to procure and deliver to the first party the necessary decree and authority of the Court of Session for his uplifting the sum consigned by the pursuers and real raisers in the said action of multiplepoinding, and also all assignations, conveyances, or transfers necessary for vesting in him the remainder of the personal or moveable estate belonging to the said deceased Andrew Penny ; and in the event of the said Mrs Catherine Penny or Birnie not becoming a consenter to this agreement, the second parties bind their constituents as aforesaid to adopt and pursue all such competent judicial steps as the first party may direct, with the object of effectuating this agreement and arrangement. *Fifth*, Upon payment of said sum of £25,000, or (in the event of the first party's foresaid option being exercised) of the respective shares thereof, as aforesaid, there shall be delivered to the first party a discharge, conveyance, and assignation in his favour, by all the parties consenting hereto, of all their foresaid claims, rights, and pretensions ; and the first party may, if he think fit, require from them any deed or deeds according to the law of Bolivia, formally transferring and assigning to him all or any rights and claims which the said consenters hereto may have in or can pretend to the foresaid whole estates by way of succession or otherwise. *Sixth*, Upon being vested in the said executry estate as aforesaid, the said first party binds and obliges himself to free and relieve the said executrices of all claims and demands lawfully prestatable against such estate, including all Government duties exigible in respect of such estate or any part thereof (but exclusive always of the heritable estate in Scotland), and if necessary to find suitable security therefor, and for his intromissions as coming in place of the said executrices. *Seventh*, The first party binds and obliges himself, upon being vested as aforesaid in the said executry estate, to settle the whole expenses incurred by the said executrices and next of kin and consenters hereto, to their law-agents in connection with the administration of the said executry estate, action of multiplepoinding, and of or in connection with this agreement, as the same may be taxed as between agent and client. *Eighth*, In the event of the second parties or their constituents failing to secure the consents hereinbefore stipulated, and of the first party resolving not to exercise his foresaid option, the parties shall be held to be respectively restored *in integrum* to the rights and position held by them prior to the execution hereof."

entering into the agreement above referred to the said executrices have acquired an interest adverse to the rights of the petitioners, and they have undertaken obligations which incapacitate them for properly discharging the duties which they owe to the petitioners with reference to the administration and recovery of the estate, both in this country and in Bolivia.”

No. 69.

Dec. 16, 1891.
Birnie v.
Christie.

Mrs Christie and Mrs Mennie and the other parties of the second part to the agreement lodged answers, in which they denied that the agreement in any way prejudiced the rights or claims of the petitioners; and they further maintained that the appointment of a judicial factor was unnecessary, as substantially the whole estate in Great Britain was already *in manibus curiæ* in the multiplepounding.

Mr and Mrs Penny Craik lodged answers to substantially the same effect.

On 7th November 1891, the Lord Ordinary (Low) refused the petition.*

The petitioners reclaimed, and argued. The respondent executors were entitled to settle their individual claims, but it was impossible not to see that under this agreement they had bound themselves *qua* executors to do all in their power to aid Mr and Mrs Penny Craik in their claims to the estate. Such a course was inconsistent with their duty to the estate under their trust. In point of fact all the estate had not been consigned in the multiplepounding, for there was other estate on its way to this country. It would be difficult, if not impossible, for the petitioners to prosecute their personal claims in the Bolivian Courts, so long as the executors remained in office, for the Bolivian Courts might reasonably hold that they alone represented the next of kin.

The respondents Mrs Christie and others maintained in argument the position taken up in their answers.

Counsel for Mr and Mrs Penny Craik were also heard, maintaining that they had an interest to see that the executors were not removed from office, and substantially repeating the arguments of the other respondents.

LORD PRESIDENT.—I think that the respondents cannot be allowed to remain in office, and that a judicial factor must be appointed. It seems to me that

* “**OPINION.**—I am of opinion that the petitioners have not made out a case for the appointment of a judicial factor.

“In the first place, as regards the moveable estate of the late Mr Penny in this country, a judicial factor is unnecessary, because the whole estate has been thrown into Court in a multiplepounding, in which the petitioners will have an opportunity of establishing their claim.

“In regard to any moveable estate which may be in Bolivia, I think that the petitioners can themselves take such steps as may be necessary to protect their rights.

“The only other ground upon which the appointment of a judicial factor is asked is, that an action has been instituted in the Sheriff Court of Aberdeenshire against the Messrs Collie, advocates in Aberdeen, who were the executors’ agents, for delivery of all papers in their hands connected with the executry. The action is said to be truly in the interests of Mr and Mrs Craik, and the petitioners say that it would be greatly to their prejudice if Mr and Mrs Craik were to be put in possession of documents and information which were obtained with the view of opposing Mrs Craik’s claim to any part of Mr Penny’s estate.

“Counsel for the majority of the executors, however, undertook that they would not attempt to proceed further in the action pending the process of multiplepounding, and I think that this is sufficient to safeguard the petitioners’ interests in regard to the documents in Messrs Collie’s possession.”

No. 69.

Dec. 16, 1891.
Birnie v.
Christie.

they have taken up a position which is adverse to the due execution of their office, and in reaching this conclusion I cannot leave out of view the very significant speech which Mr Watt addressed to us on behalf of the widow. I can quite understand that beneficiaries or next of kin should be unwilling to face the risk of a litigation, and should prefer to go out of Court in consideration of the payment of a round sum of money; but this agreement pledges the respondents *qua* executors to give all the help they can to the widow in enforcing her claims against the estate which they represent. They are to get £25,000, and in return they not only surrender all rights and claims which they may have as next of kin, but they bind themselves to procure and deliver all assignments, conveyances or transfers necessary to vest the widow's present husband in the personal estate of the deceased. It is in consequence of this undertaking that the present application is made, and Mr Watt is here to see that the respondents carry out their undertaking by opposing the application. In these circumstances I cannot but say that the petitioners have fair grounds for alarm. It is true that a large part of the estate is already in the hands of the Court in the action of multiplepoinding, but we were told yesterday, and it is not denied, that there is more to come in; and it is further significant that the agreement also provides that the first party—that is the widow's husband—may, if he thinks fit, request from the respondents any deed or deeds according to the law of Bolivia formally transferring and assigning to him all or any rights and claims which they may have in or can pretend to the foresaid whole estate by way of succession or otherwise. Accordingly the result is, that under this agreement, so far as concerns the estate, moveable as well as heritable, whether in Bolivia or in transit to this country, the widow is entitled to demand the whole of it. That is not a position in which executors ought to place themselves, or which the Court sanctions. It is the duty of executors to preserve the executry estate, but if these executors are permitted to remain in office, they are under obligation to diminish the amount of the estate entrusted to them. I am of opinion, therefore, that we should recall the Lord Ordinary's interlocutor, and appoint a judicial factor.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion. It is not a ground for displacing executors that they have personal interests conflicting with their duty as executors. The law supposes that they are able to reconcile their interest and their duty until the contrary is proved. But it is a different case where they have bound themselves to use their powers as executors for the benefit of one party, and against the estate which they represent. In such a case I think the Court has no alternative but to remove them from office and appoint a factor.

LORD KINNEAR.—I concur. If I had any hesitation before about the propriety of removing these executors, it could not have been more effectually dispelled than by the appearance of the widow at the bar.

THE COURT recalled the Lord Ordinary's interlocutor, and granted the prayer of the petition.

R. C. GRAY, S.S.C.—HENRY & SCOTT, W.S.—WISHART & MACNAUGHTON, W.S.—Agents.

SENORA MARIA GALINDO CRAIK, Pursuer (Respondent).—*D.-F. Balfour—Crabb Watt.* No. 70.

JAMES PENNY, Defender (Appellant).—*Comrie Thomson—W. Campbell.* Dec. 18, 1891.
Craig v. Penny.

Husband and Wife—Terce—Brieve—Appeal—Competency—Act 1503, cap. 77—Act 1681, cap. 10.—The heir-at-law is not entitled to obtain a sist of the proceedings under a brieve of service and cognition to terce on the ground that he is about to bring a declarator of the invalidity of the marriage, or on the ground that he is about to raise an action for declarator that the widow is barred from claiming terce by reason of having accepted a conventional provision out of heritage abroad belonging to the deceased.

Opinion (per Lord M'Laren) that under a brieve of terce it is competent for the inquest to consider whether the widow is barred from claiming terce by reason of having accepted a conventional provision.

Opinions that a brieve of service and cognition to terce may be removed to the Court of Session by appeal at any time before trial before the Sheriff.

Observations as to the competency of an appeal after trial and verdict.

(*See Birnie v. Christie, supra*, p. 334.)

On 15th October 1891 Senora Maria Galindo Craik, wife of William Penny Craik, and claiming to be the widow of the deceased Andrew Penny, of Park, Aberdeenshire, and Oruro, Bolivia, obtained a brieve from Chancery to be served and cognosced to a terce of the lands in the sheriffdom of Aberdeen, Kincardine, and Banff, in which the deceased had died vest and seised.

1st DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.

On 20th October the Sheriff-substitute (Grierson) assigned 10th November as the diet for the trial of the brieve.

On 29th October James Penny, the heir-at-law, tendered a minute, in which "he maintained that the said Maria Galindo Penny or Craik was not entitled to be served as craved, in respect (1) that she was never lawfully married to the said Andrew Penny, and (2) that, even if she can establish that she was so married, she had accepted a conventional provision from the deceased, in the form of a conveyance of large estates in Bolivia, whereby she was debarred from claiming terce in terms of the Act 1681, cap. 10, and otherwise. He further stated that there is at present in dependence in the Court of Session an action of multiplepounding in which the petitioner and her husband, and also the respondent, are called as parties. In that action the question of the status of the petitioner, as claiming to be the widow of the said Andrew Penny, is directly raised. Further, the respondent is about to raise an action of declarator against the said Maria Galindo Penny to have it found and declared that she is not entitled to terce for the reasons above stated. He therefore craved the Sheriff to sist process *in hoc statu* until the said questions shall have been determined by the Court of Session."

The Sheriff-clerk refused to receive this minute on the ground that there was no process before the Court.

On 10th November the heir-at-law (as the minutes of procedure bore) moved the Court to sist in terms of his minute. The Sheriff-substitute refused "to sist in terms of said minute, and thereupon the agent for the objector tendered a note of appeal. The Sheriff-substitute having heard parties' prors. on the competency of the appeal at this stage, ordained the inquest to proceed."

The Sheriff-substitute then remitted the brieve and claim of service to the knowledge of an inquest, composed of advocates and solicitors in Aberdeen.

After a proof, the inquest unanimously served and cognosced the urger to a just and reasonable terce of the lands described in the claim, where-

No. 70. upon the urger took instruments and acts of Court, and the Sheriff-substitute interponed his authority in the premises, and decerned.

Dec. 18, 1891.
 Craik v.
 Penny.

The heir-at-law appealed to the Court of Session.

The pursuer objected to the competency of the appeal, and argued;—The appeal was incompetent at any stage. The policy of the law was to give the most summary dispatch in the trial of brieves of service. No exception could be taken to the brieve, the Act 1503, c. 77 being peremptory, and the function of the Sheriff purely ministerial, provided the conditions of the Act were complied with, as they had been here.¹ The reason for this dispatch was that service was necessary to vesting.² The proceedings in the service were regular.³ At all events, appeal was incompetent at this stage, after the Sheriff had interponed his authority to the verdict.⁴ This was a non-retourable brieve, and therefore pleadable, and this distinction was vital.⁵ Pleadability made the procedure equivalent to Sheriff Court procedure, and assuming pleadability this was an interlocutory judgment of the Sheriff, preliminary to kenning. If the Sheriff had erred in refusing to allow an appeal, reduction was the appropriate remedy.⁶ The Court had never in any reported case entertained an appeal after verdict; but even supposing that under the old form of procedure advocacy was competent at that stage, advocations were absolutely abolished by the Court of Session Act, 1868, and the right of appeal given in lieu did not cover an appeal in such circumstances. But assuming an appeal to be competent, the appeal ought to be dismissed. It was an appeal against the judgment of the Sheriff-substitute refusing to sist, and the Sheriff had rightly so refused.

Argued for the defender;—The appeal was competent. At common law it was competent to bring up a process from an inferior Court by way of advocacy at any stage, and it was clear that this was true of a brieve of terce.⁷ The question, therefore, was, how far had this right been restricted by statute? The Sheriff Court Act, 1853, sec. 24, and the Court of Session Act, 1868, could not be construed to apply to brieves of terce, which consequently remained under the old law, and could be brought up to the Court of Session at any stage, there being no other statutes on the subject. On the merits, the Sheriff ought to have sisted. A conventional provision was an absolute bar to a claim to terce, and further, the marriage was about to be called in question in an action of declarator.

At advising,—

LORD PRESIDENT.—The respondent in this appeal obtained a brieve from Chancery in order to be served and cognosced to a terce of the lands in the sheriffdom of Aberdeen, Kincardine, and Banff, in which the late Andrew Penny, of Park, died vest and seised. On 20th October 1891 the Sheriff-substitute assigned the 10th November then ensuing as a diet for the trial of the brieve, and granted warrant to summon a jury to pass upon the inquest. On the appointed day the brieve was duly proclaimed, but at this stage, and therefore

¹ Fraser, Husband and Wife, i. 394; Tennant v. Pollok, Nov. 20, 1841, 4 D. 53.

² M'Leish v. Rennie, Feb. 21, 1826, 4 S. 485.

³ M'Neight v. Lockhart, Nov. 30, 1843, 6 D. 128, 16 Scot. Jur. 108.

⁴ Stair, iv. 3, 10, 17, 18; ii. 6, 13; Ersk. ii. 9, 50; Tennant v. Pollok, *supra*.

⁵ Bankton, 554-5-6; Cathcart v. Rocheid, 1772, M. 7663.

⁶ Balfour, 420, *et seq.*; M'Laren on Wills, i. 107.

⁷ Park v. Gib, 1769, M. 15,855; Jardine v. Currie, July 8, 1825, 4 S. 158; Macculloch v. Maitland, 1788, 15,866; Brock v. Hamilton, Jan. 27, 1852, 19 D. 701.

before the brieve and claim had been remitted to the knowledge of the inquest, **No. 70.**
 the present appellant craved the Court to sist the proceedings in terms of **Dec. 18, 1891.**
 a minute which he tendered. The Sheriff refused to sist in terms of the **Craik v.**
 minute. **Penny.**

This is the judgment of the Court below, of which the appellant complains under his present appeal; and unless we were satisfied that the Sheriff-substitute did wrong in refusing this sist, the appeal must fail, irrespective of the other difficulties it would have to surmount were we to think that the Sheriff did wrong. I am of opinion that the Sheriff did right.

In order to judge of the question which I have stated, it is necessary to advert to the terms of the minute just referred to as containing the grounds upon which a sist was craved. The leading proposition which the minute states as requiring judicial establishment in the Court of Session is that the lady was never lawfully married to the deceased. But the Statute 1503, c. 77, dealing with this very case, enacts that, if only the woman is holden and reputed as a lawful wife during the life of the deceased, she shall be terced and enjoy her terce until sentence is given (by the consistorial Court) that she was not his wife. For the Sheriff, therefore, on this ground, to have sisted, would have been flatly to refuse to obey the unequivocal order of an Act of Parliament.

The other matter stated in the minute as the subject of future litigation in the Court of Session, and as therefore a ground for a sist, was that the respondent had a conventional provision from the deceased. On this the Sheriff was not, as in the other matter, concluded by statute; but I do not think he would have been justified in sisting. It is plain that, in the view of the law, the widow's immediate access to her terce is not to be stopped, except by the most peremptory objections, and objections instantly verifiable. Here, all that was said was, that in an action not yet raised (although Mr Penny had been dead for six months), the objector was going to seek to establish that a conveyance of Bolivian lands had been granted, and that it fell under the Statute of 1681, c. 10. It would, I think, have been contrary to the spirit of the law of terce if, on a ground of this kind, the widow had been stopped from submitting her claim to the knowledge of the inquest then and there present, bearing in mind especially (1) that the kenning does not foreclose any such objection to the widow's right to terce being judicially established and made effectual, and (2) that the minuter (the present appellant), if earnest in this objection, had no need to resort to the discretion of the Sheriff, as he did by asking a sist, but might, at his own hand, have removed the case to the Court of Session by an appeal against the deliverance of the Sheriff of 20th October 1891, by which a diet was fixed for the trial of the brieve.

Accordingly, I think that this appeal should be dismissed, on the ground that the Sheriff did right in the matter of which the appellant makes complaint. I must add, however, that a verdict having been returned by the inquest, I have not been satisfied by the appellant that he could obtain redress under an appeal, as distinguished from an action of reduction, if our opinion were adverse to the decision of the Sheriff. I shall state in a word how I take the law to stand, so that the limits of my reservation may be understood. (1) The proceedings under a brieve of terce may be appealed to the Court of Session by note of appeal whenever prior to the Court of Session Act, 1868, they could have been advocated; and the Sheriff Court Acts do not apply to such proceedings to the effect of limiting the stages at which appeal may be taken. The former of these pro-

No. 70.
Dec. 18, 1891.
Craig v.
Penny.

positions rests on the 64th and 65th sections of the Court of Session Act, 1868; the latter upon the nature of the proceedings under a *briefe*. (2) While appeal is clearly competent for the purpose of removal at an early stage of the proceedings, there are precedents rendering it impossible to pronounce appeal after verdict to be incompetent, absolutely, and irrespective of the remedy which is sought. But there has been no case cited in which the Court of Session under an advocacy of a *briefe* has interfered with the verdict of an inquest, either to the effect of setting it aside or to the effect of suspending its legal consequences. So far as I am concerned, therefore, in proposing judgment now, I am not to be held as implying that, had we thought the Sheriff wrong in the matter in hand, we would have given to the appellant any remedy under his appeal.

LORD ADAM concurred.

LORD M'LAREN.—Two questions have been raised in this appeal, one as to the competency of the appeal, the other as to the right of the appellant to demand a *sist* of the proceedings in the Sheriff Court. I am inclined to think that the appellant is technically right on the question of the competency of the appeal, because it is, I think, impossible to look at the explanations given in Stair and Hume as to the history of our ancient civil and criminal procedure without coming to the conclusion that advocacy was a universal mode of bringing up proceedings in an inferior Court to this Court at any stage until the conclusion of the cause, which was definitely ascertained by the extracting of the process. The remedy afterwards was of a different nature. For obvious reasons the universal right of removing cases from an inferior to a superior Court was restricted by statute. The first step in that direction was taken in the Act of Regulations in the seventeenth century, and the tendency has since been to limit the unqualified right of appeal. But, so far as I can discover, these restrictions have never been made applicable to the ancient procedure by *briefe*, probably because it was very rarely resorted to. It appears to me, therefore, that if it had been desired to remove such a process to this Court for trial, that might have been done by advocacy before the order for trial was pronounced. What was proposed here, however, was not an appeal for the purpose of trial, for what the Sheriff was asked to do was to *sist* procedure in order that the same question might be tried in another different action. I have a difficulty in seeing that in any circumstances it is the duty of a Court having jurisdiction to try a question to decline to exercise that jurisdiction in order that the same question may be tried in a more elaborate and costly way in a higher Court. There are, it seems to me, just two ways in which a party who wishes the benefit of trial in a superior Court may proceed. He may either, in a case of this kind, advocate at once, or he may raise an action of declarator in this Court, and then apply for permission to appeal the process in the lower Court *ob contingentiam*. But in this case the appellant took neither of these courses. He simply asked the Sheriff to *sist* proceedings, not because there was an action in dependence in this Court raising the same question, but because he meant to bring such an action. I am clearly of opinion that the Sheriff was right in refusing the application.

It is said that the Sheriff practically deprived the appellant of the right to appeal by directing the Sheriff-clerk not to mark the appeal. I cannot help thinking that the appellant might, by a study of the provisions of the Act of 1868, have got over this difficulty, and that the case might have been brought here by appeal before the trial; but as we are of opinion that the only ground

of appeal is one in which the appellant cannot succeed, I am unable to see that he has suffered any loss in consequence of his appeal not having been received at that stage. I agree that the Sheriff was bound in the circumstances to proceed to trial, and that he was not entitled to try the question of the validity of the marriage in order to determine the claim to terce, because that would have been quite contrary to the provisions of the statute.

As regards the other legal consideration urged in support of the application for a sist, namely, that the pursuer's claim of terce is excluded by her having accepted a conventional provision in lieu thereof, we have not heard any argument, and are not giving any opinion upon that point. But if it had been argued before the Sheriff that the pursuer's claim was barred because she had accepted a provision from her husband out of his heritable estate in Scotland, I should then have supposed it to have been his duty to consider the point, and I do not see why the Sheriff should not have considered the question whether the pursuer was barred from claiming terce by having accepted a provision out of land in Bolivia if it had been raised before him. There might have been some difficulty in obtaining evidence on the subject, but the question was capable of decision, and I do not doubt that the jury, who seem all to have been men of learning, being either advocates or solicitors in Aberdeen, would have paid respect to the Sheriff and have followed his directions. That course, however, was not taken, and it appears to me that the whole proceeding was conducted on the footing that the appellant meant to have the case reviewed in a different form of proceeding altogether.

LORD KINNEAR.—I agree in the ground of judgment proposed by your Lordships, and also in the desire to reserve my opinion as to the competency of appealing instead of bringing an action of reduction after the verdict of the inquest has been given.

THE COURT dismissed the appeal.

WISHART & MACNAUGHTON, W.S.—R. C. GRAY, S.S.C.—Agents.

BERNARD HUGHES, Pursuer (Appellant).—*M'Clure*.
THE CLYDE COAL COMPANY, Defenders (Respondents).—*Dickson*—*G. Burnet*.

No. 71.

Dec. 18, 1891.*
Hughes v.
Clyde Coal Co.

Preparation—Fault—The Coal Mines Regulation Act, 1887 (50 and 51 Vict. c. 55)—General Rules, No. 15.—No. 15 of the General Rules of the Coal Mines Regulation Act, 1887, enacts,—“Every road on which persons travel underground where the load is drawn by a horse or other animal, shall be provided at intervals of not more than fifty yards with sufficient manholes or with places of refuge, and every such place of refuge shall be of sufficient length, and at least three feet in width between the waggons running on the road and the side of such road.”

Opinion (per Lord Justice-Clerk) that the mouths of the cross roads which led off the main level of a mine, and which were within fifty yards of each other, were to be considered as “manholes or places of refuge” in the sense of rule 15.

Opinions reserved by Lord Young, Lord Rutherford Clark, and Lord Trayner.

No. 71.

Dec. 18, 1891.
Hughes v.
Clyde Coal Co.

2D DIVISION.
Sheriff of
Lanarkshire.

ON 19th October 1889 Bernard Hughes, miner, residing at Hamilton, was injured in a pit belonging to the Clyde Coal Company, Limited, and brought an action against the company for £300 damages, or for £273 under the Employers Liability Act, 1880.

The pursuer averred that he had been run over by a hutch in the main level, and that the defenders were in fault, as "there were no manholes or places of refuge in said main level. This was a distinct breach of the Coal Mines Regulation Act, 1887, rule 15"—(quoted in rubric).

The defenders denied fault, and maintained that there were sufficient manholes or places of refuge in terms of the Act and rules. There were the mouths of branch roads leading off the main level at various intervals from each other, but not exceeding forty-eight yards at the utmost. The mouths of these branch roads were open and free to a much greater extent than required by the Act and rules.

The defenders pleaded, *inter alia*;—(2) In respect the accident was caused, or was at all events materially contributed to, by the pursuer's own fault, the defenders should be assoilzied.

The import of the proof fully appears *infra* in the opinion of the Lord Justice-Clerk.

On 17th June 1890 the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds that upon the 19th October 1889 the pursuer was in the defenders' employment, and on that day was injured while in No. 3 pit by a horse and hutch which were being used in connection with the working of said pit: Finds, under reference to note, that the pursuer was mainly, if not wholly, responsible for the accident; therefore sustains the second plea in law stated for the defenders, and assoilzies them from the conclusions of the action."*

On appeal, the Sheriff (Berry), on 24th March, adhered to the Sheriff-substitute's interlocutor, stating in his note to his interlocutor that he considered the openings made by the cross roads were sufficient compliance with the statutory enactment regarding manholes or places of refuge.

The pursuer appealed.

The defenders were not called upon.

LORD JUSTICE-CLERK.—In my opinion the judgment of the Sheriff is right.

The Mines Regulation Act requires that in all mines where the hutches are drawn by horses, in every road where this is done there shall be placed at intervals of not less than fifty yards manholes of a certain depth and breadth where the men can go for safety while hutches are passing.

The meaning of that provision is plainly this, that where there is a stretch of road on which the miners working at the face would not be able to escape from the hutches except by going a distance of more than fifty yards, then there shall be places of refuge provided in that stretch. In my opinion, however, the provision does not apply in places where no such stretch of road exists. That this is so appears to me all the more likely, because, while we were told by Lord McClure that in the whole district where this mine in which the accident

* In his note, the Sheriff-substitute said,—“It was contended that the defenders were in fault, because it was argued that there were no manholes in terms of the statute. It is proved that there were cross roads within the statutory limits laid down for manholes. Now, I regard cross roads as manholes. The greater includes the less, and a manhole is simply a means of escape. That universal practice seems to be only to place ‘manholes’ in the sense the provision desiderates when there are no cross roads within the statutory distance. . . .”

happened is situated, no manholes at all exist in the workings, it does not appear that any complaint has been made of the want of them, or that the mining inspectors have ever required that they should be provided. I do not doubt that this is on the ground that the mode of working provided a refuge at the necessary intervals without manholes.

No. 71.

Dec. 18, 1891.
Hughes v.
Clyde Coal Co.

In the case before us the pursuer who had been leaving the mine with his companions had gone back for some article he had forgotten, and was again on his way to the bottom of the shaft, when in the space between two cross roads running into the road upon which he was walking, a space of forty-seven yards in length, he saw a horse dragging hutches coming towards him. At first he attempted to run forward and get to the cross road marked C upon the plan, but seeing he must fail to get there before the horse reached it, he turned to go back. He had, however, got so far forward that the horse seeing the light in his cap, and being excited by the shouting of the pursuer and of the driver of the hutches, got frightened and ran off. The pursuer ran in front of the horse so as to reach the cross road marked D, which was a place of refuge, but while he was running he also tried to stop the horse, with the result that he was thrown down, and the hutches ran over him, and he sustained the injuries of which he complains.

It was a very unfortunate accident, but I do not think that the pursuer has proved that any blame attaches to the owners of the mine for what has happened; and in my opinion that is sufficient for the decision of this case without any reference to the provisions of the Coal Mines Regulation Act.

It was a pure accident, resulting from his mistaken view that he could reach C before the horse came up.

Had he reached C in time it would have been a refuge such as the Act contemplates, and as there was only a distance of forty-seven yards between the cross roads, there was no necessity for a manhole.

LORD YOUNG.—I concur in the result. My opinion rests on this entirely, that the accident to the pursuer has not been shewn to be attributable to any want of care on the part of the owners of the pit.

I desire to reserve my opinion as to whether the cross roads are to be considered as manholes within the meaning of the Coal Mines Regulation Act.

LORD RUTHERFURD CLARK.—I also think we ought to abstain from deciding any general question. I think it is not proved that the accident happened from want of manholes.

LORD TRAYNER.—It appears to me that this accident cannot be attributed to any fault on the part of the defenders.

I also think that we should not decide any general question as to what may constitute a manhole within the meaning of the Act.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the interlocutor of the Sheriff-substitute: Therefore dismiss the appeal, and affirm the judgments of the Sheriff and Sheriff-substitute appealed against."

CHARLES T. COX, W.S.—WINCHESTER & FERGUSON, W.S.—Agents.

No. 72. JAMES COCKBURN M'LAURIN, Pursuer.—*Comrie Thomson—Shaw—Ure.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*D.-F. Balfour—Dickson.*

Jan. 5, 1892.
M'Laurin v.
North British
Railway Co.

Reparation—Amount of damages—Excess of damages.—The Court will be slow to set aside the verdict of a jury in an action for damages for personal injury on the ground of excess of damages, if it cannot be shewn that the jury took into account elements which they were not entitled to take into account.

Observations as to the elements which a jury might legitimately take into account in estimating the amount of damages for personal injury in an action in which it was judicially admitted that the pursuer had suffered no "specific loss to his business in consequence of the injury sustained by him."

A merchant and manufacturer, forty-nine years of age, raised an action of damages against a railway company to recover damages for injuries received by him in a railway collision. His nose was crushed, and although by surgical appliances it was to a certain extent restored, he entirely lost his sense of smell, and partly also his sense of taste. He was confined to bed for some weeks and suffered great pain. The collision occurred in August, and he did not begin to attend business again till November; from November till March he could only attend about half the usual business hours, and for some months thereafter was unable to do full work. The loss of his sense of smell interfered with his business capacity so far as it disabled him from testing yarns, in which he traded, by their smell. He also suffered from nervous shock. He had not entirely recovered from the effects of this shock at the date of the trial, but the medical men, called for him as witnesses, deponed that in all probability he would entirely recover from this. His outlay for medical attendance and treatment was £213. It was admitted by minute that he had not suffered any specific loss to his business. The jury awarded him a sum of £1800. In an application for a new trial on the ground that this was an excessive amount, the Court refused to disturb the verdict.

1ST DIVISION.
Ld. Wellwood.

JAMES COCKBURN M'LAURIN, a partner of the firms of M'Laurin Brothers, yarn and grey cloth merchants, Glasgow, and of A. Y. M'Laurin & Company, muslin manufacturers there, was injured in a railway collision on the North British Railway on 28th August 1890. He raised an action to recover damages in respect of his injuries. The company did not dispute liability, and the only question was as to the amount of damages. The pursuer laid these at £5000.

A minute was lodged by the pursuer in which he stated that "he did not propose at the trial of the cause to prove that the pursuer had suffered any specific loss to his business in consequence of the injury sustained by him in the collision."

The case was tried on 12th November 1891 before Lord Wellwood and a jury. The main facts proved were these: The pursuer was forty-nine years of age, and up to the date of the accident took an active part in his business, in which, however, he had partners. He lived with his wife and family in a villa, which he had bought for £2800, near Glasgow, and had two servants. The most noticeable effects of his accident were bruise on his forehead, and a compound fracture of the bones of his nose; his nose was described as being smashed to a pulp. For some hours after the accident he was unconscious, and for several days he lay in a very critical condition, being excited by the slightest noise, such as the turning of the door handle or footsteps on the gravel outside the house. With view to the restoration of his nose he was obliged to lie for three weeks on his back with a lead case on his nose. For a great part of this time the blood from his nose passed into his stomach, causing him to vomit blood in considerable quantities. He suffered great discomfort, and was very sleepless. After recovering to a certain extent he went first to Shandon and then to Crieff. While there he still suffered from sleeplessness, pains in the forehead, and twitching in the limbs. His expenses

in the course of this holiday, along with doctors' fees, amounted to £213, 9s. His nose was in the end to a certain extent set up again; it was described, however, as being a very different nose from what it had originally been, both in shape and symmetry. It had formerly been a Roman nose; the ridge of it was now depressed and it was not straight.

No. 72.
Jan. 5, 1892.
M'Laurin v.
North British
Railway Co.

The pursuer returned to business in the end of November. From that time till the end of March he only went for half-days to the office, and had not, up to the time of the trial, resumed full work. He still complained of a "crushed" feeling in his head, and of twitchings in his arms, *e.g.*, when he held up a newspaper to read it. His taste for society was gone, and he and those connected with him in business remarked that in the conduct of his business he was a changed man, no longer so well informed, keen, and energetic in business affairs as he had formerly been. The doctors examined on his behalf deponed that there was no damage to the nerve-centres, and that the symptoms spoken to would, they expected, disappear altogether. He had, however, lost all sense of smell, and in part his sense of taste, the latter to such an extent that he could not tell beef from mutton; the former so that he was unable on two occasions to detect serious escapes of gas that had occurred in his house, once from a gas stove in his bedroom, and once from a gas-cock in the lavatory. His sense of smell had been of practical use to him in his business, as by it he could, before his accident, detect mildew in yarns. This power he had now lost.

A remarkable feature in the trial was that the defenders examined no witnesses.

The jury unanimously found for the pursuer, assessing the damages at £1800.

The defenders moved for a rule, which was granted. In support of the rule they founded on the absence of all evidence of pecuniary loss, and maintained that for personal suffering and disfigurement, the only elements of damage left, the sum of £1800 was egregiously excessive.

The pursuer in shewing cause pointed out that the time which had elapsed between the date of the accident and the trial—fifteen months—was sufficient to allow it to be seen what the permanent results upon the man were. They were serious, even if the doctors' hope of complete recovery were realised. There had been great pain and permanent disfigurement, with permanent incapacity to some extent. The rule laid down by Lord M'Laren in *Young v. The Glasgow Tramway Company*,¹ for assessment of damage, was the rule to be applied here, *viz.*, that the jury must be accepted as the best judges on the matter of damages, unless they had taken some illegitimate considerations into view, or left some legitimate considerations out of view.

LORD PRESIDENT.—The subject-matter of this trial is certainly singular, and perhaps unique, and I am not surprised that there prevails at the bar considerable difference as to the manner in which the different elements which affect the amount of damages should be appraised. I shall notice some of these elements, to see how far it is true, as the defenders have pressed upon us, that the jury have gone so egregiously wrong in the estimate which they have made as to call for our interference.

Now, as regards a sum of £213 for medical attendance and treatment, &c., we are upon solid ground. No one doubts that the pursuer is entitled to recover that sum. We have, therefore, to deal with the residue only of the £1800 which the jury have awarded.

¹ Nov. 29, 1882, 10 R. 242.

No. 72.

Jan. 5, 1892.
M'Laurin v.
North British
Railway Co.

It is certain that the pursuer suffered a shocking injury, and he must have endured deplorable pain. His nose was smashed to pulp, although it has, by artificial surgical means, been reinstated and reformed so as to minimise, as far as may be, the injury done to the features. But while he was undergoing the necessary treatment for this artificial restoration of his nose, he lay for weeks in a constrained position, which in itself must have been a serious infliction, in addition to the pain and anxiety necessarily involved.

Then, when he went back to business, he was found wanting in the nerve, the energy, the power of concentration, and the activity, which had before enabled him to take a successful part in the conduct of his affairs. Various expedients were tried to remedy this; he went on a holiday to begin with, then from November to March he only attended at his office for half the business day, after that he stayed longer at work, but even down to the end of July—nearly a year after the accident—he was not doing a full day's work.

What was his state after this period of rest and partial convalescence? His activity was impaired, his memory was blunted, and his general alertness perceptibly diminished. It is true that the medical men examined on his behalf believe that these symptoms will yield to treatment, and that there is no permanent injury done to the nerve-centres. That statement we are quite entitled to take as the judgment of experts on the future, but we must not convert prediction into fact.

We come next to a very definite and specific injury. While the pursuer's nose has been restored, not indeed to a condition of identity, but to a respectable appearance, his sense of smell is gone, and there is a corresponding loss of sense of flavour. Now, this deprivation of the sense of smell is not only total but it is permanent; and this presented a serious and somewhat singular problem for the jury. It so happens that in this man's own history there has already been striking evidence of what is implied in the loss of all sense of smell. It seems that, in consequence of this loss, he was, on an occasion to which members of his family speak, unable to detect an escape of gas which had taken place, and was thereby exposed to some peril. That is a fact by which I can quite understand that the jury might be impressed, and by which I think, they might quite properly be set a-thinking. It demonstrates that this loss of smell is not only a loss of all the pleasures connected with that sense, but of a certain safeguard against familiar dangers. It has also been shewn that this loss of the sense of smell would disable him from detecting certain defects in the yarns in which he dealt, and would thus directly incapacitate him to that extent for business.

It has been admitted by the pursuer that he did not, as a consequence of his accident, suffer any "specific" loss in his business, but the question is quite open as to the conditions of comfort, ease, and success which will attend him either in the trade in which he is at present engaged, or in any other trade which he may hereafter find it necessary or convenient to take up. I make this observation, because it would be a mistake to say either that the departure by the pursuer from any claim for loss of business eliminates the consideration of his physical and mental condition as a business man, or that the loss of the sense of smell is a thing to be regarded apart altogether from this gentleman's position as a man of business. It is not so. It is quite legitimate to consider that loss as affecting his aptitude and capacity in that character, and the same observation applies to the effects of the accident on his nerves and memory.

I find therefore that there are in this case a number of elements of damage, each of them of considerable flexibility, so as to admit of different estimates in different minds when it becomes necessary to put a pecuniary value upon them. On the other hand, it is not said by the Dean of Faculty for the defenders that any element has been taken into account which was not a legitimate element for consideration.

No. 72.
Jan. 5, 1892.
M'Laurin v.
North British
Railway Co.

Can we then, adopting the criterion laid down in the case of *Young* (10 R. 242), say that the jury have gone so egregiously wrong that it is necessary for us to interfere with their estimate?

After the argument which we have heard, I would probably not myself, if it had rested with me, have given so much as £1800, but I would certainly have given a good deal more than £1000. The sum of expenses the pursuer must have—that is his *ex debito justitiæ*.

Then he has totally lost his sense of smell, and to some extent, at least, his sense of flavour, involving not only a loss of all pleasure connected with it, but also of a certain safeguard, a certain diminution of business aptitude.

In the next place, I take the condition of the man in nerve and memory. He is a damaged man. I take him as having a prospect—a good prospect—of complete recovery, but I do not take that as an ascertained certainty. I must add, taking a broad and rough view of the matter, that I do not regard as anything but a very serious matter that a man has had his nose smashed, with a certain change of appearance. That is a matter on which he may very naturally be sensitive, and it is a matter for substantial reparation. In addition to all this there is the pain and anxiety inseparable from such injury.

The jury heard the whole case, and saw the moderation with which it was conducted on both sides. I cannot say that they have committed any error, and if my own estimate of the amount of damages would have been somewhat less than theirs, the difference between us would not have been so large as to warrant me in moving your Lordships to grant a new trial.

LORD ADAM concurred.

LORD M'LAREN.—The ground on which a new trial is here claimed is excess of damages. "Excess of damages" is, if I recollect aright, the expression used in the statute by which jury trial was introduced into Scotland. Simple excess of damages would then entitle the Court to interfere. But the statute has been interpreted to mean that relief will only be given on grounds analogous to those on which we give relief in other cases, viz., that the sum awarded is against the weight of the evidence, and is wholly disproportionate to the circumstances. That is the footing on which the case has been argued to us.

If I were considering this case as a jurymen, I should probably hold that a sum considerably less than £1800 was sufficient compensation for the serious injuries which were proved. I should have inclined to award £1000, but always under the reservation, that I should not consider any sum within a few hundred pounds of that sum as unfair. A somewhat higher sum is indicated in your Lordship's opinion, and this difference of opinion among the Judges illustrates the difficulty of estimating damages for personal injury, and induces caution in interfering with the verdicts of juries where injury is proved. Here there are two elements which in every such case have to be taken into consideration, (first) the pain and suffering which the pursuer endured, and (secondly)

No. 72.

Jan. 5, 1892.
M'Laurin v.
North British
Railway Co.

the cost of the necessary medical treatment and change of air during convalescence.

Then there are also in this case the elements of personal disfigurement, the loss of the use of one of the senses, and the possibility of loss in business in the future.

Personal disfigurement is a different thing from broken bones or any other injury which can be completely repaired. The sufferer has the prospect of going through life disfigured, a thing that will continue to be a source of pain and annoyance to himself and of distress to his friends.

The terms of the minute, to which reference has been made, would not prevent the jury from taking into account the fact that this man is permanently disabled, and can only maintain his business in the same condition as before by making larger use of the exertions of his partners, a circumstance which may lead to eventually diminished income. Taking account of all these elements, I am unable to say that the verdict is one which should be set aside, although my personal opinion is that a smaller sum would be sufficient.

LORD KINNEAR.—The only rule or principle of law I know of for estimating damages in such cases is that it shall be the estimate which twelve reasonable men in a jury box, after instruction by the Judge, arrive at. Excess of damages can only mean that the sum awarded is more than what reasonable men would have given after taking a full view of the whole matter, and having been instructed by the Judge. We cannot set aside a verdict unless we think that no reasonable man would have awarded so much. I cannot possibly say that here.

LORD WELLWOOD.—I agree with Lord M'Laren that £1000 would have been sufficient here. But the pursuer was entitled to a substantial sum, and the question is whether £1800 is excessive. After hearing the opinions which your Lordships have delivered, I am not prepared to dissent from the views which have been expressed, although I think that a much smaller sum would have been sufficient in a case in which it is admitted that the pursuer has suffered no pecuniary loss in his business.

THE COURT discharged the rule of consent, applied the verdict, and decreed for £1800.

J. W. & J. MACKENZIE, W.S.—MILLAR, ROBSON, & Co., S.S.C.—Agents.

No. 73.

Jan. 7, 1892.
M'Fadyen v.
Spencer & Co.

HECTOR M'FADYEN, Pursuer (Appellant).—*G. W. Burnet.*
JAMES SPENCER & COMPANY, Defenders (Respondents).—*Comrie Thomson*
—*Craigie.*

Reparation—Slander—Privilege—Malice.—In an action of damages for slander the pursuer averred that he was a joiner in the employment of C. M. & Co., shipwrights; that on a certain day he and three other workmen were sent by the firm to execute a piece of work on board a vessel lying in the docks at Glasgow belonging to the defenders; that some days after the said workmen had left the vessel the defenders sent an account to C. M. & Co.,—"To six bottles of whisky, at 3s. 6d. per bottle, abstracted by your men while putting up, &c., on board" the vessel, and subsequently wrote this letter to C. M. & Co.,—"In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were in-

tact, but after they left we found, on examination, that a case had been tampered with and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it." The pursuer averred that the account and letter "falsely, maliciously, calumniously, and without probable cause," represented the pursuer as being dishonest, and as having stolen six bottles of whisky. There was no other averment of malice.

Held (dub. Lord Rutherford Clark) that the pursuer's averments shewed that the defenders were privileged in making the statements complained of, and that as the pursuer had failed to set forth facts from which malice could be inferred, the action was not relevant.

HECTOR M'FADYEN, joiner, Glasgow, raised an action in the Sheriff Court, at Paisley, against James Spencer & Company, owners of the ship "Frith of Forth," for damages for alleged slander.

The pursuer averred that he was a journeyman in the employment of Campbell, M'Donald, & Company, shipwrights and joiners, Glasgow, that on 11th September 1891 he and three other workmen were sent by the firm to erect a powder bulkhead in the vessel "Frith of Forth," lying in Queen's Dock, Glasgow, which was to sail next day, that he and the other three workmen were the only workmen of the firm employed on the vessel, and that they completed their work and left the vessel about seven o'clock on the evening of the 11th.

The pursuer further averred,—“On 14th September 1891 the defenders rendered to the said Campbell, M'Donald, & Company an account in the following terms:—‘Messrs Campbell, M'Donald, & Co. to James Spencer & Co.,—316 Paisley Road, Glasgow.—To six bottles whisky, at 3s. 6d. per bottle, abstracted by your men while putting up the powder bulkhead on board “Frith of Forth,” £1, 1s.—Glasgow, 14 Sep. 1891.’”

“On 15th September 1891 the defenders wrote a letter to the said Campbell, M'Donald, & Company in the following terms, viz.:—‘Glasgow, 15th Sept. 1891.—Messrs Campbell, M'Donald, & Coy., Crookston Street.—Dear Sirs,—In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were intact, but after they left we found, on examination, that a case had been tampered with, and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it.—JAMES SPENCER & Co.’”

The pursuer further averred;—“While the said vessel “Frith of Forth” was lying in said Queen's Docks being loaded, there were numerous labourers and workmen continually going back and forward between her and the quay up to the time she sailed.”

“The account and letter quoted were of and concerning, *inter alia*, the pursuer, who was one of the said Campbell, M'Donald, & Co.'s men therein referred to, and wickedly, falsely, maliciously, calumniously, and without probable cause, represented the pursuer as being dishonest, and as having stolen six bottles of whisky.”

The pursuer pleaded;—(1) The account and letter libelled being of and concerning the pursuer, and having been written by defenders, and being false and slanderous, the pursuer is entitled to reparation.

The defenders pleaded;—(1) The pursuer's averments are irrelevant and insufficient to warrant the prayer of the petition. (2) The defenders having probable cause for sending the account and letter founded on, and these communications being privileged, decree of absolutor should be granted. (3) The defenders not having slandered the pursuer, and having expressly disclaimed all imputations against the pursuer's character, they should be assoilzied.

No. 73.

Jan. 7, 1892.
M'Fadyen v.
Spencer & Co.

2D DIVISION.
Sheriff of Ren-
frewshire.

No. 73.

Jan. 7, 1892.
M'Fadyen v.
Spencer & Co.

The Sheriff-substitute (Cowan) held the action relevant, and allowed a proof.*

The pursuer appealed for jury trial, and proposed the following issue:—"It being admitted that, on or about Friday, 11th September 1891, the pursuer was a journeyman joiner in the employment of Campbell, M'Donald, & Co., shipwrights and joiners, 53 Crookston Street, Glasgow, and was engaged in putting up a powder bulkhead on board the vessel 'Frith of Forth,' then lying in Queen's Dock, Glasgow; that, on or about 14th September 1891, the defenders rendered to the said Campbell, M'Donald, & Co. the account contained in schedule I. annexed hereto; and on 15th September 1891 addressed to the said Campbell, M'Donald, & Company the letter contained in schedule II. hereto annexed, both of which documents were duly received by the said Campbell, M'Donald, & Co. Whether the said account and letter are of and concerning the pursuer, and falsely and calumniously represent him as being dishonest, and as having stolen six bottles of whisky, to his loss, injury, and damage?"

Argued for the defenders;—The action was irrelevant. The pursuer's statement shewed that the defenders, in sending the account to Campbell, M'Donald, & Co., and in giving the explanation in the letter complained of, were privileged.¹ The pursuer must if he wished an issue in such a case specify some facts and circumstances pointing to malice.² This the pursuer had not done. It would be necessary for him to state that the defenders knew something about him, and apart from their own duty and interest intended to injure him.

Argued for the pursuer;—If there was slander malice was presumed. The account stated that he and the other pursuers had abstracted whisky. The letter reiterated that. That was a slander. If the defenders thought someone had stolen whisky of which they had charge they certainly had a privilege in saying so. But that privilege was in saying so to the procurator-fiscal for a public purpose. They had no privilege to accuse people of theft to a private individual for the purpose of making a money claim.³ It was worse rather than better that they went with the slander to the pursuer's master. There was no relation between the defenders and Campbell, M'Donald, & Company, which gave the former any privilege. It was all the worse if the defenders knew nothing of the pursuer, yet called him a thief.

LORD JUSTICE-CLERK.—The facts as disclosed upon record by the pursuer, and in respect of which he asks an issue, are that the pursuer and certain brother workmen were employed in the hold of the ship "Frith of Forth" on a

* "NOTE.—Even if it were true that whisky was abstracted from the hold of the 'Frith of Forth,' the defenders were beyond their legal right in demanding from the pursuer's employer payment of it. The delict of the servant does not constitute a ground of claim against the master. The defenders might properly have made inquiries at the master to ascertain what workmen had been employed at the vessel; they might even as the result of such inquiries, have lodged a criminal complaint against the pursuer, and such action on their part would have been privileged. They chose, however, to render a baseless claim to the pursuer's master, adding the statement complained of. The Sheriff-substitute cannot see that they were privileged to do so. . . ."

¹ Shaw v. Morgan, July 11, 1888, 15 R. 865.

² Innes v. Adamson, Oct. 25, 1889, 17 R. 11.

³ Wilson v. Purvis, Nov. 1, 1891, 18 R. 72.

certain occasion, that after they left it the defenders sent an account to the pursuer's employers for whisky alleged to have been "abstracted by your men," and that they (the defenders) followed that up by a letter saying that "we know that when your men went down into the hold to put up the powder bulkhead the whisky cases were intact, but after they left we found on examination that a case had been tampered with, and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it."

No. 73.

Jan. 7, 1892.
M'Fadyen v.
Spencer & Co.

These being the material averments of the pursuer, I think we have before us a very peculiar case. It is plain that it cannot be said that the defenders were making an accusation of theft against any individual workman. It is not suggested that they knew who were the men employed by Campbell, M'Donald, & Company, nor even how many of them there might be. The statement complained of is just this, that on examining the cases after the workmen of that firm had left the ship they found that six bottles of whisky were missing, and that they think that the employers of these men ought to pay the value of that whisky since the only conclusion they could come to on the facts is that these men took it. I think that the statement the defenders made was legitimate, in the absence of any averment of circumstances tending to shew that it was maliciously made. The ordinary presumption from the use of words of a slanderous or calumnious nature is not applicable. The defenders had in the circumstances I think a privilege in making such a statement to the pursuer's employers. The next question, therefore, is whether the pursuer has stated any such circumstances as to lead, if they were proved, to the inference that there was malice, and which therefore entitle the pursuer to an issue for trial upon the footing that the burden is laid upon him to prove that the statements were made maliciously. I find no such averment on record. It is only said that by the account and letter the defenders "maliciously, falsely, calumniously, and without probable cause represented the pursuer as being dishonest and as having stolen six bottles of whisky." But this averment is no more than the ordinary statement in any case of slander. It does not supply us with any fact which if established would infer special malice. Indeed it is difficult to see how such facts could be averred.

My opinion is that the account and letter do not contain allegations against any particular person. I do not gather that such allegation is made from the mere statement that the whisky is missing, and that "your men" must have taken it. I can understand that there may be circumstances in which a statement that an article is missing and must have been taken by theft would amount to a charge against a particular individual or more than one individual. But I do not think that we have such a case here. All that is said is, the whisky was there, you had workmen there, and as it disappeared when they were there we call on you to pay for it. That may or may not be a claim which they could enforce. I should doubt their right to maintain it. But as regards the statements themselves I see nothing of the nature of a charge of theft against any individual or individuals. I am of opinion that the action should be dismissed as irrelevant.

LORD YOUNG.—I concur. Especially do I concur in the observations which your Lordship last made. The defenders made a charge against the pursuer's master for whisky abstracted while their men were putting up a bulkhead. I think they would have justified that by proving that it did disappear while

No. 73.

Jan. 7, 1892.
M'Fadyen v.
Spencer & Co.

their men were there, so that some of them—even one it might be—must have taken it. It was not necessary in order to justify what they said to shew that all were engaged in taking it, or who they were who were so engaged. It would have been enough to shew that it disappeared when the men were there, and must have been made to disappear by all of them, or some or one of them. In the letter which they wrote with regard to the claim contained in the account, that is the justification which they give. It is not a charge against any individual workman. But the case having been laid before legal advisers it occurred to them that each of the workmen who were putting up the bulkhead has a separate action in respect of that statement if he only aver and offer to prove that he was engaged at the work of putting up the bulkhead. But that very matter—whether he was so employed or not—might be the subject of controversy at the trial.

It is impossible to say that the defenders had any feeling, good or bad, as to all or any of the men employed by Campbell, M'Donald, & Company. They simply made a claim against them for the whisky, as they would have done if there had been a hundred men there, and not four, and the missing whisky had amounted to twenty gallons and not one. If there had been a hundred men I suppose we would have had a hundred actions, every one of the hundred men saying that he was engaged there, and therefore has a title to sue because he was called a thief. That seems very extravagant, but I do not pursue it. I refer to my opinion in *Shaw v. Morgan*, which was cited to us, in which I stated the law as to privilege as I understand it, and having regard to the views there stated I think the occasion of this alleged slander shews a case of privilege which repels the presumption of malice. If so, malice must be averred, and I think the case is not one in which the mere use of the term malice will suffice. It is one in which some facts must be averred which will *prima facie* justify the use of the term malice. If the facts are only that men are at work in my house, and something is afterwards amissing, and I complain of that to the tradesman who sent them, I think it is ridiculous to say that there exists a presumption of malice against me. Nor is it enough to say that I made my complaint maliciously. The record must state some particular facts which are to be proved which will lead to the inference that there was malice if they are established. There being no such facts averred, I think the action is irrelevant.

LORD RUTHERFURD CLARK.—I have had doubt on this case. Nor are my doubts, I must say, removed. But as I am alone in these doubts as to the decision your Lordships propose, my opinion is of no importance, and I do not dissent.

LORD TRAYNER.—I think that the circumstances of this case, as the pursuer himself states them, repel the presumption of malice. I also agree that it is a case in which it is not enough for the pursuer merely to say that the slander alleged was made maliciously. He must specify the facts from which the alleged malice is to be presumed, the facts which justify the use of the term malice. As there is no such specification, I think the action is irrelevant.

THIS interlocutor was pronounced :—"Find that the pursuer has not averred facts relevant to support the conclusions of the action; therefore dismiss the action."

MRS ESTHER CLIDERO AND ANOTHER, Pursuers (Respondents).—
Guthrie Smith—Daniell.

No. 74.

THE SCOTTISH ACCIDENT INSURANCE COMPANY, LIMITED, Defenders
 (Reclaimers).—*D.-F. Balfour—Jameson—Crole.*

Jan. 12, 1892.
 Clidero v.
 Scottish Accident Insurance
 Co., Limited.

Insurance—Life insurance—Insurance against accident—Bodily injury caused by "violent, accidental, external, and visible means."—In an action on an accident insurance policy under which the insurance company were liable in the event of the death of the insured through "bodily injury caused by violent, accidental, external, and visible means," it was proved that the insured had complained of feeling a pain as of something having "given way inside," when he was in the act of pulling on his stockings. He died about thirty-six hours afterwards. The medical men who had attended him examined his body *post-mortem*, and pronounced that the proximate cause of death was failure of the heart's action through pressure on the heart caused by distension of the colon, which had become obstructed. There was no evidence of disease in any of the organs, and the medical men who had made the examination could give no reason why the colon had become obstructed on the morning in question, except that the deceased, who was a stout man, must have used some extra force when in the act of stooping down to draw on the stocking, and so twisted the colon out of position; but the deceased in his account of what took place, as deposed to by those who heard him, did not mention that he had made any unusual movement when pulling on his stocking.

The Court (*rev. judgment of Lord Kyllachy*) *assolzie'd* the defenders, holding that it had not been proved that the death was due to bodily injury caused by violent, accidental, external, and visible means.

WILLIAM CLIDERO, currier, Northallerton, was insured with the Scottish Accident Insurance Company, Limited, under a policy which provided that the company should be liable, "if at any time . . . during the continuance of this policy, the insured has sustained any bodily injury caused by violent, accidental, external, and visible means, and the direct effect of which injury has either caused the death or permanent total disablement (as defined on the back hereof) of the insured." The policy also provided that it should not cover the case of death by suicide, nor the case of death "arising from natural disease or weakness, or exhaustion consequent upon disease, or any surgical operation rendered necessary thereby, or arising from such disease, weakness, exhaustion, or surgical operation, although accelerated by accident."

Clidero died on 12th October 1890.

On 18th March 1891 his widow and son, as his executors, brought an action against the insurance company for payment of the sum in the policy. They averred;—(Cond. 4) "On 11th October 1890 the insured, who was a corpulent man, met with an accident while in the act of pulling on one of his stockings. In the act of stooping he accidentally pressed with violence on the lower abdomen, and the strain thus caused resulted in a portion of the bowel being suddenly displaced and becoming twisted. Pain within the abdomen was felt by the deceased at the time, and distention of the abdomen immediately set in; and notwithstanding the remedies and measures applied for his relief, he died in the course of the following day. His death was due to internal injuries proceeding from a visible external cause—the violent pressure on the lower abdomen—and unintentionally and accidentally inflicted."

The defenders denied that the death of the insured was the result of an accident within the meaning of the policy, and averred that the deceased had died from natural disease of the heart and bowels.

The pursuers pleaded;—The death of the deceased being due to bodily injury directly caused by violent, accidental, external, and visible means,

No. 74. within the meaning of the aforementioned policy of insurance, the pursuers, as his executors and representatives, are entitled to decree for the sum sued for, with expenses.

Jan. 12, 1892.
Clidero v.
Scottish Accident Insurance
Co., Limited.

The defenders pleaded;—(3) The death of the insured having arisen from natural disease or weakness, or exhaustion consequent upon disease (whether accelerated by accident or not), and not by violent, accidental, external, and visible means, the defenders ought to be assoilzied from the conclusions of the summons, with expenses.

A proof was allowed.

Dr Walton, the medical attendant of the deceased, deponed,—“On Saturday, 11th October, I was sent for to see the deceased. I do not remember the exact hour, but it was sometime in the afternoon. He then told me that he felt intense pain in the abdomen, and that he was very uncomfortable from distention. He told me that in the act of pulling on one of his stockings he felt something give way inside, and that afterwards he had a very acute pain, which passed off and left a dull aching sensation. According to his account he had just got out of bed and was in the act of pulling on his stocking when the accident occurred. I examined him, and found that there was some obstruction of the intestines. I gave him a mixture to take, and visited him again the same evening. I saw him again four or five times on Sunday, 12th October. I was with him for a considerable time on the Sunday. I was there first before eleven o'clock in the forenoon, and afterwards at three, five, eight, and eleven o'clock. On the occasion of my visit at eleven o'clock in the forenoon I was accompanied by Dr Tweedie, and I found that the distention had considerably increased, and the body was cyanosed or blue. Later on in the day I examined the patient's heart, and noticed that the heart-beat was slightly displaced upwards. The apex of the heart-beat was displaced fully an inch above the nipple, whereas it should be an inch and a-quarter below the nipple. I saw the patient again at eleven o'clock at night, when I was again accompanied by Dr Tweedie. Dr Bartrum and Dr Wells were also there on that occasion. About eight o'clock at night we had a conference and decided to open the patient's abdomen, if we could obtain his consent. We returned at eleven o'clock for the purpose of performing that operation. The arrangements were all complete for the operation, the patient had been laid upon the table, and we were just about to begin, when he suddenly expired.” In cross-examination Dr Walton further deponed,—“I did not ask Mr Clidero how he was sitting when he was pulling on his stocking. I did not think that of importance as shewing how the injury had been caused. (Q.) Did he not tell you where he had been sitting, or the motion he made to pull on his stocking, or whether it was in any way usual or unusual? (A.) I am not certain; I believe he told me that he was sitting on the bed.

This evidence was substantially corroborated by Drs Tweedie and Bartrum, and, as regarded Clidero's own account of what occurred, by Mr Clidero and John Clidero, the son. None of these witnesses deponed to Clidero having stated that anything external of a violent or accidental character took place when he was in the act of pulling on his stocking.

After Clidero's death a *post-mortem* examination was held, which shewed that the colon had fallen out of its place, and, becoming folded had been obstructed, and this obstruction produced very great distension, which, by pressure on the heart, ultimately stopped the action of the heart, and so caused death.

Dr Walton gave this further evidence,—“(Q.) Were the appearances which you saw consistent with the man's own account of what had happened? (A.) Yes. (Q.) Supposing the deceased was engaged, as it

said, in the act of stooping, how do you account for the result which occurred? (A.) I account for it in this way, that the ribs and liver being fixed points, any stooping over would thrust down the moveable part of the bowel, and in restoring himself to a straight position, the bowel, instead of going back into its recess, had slipped in front of the liver, or the liver had slipped behind the bowel. That condition of matters might be produced by disease. We made a careful examination to see if there was any appearance of disease, so far as the abdominal organs were concerned, and we found none. I did not know at the time that the deceased was insured. There being no appearance of disease, the condition which I observed could not have been produced by anything but force." In cross-examination,—“(Q.) How do you account for the ordinary act of pulling on his stocking having caused a displacement of the colon on this occasion, and never having done it before? (A.) He had not come under the same conditions before. (Q.) Do you mean that the bowel had not been in the same condition before? (A.) It may not have been exactly in the same position, and there may not have been the same force.”

Dr Tweedie deponed,—“(Q.) How, in your opinion, did the occurrence take place? (A.) Looking to what the deceased told me as to his being stooping at the time, I think the force conveyed through the ribs and the liver would be quite sufficient in a stout man to press the transverse part of the colon downwards, and when the man was readjusting himself the free edge of the liver had slipped behind instead of in front of it. . . . A sudden displacement of this kind could only be due to external force. The force resulting from the sudden act of stooping would be enough, in my opinion, to cause such a displacement, more particularly with a stout man, such as the deceased was.” In cross-examination,—“(Q.) How do you account for the simple act of stooping to put on a stocking producing this displacement in a healthy subject? (A.) I suppose a very stout man would have to use more force to reach his foot than a thin man, and the extra amount of force would be sufficient to cause some displacement in the bowel. (Q.) I suppose Mr Clidero had put on his stockings all his life; how do you account for its happening in this way? (A.) I cannot account for its happening at the particular moment.”

The defenders adduced several doctors as experts, who deponed that in their opinion Clidero must have died of disease—as to the precise disease these witnesses were not at one.

On 1st July 1891 the Lord Ordinary (Kyllachy) decerned in terms of the conclusions of the summons.*

* “OPINION.—I cannot say that I have much doubt as to what my judgment in this case should be. I am of opinion that it is sufficiently proved that the deceased did not die of disease in any proper sense of that term, but that on the contrary he died of an accident which may quite reasonably be described as ‘violent, external, and visible.’ Speaking generally, I prefer the real evidence afforded by the facts as described by the deceased himself, by his family, and by the medical men who attended him—I prefer that real evidence—to the speculations and theories of the medical witnesses for the defenders. And further, if I have to choose between the medical opinions on the one side and those on the other, I confess that I prefer the testimony of the doctors who attended the deceased, who heard him describe what occurred, and who afterwards made the *post-mortem* of his body, to the testimony of the gentlemen, however eminent, who were to-day adduced for the defenders, and who, without the least disrespect to them, had not, and could not have, the same opportunities for forming a judgment as the three gentlemen examined for the pursuer. Perhaps, when I say that, I say enough. But I may add just one or

No. 74.
Jan. 12, 1892.
Clidero v.
Scottish Accident Insurance
Co., Limited.

No. 74.

Jan. 12, 1892.
Clidero v.
Scottish Acci-
dent Insurance
Co., Limited.

The defenders reclaimed, and argued;—The pursuers had failed to prove that Mr Clidero had died from accident; the true cause of his death was natural disease. At all events, the bodily injury, if there was such an injury, had not been caused by some “violent, accidental, external, and visible means.” All these qualities must concur; but in the first place there was no evidence whatever of violence. The Lord Ordinary had based his judgment on the hypothesis of there having been some wrench or strain, but this was pure hypothesis, which received no support from the evidence. Then the means must be “accidental.” It was, perhaps, difficult to define “accidental” in the abstract, but for the purposes of the present policy its meaning was sufficiently plain. It meant something which could not be anticipated in the ordinary course of things, and what that was in the present case the pursuers had failed

two observations which I think must have occurred to everyone who has listened to the evidence.

“In the first place, I think it does not admit of doubt that the proximate cause of this gentleman's death was not heart disease, or diarrhœa, or flatulence, or any similar form of disease, but was simply and solely an obstruction of his bowels, resulting in extreme distension, and thereby causing pressure upon the heart and lungs sufficient to produce a stoppage of the heart's action. There is no doubt that that was the proximate cause of death, and being so, the question is what was the cause of this obstruction of the bowels which operated in the way I have described. Now, what we know about that obstruction is this—we know for certain that it was not a thing which came on gradually, but that it came on suddenly, and also contemporaneously, with a certain strain or wrench or untoward movement of his body, which deceased somehow produced in pulling on his stockings on the morning in question, and which he described at the time as making him feel that something had given way in his inside. We do not know exactly how he stood or sat on the occasion in question, whether he made some slip, or how exactly the thing happened. All we know is that something unusual occurred, sufficient to produce the unusual result of such a sensation suddenly supervening in the course of that ordinary operation. That being so, the next fact is, that a displacement of the intestines involving an obstruction of the bowels immediately supervened, and the question really is, whether this displacement can be reasonably attributed to any other cause than the occurrence by which it was immediately preceded. The doctors examined for the pursuer have no doubt on that subject. They say that what happened was, in their opinion, a sufficient cause—a cause amply sufficient to explain the symptoms and appearances which they observed. And they say further, that neither the *post-mortem* examination nor the deceased's previous symptoms disclosed or suggested any other cause sufficient, in their opinion, to account for death. Now, that I confess seems to me rather a formidable case to controvert. What is said on the other side? I think it comes pretty much to this, that the suggested cause of death is not one that is probable, that it is one which has not hitherto come within the experience of the medical profession. Well, I suppose everything of the kind must occur for the first time, and it does not seem to me to be in the least conclusive that an occurrence of this kind has not hitherto come within the experience of the doctors examined. They say, however, that everything may be explained by disease. (His Lordship then proceeded to consider the evidence of the medical experts, who had been adduced by the defenders.)

“I find therefore without much difficulty (1) that the cause of death was the obstruction in the bowels, and (2) that the true cause of that obstruction was not disease, but some wrench, strain, or untoward movement caused by the gentleman to himself on the morning in question, and which wrench or strain or untoward movement was so violent as to bring part of his intestines out of their proper place, and put them in front of instead of behind the liver. That being so, I am of opinion that the pursuers are entitled to succeed, and I give them decree in terms of their summons, with expenses.”

to shew. Then the cause must be external, by which was to be understood something independent of the volition of the insured. Here, so far as the evidence shewed, nothing took place, nothing "visible," that was to say, except as the result of the volition of the deceased. No doubt the last condition might be said to be present, for the act of putting on the stockings was visible, but that act could not be said to be either violent or external or accidental. The deceased had performed this act just as he had been accustomed to perform it. What the policy contemplated was that something outside the body and will of the deceased, of a violent character, should cause bodily injury which was the proximate cause of death. Here, so far as appeared, the proximate cause was something internal. The pursuers' contention virtually made the defenders life insurers generally, not insurers against death through accident.

Argued for the pursuers;—The Lord Ordinary was right. The defenders construed the policy too strictly in favour of themselves, whereas such policies were, *in dubio*, to be construed against the company.¹ The Lord Ordinary's conclusion that death had taken place on the particular morning because the deceased had unintentionally given himself a strain or wrench in pulling on his stockings was the sound conclusion. If that were the cause it complied with the terms of the policy. It could not be maintained, in the first place, that any great violence was essential; to confine the policy to such cases as railway accidents or explosions would be unduly to limit the policy contrary to the true intention of the parties. "Accidental" had no very clear qualifying effect, it simply meant unforeseen; "external" meant outside the body of the insured; to say that it meant outwith the volition of the deceased was truly to make the policy almost nugatory, for few things happened to people wholly independently of their wills. For if they had not willed to be in the particular place the occurrence would not have happened to them. This construction of the policy was borne out by the authorities. Thus drowning when in an epileptic fit had been held to be death through accidental, external, and visible means.² Also injury to the spine when lifting a heavy burden.³ Death from sunstroke, on the other hand, had been held not to be death from accident,⁴ but that was on the principle the death was due to a disease.

At advising,—

LORD PRESIDENT.—The question in this case is whether, on the evidence before us, William Clidero died of a "bodily injury caused by violent, accidental, external, and visible means." The defenders had insured him against this event, and their liability depends on this event having occurred.

Up to a certain point, the facts about this very unusual death are clear enough. An obstruction occurred in the colon, causing great distension; and the resulting pressure on the heart was so great that its action stopped. To go a step further back, the obstruction in the colon was caused by that intestine having fallen out of its place and got folded.

This is the account given by the three medical men who attended the deceased, and who made a *post-mortem* examination of his body, which revealed the displacement and obstruction of the colon. That the distension, which was enormous, might stop the action of the heart cannot be disputed, and this I take to have been the proximate cause of death.

¹ Hooper v. Accident Insurance Co., 1860, 29 L. J. Excheq. 340.

² Winspear v. Accident Insurance Co., 1880, L. R., 6 Q. B. Div. 42.

³ Martin v. Travellers' Insurance Co., 1 Fes. and Finl. 505.

⁴ Sinclair v. Accident Maritime Passengers' Insurance Co., 30 L. J. Q. B. 77.

No. 74.
 Jan. 12, 1892.
 Clidero v.
 Scottish Acci-
 dent Insurance
 Co., Limited.

It is to be observed that all that I have described is internal to the body of the deceased, and it is as to this region that I consider the evidence to bear out the pursuers' case. But the crucial question is whether the displacement of the colon was caused by external means, which were violent, accidental, and visible. I think not merely that the pursuers have not established that it was, but that this part of their case is a complete blank.

The evidence on this point consists of testimony as to statements made by the deceased during his brief illness. He spoke on the subject to, or at least in presence of, five persons (all of them are witnesses), and he gave quite the same account on each occasion of speaking. "He told me," says Dr Walton, "that in the act of pulling on one of his stockings, he felt something give way inside, and that afterwards he had a very acute pain, which passed off and left a dull aching sensation. According to his account, he had just got out of bed and was in the act of pulling on his stocking when the accident happened." "(Q.) Did he not tell you where he had been sitting or the motion he made to pull on his stocking, or whether it was in any way usual or unusual? (A.) I am not certain, I believe he told me that he was sitting on the bed." "I inquired," says Dr Tweedie, "what had been the cause of his illness, and Mr Clidero said that on the Saturday morning, after getting up, he was sitting on the edge of the bed drawing on his stockings when he felt something give way in his inside, and that immediately afterwards he had a great deal of pain and began to swell up." "I asked him," says Dr Bartrum, "the cause of his illness, and he told me he had been pulling on his stockings the day before and he suddenly felt something give way in his inside. He did not say anything to me about a twist." "I remember quite well," says Mrs Clidero, "of my husband coming downstairs on the Saturday before he died, and complaining that he had felt something had given way in his inside while he was putting on his stocking." "He said," says John Clidero, referring to the same occasion as his mother, "that he had felt something give way in his inside when he was putting on his stocking."

I have now read *in extenso* the whole evidence of what took place, and in that evidence I fail to discover any description of violent, external, accidental, and visible means of causing bodily injury. The man was putting on his stockings, and he felt something gave way in his inside. The only external fact is his putting on his stocking, and in that of itself there is nothing either violent or accidental. But further, there is in the evidence no hint or suggestion that any misadventure occurred incidental to the putting on the stockings (such as a slip or fall), or that anything external befell, except in accordance with the intention and by virtue of the volition of the deceased. Either, therefore, the movements involved in putting on the stockings caused the displacement of the colon, in which case the means causing the injury were not accidental or violent, or the two things were unconnected, except in point of time.

The Lord Ordinary, however, introduces into the case what appears to be quite another element. He treats it as "certain" that in pulling on his stockings the deceased "somehow produced a certain strain or wrench, or untoward movement of his body." I take it that by these words his Lordship must refer to something external, for otherwise the "external means" postulated by the policy, in terms which he had just quoted, would be still to seek, and he suggests no other. But if so, I must say that of "a strain or wrench, or untoward movement of the body," I can discover no trace in the evidence, and

this interpolation, in the chain of facts, of a conjecture of something like violent, external, accidental, and visible means constitutes, in my judgment, a fatal flaw in the reasoning on which the interlocutor rests. No. 74.
Jan. 12, 1892.
Clidero v.
Scottish Acci-
dent Insurance
Co., Limited.

The Lord Ordinary, indeed, in the first paragraph of his opinion presents the case as if it depended on a conflict of medical opinion as to the cause of death, and his Lordship prefers the opinion of the medical men who attended the patient and examined the body. In the view which I take, however, the radical defect of the pursuers' case lies outside the region of medical opinion altogether, and in the much simpler region of the external incidents of this unfortunate gentleman's dressing on the morning in question. But I may add that the pursuers' medical witnesses, who had heard from their patient a narrative in which, as already shewn, there is no hint or suggestion of any involuntary external incident, take that narrative as they find it; their scientific theory, such as it is, rests on no other basis, and certainly does not assume any wrench, strain, or untoward movement of the body. Here is Dr Walton's examination in chief: "(Q.) Supposing the deceased was engaged, as he said, in the act of stooping, how do you account for the result which occurred? (A.) I account for it in this way, that the ribs and liver being fixed points, any stooping over would thrust down the moveable part of the bowel and in restoring himself to a straight position the bowel, instead of going back into its own recess, had stopped in front of the liver, or the liver had stopped behind the bowel." Dr Tweedie takes quite the same view: "The force resulting from the sudden act of stooping would be enough, in my opinion, to cause such a displacement, more particularly with a stout man, such as the deceased was." "I suppose," he says in another passage, "a very stout man would have to use more force to reach his foot than a thin man, and the extra amount of force would be sufficient to cause some displacement in the bowel."

Now, if this theory, which is simple if not crude, is open to the criticism that it assigns to those organs a more precarious position than experience has led the world to suppose to belong to them, it at all events has the merit of demanding no more than the proved facts of the case, those being the voluntary and intentional acts of a man putting on his stocking, with nothing violent or accidental about them. This theory, therefore, is equally destructive of the pursuers' case with the competing theory advanced by the defenders, which, with perhaps more plausibility, conjectures that the stability of the colon may have been impaired by previous internal modifications. My opinion, however, that the defenders must be assoilzied rests on the ground that to whatever the death of William Clidero was due, as its ultimate cause, it was not the result of injury caused by violent, accidental, external, and visible means.

LORD ADAM.—There is no doubt, as your Lordship has said, that the death of Mr Clidero was caused by, as the doctors say, cardiac failure; but that again was caused by tympanitis, and the effect of tympanitis was caused by obstruction of the bowel or colon. There is no doubt about that. The question is, whether the death so caused was caused by violent, accidental, external, and visible means.

Now, no one was present when this occurrence happened. Mr Clidero seems to have been alone, and we have only his own account of it, as detailed to some five people, I think,—to his wife, his son, and the three medical men. The account which he gives in those passages which your Lordship has read—I shall

No. 74. not read them again—to all and each of them is the same, viz, that he was doing upon that morning what he had done apparently for many years of his life before. He had got up; he was sitting at the side of the bed; and he was in the act of pulling on his stockings, when he felt something, as he says, give way within; that he then felt acute pain, which afterwards passed off, but with the result, as we know, that it led to illness, and ultimately, in about thirty-six hours, to his death. These are the simple facts.

Jan. 12, 1892.
Clidero v.
Scottish Accident Insurance
Co., Limited.

As your Lordship has pointed out, in the account which Mr Clidero gives himself, he describes everything as having taken place on that morning—I mean as far as his own acts are concerned—just as on all previous mornings. He does not describe any accident, such as a fall, during the time he was putting on his stockings; he does not hint at such a thing; he does not describe, and he does not hint, as one would have expected if it had happened, that there was any wrench or anything of that sort taking place,—everything went on as usual, except what happened,—that he felt something give way.

That being so, the question is whether that is violence such as is within the meaning of this policy.

Your Lordship has also read what the medical men, Dr Walton and Dr Tweedie, say upon that, and it is quite clear from their evidence—indeed they say so in so many words—that the account which they received from Mr Clidero himself (which is all we have to go upon) was sufficient to explain his death viz, the simple fact of a stout man stooping down to pull on his stockings was upon this occasion, sufficient to cause, and was the only cause of, his death. Now, if that be so, where was the violence? I cannot persuade myself, as the Lord Ordinary has done, that upon that simple account, and it is the only account we can go upon as to the facts of the case, there was anything like violence upon this occasion. Neither do I think that it was accidental in the sense of this policy. The question, in the sense of this policy, is not whether death was the result of accident in the sense that it was a death which was not foreseen or anticipated. That is not the question. The question is, in the words of the policy, whether the means by which the injury was caused were accidental means. The death being accidental in the sense in which I have mentioned and the means which lead to the death as accidental, are to my mind two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence, as your Lordship pointed out, that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened, the man's death. On these grounds I agree with your Lordship that there is nothing violent in the sense of the policy to account for this man's death.

But I must confess that on reading the doctor's evidence, I was surprised to find that they did not ask Mr Clidero for any further account of what took place upon that morning. Something unusual having happened, that they do not ask him,—at all events they do not tell us,—whether it was caused by an accident, such as a fall forward or backward when in the act of pulling on his stockings. None of the doctors say that; they are perfectly satisfied as to the

cause; and, taking the facts upon which they go, viz., that everything was going on as usual—that it was simply a result arising from a stout man stooping forward in the ordinary act of putting on his stockings—I cannot think that that falls within the description in this policy,—that death resulted from violent, accidental, external, and visible means.

No. 74.

Jan. 12, 1892.
Clidero v.
 Scottish Accident Insurance
 Co., Limited.

LORD M'LAREN.—I agree with all that your Lordship has said in your statement of the case. As we are proposing to alter the Lord Ordinary's interlocutor, it may be right that I should briefly indicate the ground of judgment, as it presents itself to my own mind. The question, as your Lordships have pointed out, is really one, in the first place, of construction of the clause containing the conditions of the insurance. This peculiar kind of insurance defines the condition of liability as applicable to death resulting from violent, accidental, external, and visible means. Now, while in this case it appears that the immediate cause of death was stoppage of the heart, and that the doctors account for this by the displacement of the bowel, what we have to look to is the external cause, whatever it was, which contributed towards that result. I consider that a policy of this kind is quite capable of covering the case of injuries that are self-inflicted. It is not necessary as a condition to a claim that the external cause should be either pure accident, or should result from the negligence or agency in some form of another person. But it rather appears to me that the criterion of responsibility must be that the injury has resulted from some involuntary movement on the part of the deceased. I agree with an observation made by the Dean of Faculty in his speech, that where the injury which is the cause of death is the consequence of a voluntary act, taking effect in a way that was intended, and only in that way, then that does not satisfy the condition of the policy. Such an act cannot be described as violent as well as external. The kind of self-inflicted injuries which are covered by such a word embraces such cases for instance as where a person using a tool accidentally makes a slip and severs an artery, or where a person intending to open a window loses his balance and is thrown to the ground. In either of these illustrations, in addition to the voluntary act which the person intended to perform, there is a movement which he never intended to make, and which results from some unexplained and involuntary cause. But in this case the man's own evidence, which we have through the medium of his wife and two medical men, is, I think, quite consistent with the supposition that the internal injury which he received was the result,—so far, I mean, as external means are concerned—merely of the position in which he voluntarily put his body in the act of pulling on his stocking. Now, if in consequence of the strained position which he voluntarily assumed, there occurred internal displacement from some disturbance of the equilibrium of the internal affairs of the body, that would not, in my opinion, come within the scope of this policy, and it lies with the pursuers to shew that there was some movement of an involuntary kind which may be described in a large sense as violent and accidental.

My opinion is, with your Lordships, that no such involuntary action as the Lord Ordinary describes in his judgment has been proved, and therefore that the ground of judgment fails, and that the defenders ought to be assolizied.

LORD KINNEAR.—I agree with your Lordships.

THE COURT recalled the interlocutor of the Lord Ordinary, and assolizied the defenders.

A. P. PURVES & AITKEN, W.S.—J. & R. A. ROBERTSON, S.S.C.—Agents.

No. 75.

WILLIAM ALLAN AND OTHERS, Pursuers (Appellants).—*Jameson—Younger.*Jan. 13, 1892.
Allan v.
Johnstone.WILLIAM JOHNSTONE, Defender (Respondent).—*Dickson—Ur.*

The "Archdruid."

Ship—Charter-party—Bill of lading—Demurrage—Lay-days.—A charter-party of a steamship chartered to carry grain from the Black Sea provided that there should be "eleven running days, Sundays excepted, for loading and unloading, and ten days on demurrage over and above the said lay-days at 6d. per ton per running day. The 1885 bills of lading to be used under this charter, and its terms to be considered part thereof."

The printed bill of lading 1885, as filled up by the master at the port of loading, contained this clause:—"Five and a-half *5½* laying-days remain for discharging the whole cargo." The words and figures in italics were filled in by the master.

In an action for demurrage against an onerous indorsee of the bill of lading, the shipowner contended that under the charter-party part of a day fell to be counted as a day, and that the shipmaster went beyond his power in stating the lay-days remaining for discharge at more than five days.

Held that the master was empowered by the charter-party to fill up the blanks in the bill of lading, and that the bill of lading as filled up was binding on the owners. Question as to the time from which lay-days begin to run.

1st DIVISION.
Sheriff of
Lanarkshire.

By charter-party, dated 20th October 1890, the s.s. "Archdruid," belonging to William Allan and others, was chartered to proceed to Kustendje in the Black Sea, and there load a cargo for the United Kingdom.

The charter-party, *inter alia*, provided,—"*2. . . . Eleven running days, Sundays excepted, are to be allowed the said freighters (if the steamer be not sooner dispatched) for loading and unloading, and ten days on demurrage over and above the said lay-days at sixpence per ton on the steamer's gross register tonnage per running day. . . . The 1885 bills of lading to be used under this charter, and its terms to be considered part thereof.*"

After loading a cargo of barley at Kustendje the master granted a bill of lading, which was headed "Mediterranean, Black Sea, and Baltic grain cargo steamer. Bill of lading 1885," and the terms of which were, *inter alia*,—"Shipped in good order and condition . . . and to be delivered in the like good order and condition at the port of discharge unto orders or to his or their assigns, he or they paying freight and demurrage, if any, for the said goods. All conditions as per charter-party, dated in London the 20th October 1890. Five and half *5½* laying-days remain for discharging the whole cargo. . . ." The words and figures printed in italics were filled in by the master.

The "Archdruid" reached Glasgow on 26th December 1890, and on that day the owners' agents wrote to Mr William Johnstone, the onerous indorsee of the bill of lading, that the "Archdruid" "will be ready to commence discharging at 6 A.M. to-morrow morning, and lay-days will commence then." The unloading began at 7 A.M. on Saturday the 27th. Her discharge was completed between midnight on Monday 5th and A.M. on Tuesday, 6th January.

The owners now sued William Johnstone in the Sheriff Court Lanarkshire for payment of three days' demurrage, amounting to £93, 3s. The action proceeded upon the footing that six lay-days had been occupied at Kustendje, that five only remained for the discharge and that these began at 12 P.M. on 26th December, and expired at 1 P.M. on 2d January following, excluding the intervening Sunday and New Year's day, which by mutual consent was observed as a holiday.

The defender resisted the claim, relying on the terms of the bill of lading, and stating that the five and a-half days left for discharge began

at 6 A.M. on the morning of the 27th December. He explained that the delay in unloading was caused by the defective condition of the steamer's winches, upon which repairs had to be executed, and to the irregular discharge given by the stevedores. He tendered £50 in full settlement of the pursuers' claims. No. 75.

Jan. 18, 1892.
Allan v.
Johnstone.

The "Archdruid."

The Sheriff-substitute (Guthrie) allowed a proof.

It appeared from the proof that the master had inserted the term of 5½ days in the bill of lading as a compromise between five, which he had considered the proper term, and six, for which the merchant had wanted him to sign. The winches had been out of order on three occasions during the unloading for a period of about seven and a-half hours in all.

The Sheriff-substitute found "that the 'Archdruid' finished discharging at Glasgow on Tuesday 5th January, and that allowance being made for detention due to the defective working of the ship's winches, the vessel is entitled to one day on demurrage, over and above the lay-days allowed by the charter-party," and decerned for the sum of £31, 1s.*

The pursuers appealed, and argued;—In a charter-party like the present half days must be counted as completed days.¹ Parts of days were for this purpose whole days, and therefore six days were spent in the loading at Kustendje. It might be that the master had misapprehended the legal effect of the statement he made in the bill of lading, but it could not be said that the master had any power to innovate upon the terms of the charter-party, which were here specially imported into the bill of lading, or that it was within the master's institorial power to make the statement contained in the bill of lading.² In any view, such a statement was not binding upon the owners.³ Further, the bill of lading specially incorporated the charter-party, and the defenders must therefore be held to be cognisant of its terms. As far as regarded the matter of computation, lay-days and demurrage were *in pari casu*. Accordingly, five days only remained for discharging, and these having begun at 12 P.M. on the 26th December, they were exhausted at 12 P.M. on Friday 2d January. Three days more were occupied in the discharge, which was not completed until late upon the Monday night or Tuesday morning. Sundays, although specially excluded from the lay-days, must count for demurrage purposes. It was admitted that the winches were partially out of order, but the charterers took the risk of that.⁴ On the footing that they did not, seven and a-half hours only fell to be deducted on that account.

Argued for the respondent;—He was merely an onerous indorsee of

* "NOTE.— . . . If the consignees are entitled to five and a-half lay-days, then the ship having been ready to discharge on Saturday morning 27th December, and Sunday, under the charter-party, and 1st January by consent, being discounted, demurrage would properly begin to become due on Saturday 3d January at noon. But it is conceded that a certain deduction ought to be made for stoppages in discharging at two of the holds in consequence of the winches breaking down. The allowance for delay, due to the ship's want of winch power, may fairly be stated at a day and a-half, taking us on to Monday, and in this way, as the ship did not finish her discharge till Tuesday the 5th, one day's demurrage, taking into account the defender's hand-winch and overtime, appears to me to be due at the lowest computation."

¹ Hough v. Athya & Son, May 27, 1879, 6 R. 961; Commercial Steamship Co. v. Boulton, 1875, L. R., 10 Q. B. 346.

² Holman v. Peruvian Nitrate Co., Feb. 8, 1878, 5 R. 657.

³ Maclean & Hope v. Fleming, March 27, 1871, 9 R. (H. of L.) 38.

⁴ Postlethwaite v. Freeland, May 7, 1880, L. R., 5 App. Ca. 599; Budgett v. Brimington & Co. [1891], 1 Q. B. 35; Mitchell v. Scaife, 1815, 4 Campbell's Rep. 278.

No. 75.

Jan. 13, 1892.
Allan v.
Johnstone.

The "Arch-
druid."

the bills of lading, and accordingly could not be bound by the terms of the charter-party, of which he knew nothing, and to which he was a stranger. The bill of lading constituted the contract, and where there was a discrepancy between the charter-party and the bill of lading, as in a question between the owners and the onerous indorsee of the bill of lading, the bill of lading ruled.¹ Here the bill of lading was merely explicatory of an ambiguous clause in the charter-party. The master's authority extended to stating the number of lay-days spent at the port of loading, and his representation of that fact was binding upon his owners, especially as they had given him a printed form with a blank clause in it to fill in. The five and a-half days for discharging must be counted from 7 A.M. on the morning of the 27th December, and they therefore expired at 7 P.M. on Saturday the 3d. But the delays owing to the breakdown of the winch extended the time into the Sunday. There was therefore only one day's demurrage due.

LORD PRESIDENT.—The first question in this case is, how many days were the consignees entitled to for unloading the vessel, whether to five or five and a-half days. The answer depends in the first instance upon the terms of the bill of lading. The bill of lading sets out that "five and half 5½ laying-days remain for discharging the whole cargo." It is quite clear that this is not a mere note or statement of fact that, as matter of history, five and a-half days had been consumed in the loading of cargo. On the contrary, it now appears from the explanation given by Mr Dickson that, there being in the charter-party a provision that "eleven running days, Sundays excepted, are to be allowed . . . for loading and unloading," the bill of lading which was granted in pursuance of the 22d clause of the charter-party is in such a form as to place on the master who signed it a duty to apprise the holder of the bill of lading how much time he has for discharging his cargo. Accordingly, as one of the terms of the bill of lading the master made provision that there should be five and a-half days for discharging. His authority for doing so is, I think, demonstrated by the fact that the charter-party provides that "the 1885 bills of lading are to be used under this charter." An 1885 bill of lading is undoubtedly a bill of lading in the form actually used, and it leaves a blank to be filled in by the master stating how many laying-days remain for discharging. Accordingly, it appears that the master is directly empowered to do the exact thing which in point of fact he has done. It was as a legally authorised agent, and so binding his owners, that he inserted in the bill of lading the statement that five and a-half days remained for discharging. Therefore the rights of parties fall to be determined by the provisions of the bill of lading, and they are unambiguous.

The next question is whether more than one day, plus the five and one-half days, have been occupied in discharging. I think the calculation is sufficiently clear,—starting from 6 A.M. or 7 A.M. on the morning of the 27th December,—with the result that the respondents are placed in the situation which Mr Dickson described as entering the Sunday, and the question therefore falls. I do not see how the owners can get over the terms of the letter of 26th December written by Messrs Dixon & Harrison, their agents, in which they state that the

¹ *Leduc & Co. v. Ward and Others*, Feb. 1888, L. R., 20 Q. B. D. 475; *Gardner & Sons v. Trechmann*, Dec. 1884, L. R., 15 Q. B. D. 154; *Mercantile Bank v. Gladstone*, 1868, L. R., 3 Exch. 233; *Carver on Carriage by Sea*, sec. 152.

vessel would be ready to commence discharging at 6 A.M. the next morning, No. 75. and that the lay-days would begin then. Discharging was commenced not at six, but at seven (for it was not until the latter hour that *de facto* the vessel was ready), and was completed about 2 A.M. on the 6th January, so that taking the five and a-half lay-days and making an allowance for delays owing to the breakdown of the winches, and leaving out of account the intervening Sunday and New Year's day we get into the following Sunday. It is plain that some allowance must be made for the defect of the winches, for it is part of the contract contained in the charter-party that the ship must be in every way fitted for her work. Taking the most moderate estimate of the time lost by the injury to the winch, we reach the period I have indicated. I do not doubt that the obligation of the owners of cargo is as stated in the case of *Postlethwaite*, but that does not affect the case of the failure of the shipowner to provide a sufficiency of tackle to carry out the discharge, which is what we have in the present case. Accordingly, I think the result is that one day, and one day only, of demurrage is due.

Jan. 13, 1892.
Allan v.
Johnstone.
The "Arch-
druid."

It is satisfactory that we have been able to arrive at the same conclusion as the Sheriff-substitute, especially as the sum at stake is very small, but I can say for all of us that we have given the case as much consideration as if the amount involved had been much larger.

LORD ADAM.—The question in this case is whether the shipowners are entitled to one or three days' demurrage, and that depends on three other questions—(1) whether the shippers were entitled to five and a-half or only to five lay-days for unloading; (2) whether the first day commenced at midnight on the 27th December, or only at six or seven in the morning; and (3) whether any, or if so, what time was to be allowed for defects in the winch. The first question is whether the shippers were entitled to have five or to have five and a-half days for discharging. I entirely agree with your Lordship. The answer to the question depends upon the construction of the bill of lading taken in connection with the provision of the charter-party, that "eleven running days, Sundays excepted, are to be allowed for loading and unloading." The contention upon one side is that it was *ultra vires* of the master to infringe upon the terms of the charter-party by inserting in the bill of lading the statement that five and a-half days remained for discharging; that a day commenced is to be reckoned a complete day, and therefore that five and a-half days must mean six days, the inference from that being that five days only remained for unloading at the port of discharge. The answer is that the bill of lading is the ruling document, and that it was within the right of the master to insert the statement in the bill of lading, and that his owners are bound by it. I think the latter is the right view, and that the master was entitled to fill in the blank in the bill of lading, which had been presented to him by the owners of cargo.

The next question is, when did the lay-days commence at the port of discharge? If there had been nothing special in this case, I do not say that I would not have been of opinion that the hour at which lay-days must begin is twelve o'clock midnight. But this case must depend upon its own circumstances, and I think the letter of the 26th December from the pursuers' agents is conclusive, that the lay-days must be held to have commenced at 6 A.M. on the 27th, or perhaps more properly at 7, when the working day commenced.

With reference to the third question, it was maintained, on the authority of

No. 75.

Jan. 13, 1892.

Allan v.

Johnstone.

The "Arch-
druid."

the cases of *Postlethwaite* and *Budgett*, that the shippers must take the risk of such delays as occurred through the failure of the winch. I cannot assent to that view, and I think the delay was attributable to the defect of the ship. That being so, and allowing a reasonable time for the delay, and excepting Sunday, 28th December, and New Year's day, which it is admitted is to be deducted as a holiday, the lay-days are therefore carried down to Sunday the 4th January. If that be so, the shipowners do not dispute that only one day's demurrage is due.

LORD M'LAREN.—When it is ascertained that the lay-days have been exhausted, demurrage must, I think, be held to begin at the hour at which the lay-days are exhausted, and the days of demurrage are reckoned as periods of two hours from that hour. Any surplus interval of time in excess of a full day is to be counted as an additional day. This point is established by a series of decisions of the English Courts, and cannot now be questioned. It may be settled, as I think we must hold it to be, that demurrage may begin at any hour of the day, that can only be because the lay-days begin and end at the same hour. This is not matter of law, but of arithmetic. There is no valid opinion, any such distinction as was contended for by the appellants to the effect that lay-days always begin at midnight. There is, however, a distinct and different kind. It appears to me that if the ship arrives in port in the afternoon it would not be consistent with good sense that the obligation to load or unload should take effect at the instant when she is brought alongside of the quay. Men cannot be got to assist in the loading or unloading at the moment when notice has to be given to the agent for cargo of the arrival of the ship. Accordingly, I understand that by custom, if a ship arrives after the hour of noon, the lay-days are reckoned from the morning of the following day. But whether they are to be reckoned from midnight, or from the hour at which it is agreed for loading or unloading to begin, is a point on which it is not necessary to give an opinion, because, as your Lordship has pointed out, it is settled for the purposes of the present case by the letter of the owners' agents of 26th December. That letter is assented to, and therefore as regards the time during which the ship was lying at Glasgow, it must be assumed that, by agreement of parties, the lay-days could not be reckoned from an earlier hour than 6 A.M., or 7 A.M. on the 27th, because it is proved that the ship's crew were not ready to assist in the unloading until that hour.

In this state of the facts, we have to consider that by a clause in the charter-party the master was authorised to sign a bill of lading of a specified form prescribed as an "1885 bill of lading." The form contains a clause with a space in it, to be filled up by the master with a statement of the number of days allowed for unloading. That information would be very useful to the consignee, because he would then know what chance there was of demurrage claims being made against him. It was in pursuance of the authority thus given that the master inserted the statement that five and a-half days remained for unloading. The amount which was arrived at as a compromise after a dispute as between five and six days. I am clearly of opinion that the master was acting within the scope of his authority when he made himself a party to this agreement by signing the bill of lading as for five and a-half running lay-days.

I do not enter on the question of fact regarding the time which was allowed for unloading at Glasgow, which has been fully examined by your Lordships. I am satisfied that no more than one day's demurrage is due, and therefore I am of the same conclusion as the Sheriff-substitute.

Mr. KINNEAR.—I am of the same opinion.

No. 75.

That point in the case depends upon the construction to be put upon the bill of lading, taken along with those of the charter-party, and I do not think the reading of the documents can be affected at all by the evidence to which we were referred. The bill of lading in terms allows five and one-half days for discharging the cargo. I take it that according to the general meaning of the words, the days mean whole days, but if the parties to the contract are so minded, it is within their power to stipulate that a day shall be divisible; and the question is whether they have not so stipulated in the present case. The bill of lading is imported into the contract which is expressed in the charter-party, and empowers the master to fill up the blank in the bill of lading, and so enables him to fix the period to be allowed to the merchant for discharge. The master having filled up the blank by the statement that five and a-half days were allowed for discharging, and having taken the cargo on the conditions so expressed, it seems to me to be out of the question for the owner to say that he is bound by the master's act, or that the statement amounts to anything else than a stipulation as between the onerous indorsees and the owners that there were to be five and a-half days for unloading before demurrage begins to run. As to the time from which the laying-days are to run, I think that is settled by the determination contained in the letter of the shipowners' agents that the ship was to be ready to discharge at 6 A.M. on the 27th. On the question of fact, I agree with your Lordships, and have nothing to add.

THE COURT pronounced an interlocutor finding in fact that under the bill of lading, of which the defender was onerous indorsee, five and one-half laying-days were allowed for discharge; that the bill of lading was in the form provided in the charter-party; that it was the duty of the master to settle and fill in the time remaining for discharge, and that he had done so; "that the vessel was not tendered as ready for discharge until 6 A.M. of 27th December 1890, and was not in fact ready for discharge until 7 A.M.; that the discharge was finished on 5th January 1891; that during the said period the discharge was interrupted by the occurrence of a Sunday and of New Year's Day (on which by mutual consent no work was done), and also by the vessel being for upwards of six hours not in a condition to give discharge owing to some of the winches being disabled: Find in law that the pursuers are entitled to one day's demurrage, and no more: Therefore dismiss the appeal."

J. & J. ROSS, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JESSIE M'KINVEN, Pursuer (Respondent).—*M'Clure*.
MATTHEW M'MILLAN, Defender (Appellant).—*Strachan*.

No. 76.

Parent and Child—Bastard—Filiation—Proof of paternity.—Evidence adduced by the pursuer in an action of filiation which the Court held (diss. *M'Kinven v. M'Millan*, Jan. 13, 1892.) insufficient to establish that the defender was the father of the pursuer's child.

Observations on the nature of the evidence which will be sufficient to establish the paternity of a bastard in an action of filiation.

JESSIE M'KINVEN, Glenbarr, near Campbeltown, raised an action in the Sheriff Court of Argyllshire against MATTHEW M'MILLAN, residing at Sheriff of Glenecardoch Farm, Barr, near Campbeltown, for aliment for a bastard Argyll.

No. 75.

Jan. 13, 1892.
Allan v.
Johnstone.

The "Arch-
druid."

the cases of *Postlethwaite* and *Budgett*, that the shippers must take the risk of such delays as occurred through the failure of the winch. I cannot assent to that view, and I think the delay was attributable to the defect of the ship only. That being so, and allowing a reasonable time for the delay, and excepting Sunday, 28th December, and New Year's day, which it is admitted is to be deducted as a holiday, the lay-days are therefore carried down to Sunday the 4th January, and if that be so, the shipowners do not dispute that only one day's demurrage is due.

LORD M'LAREN.—When it is ascertained that the lay-days have been exhausted demurrage must, I think, be held to begin at the hour at which the lay-days are exhausted, and the days of demurrage are reckoned as periods of twenty-four hours from that hour. Any surplus interval of time in excess of a number of full days is to be counted as an additional day. This point is established by a series of decisions of the English Courts, and cannot now be questioned. If it be settled, as I think we must hold it to be, that demurrage may begin at any hour of the day, that can only be because the lay-days begin and end at the same hour. This is not matter of law, but of arithmetic. There is not, in my opinion, any such distinction as was contended for by the appellants to the effect that lay-days always begin at midnight. There is, however, a distinction of a different kind. It appears to me that if the ship arrives in port in the afternoon, it would not be consistent with good sense that the obligation to load or unload should take effect at the instant when she is brought alongside of the quay. Men cannot be got to assist in the loading or unloading at the moment, and notice has to be given to the agent for cargo of the arrival of the ship. Accordingly, I understand that by custom, if a ship arrives after the hour of noon, the lay-days are reckoned from the morning of the following day. But whether they are to be reckoned from midnight, or from the hour at which it is usual for loading or unloading to begin, is a point on which it is not necessary to give an opinion, because, as your Lordship has pointed out, it is settled for the purposes of the present case by the letter of the owners' agents of 26th December. That letter is assented to, and therefore as regards the time during which the ship was lying at Glasgow, it must be assumed that, by agreement of parties the lay-days could not be reckoned from an earlier hour than 6 A.M., or rather 7 A.M. on the 27th, because it is proved that the ship's crew were not ready to assist in the unloading until that hour.

In this state of the facts, we have to consider that by a clause in the charter party the master was authorised to sign a bill of lading of a specified form, described as an "1885 bill of lading." The form contains a clause with a blank in it, to be filled up by the master with a statement of the number of days left for unloading. That information would be very useful to the consignee, because he would then know what chance there was of demurrage claims being brought against him. It was in pursuance of the authority thus given that the master inserted the statement that five and a-half days remained for unloading, an amount which was arrived at as a compromise after a dispute as between five and six days. I am clearly of opinion that the master was acting within the scope of his authority when he made himself a party to this agreement and signed the bill of lading as for five and a-half running lay-days.

I do not enter on the question of fact regarding the time which was spent in unloading at Glasgow, which has been fully examined by your Lordships. I am satisfied that no more than one day's demurrage is due, and therefore con-
to the same conclusion as the Sheriff-substitute.

LORD KINNEAR.—I am of the same opinion.

No. 75.

The first point in the case depends upon the construction to be put upon the terms of the bill of lading, taken along with those of the charter-party, and I do not think the reading of the documents can be affected at all by the evidence to which we were referred. The bill of lading in terms allows five and one-half laying-days for discharging the cargo. I take it that according to the general rule laying-days mean whole days, but if the parties to the contract are so minded, it is quite within their power to stipulate that a day shall be divisible; and the question is whether they have not so stipulated in the present case. The bill of lading is imported into the contract which is expressed in the charter-party, which empowers the master to fill up the blank in the bill of lading, and so enables him to fix the period to be allowed to the merchant for discharge. The master having filled up the blank by the statement that five and a-half days remained for discharging, and having taken the cargo on the conditions so expressed, it seems to me to be out of the question for the owner to say that he is not bound by the master's act, or that the statement amounts to anything else than a stipulation as between the onerous indorseees and the owners that the former are to have five and a-half days for unloading before demurrage begins to run.

As to the time from which the laying-days are to run, I think that is settled by the intimation contained in the letter of the shipowners' agents that the ship would be ready to discharge at 6 A.M. on the 27th. On the question of fact, I entirely agree with your Lordships, and have nothing to add.

THE COURT pronounced an interlocutor finding in fact that under the bill of lading, of which the defender was onerous indorsee, five and a-half laying-days were allowed for discharge; that the bill of lading was in the form provided in the charter-party; that it was the duty of the master to settle and fill in the time remaining for discharge, and that he had done so; "that the vessel was not tendered as ready for discharge until 6 A.M. of 27th December 1890, and was not in fact ready for discharge until 7 A.M.; that the discharge was finished on 5th January 1891; that during the said period the discharge was interrupted by the occurrence of a Sunday and of New Year's Day (on which by mutual consent no work was done), and also by the vessel being for upwards of six hours not in a condition to give discharge owing to some of the winches being disabled: Find in law that the pursuers are entitled to one day's demurrage, and no more: Therefore dismiss the appeal."

J. & J. ROSS, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JESSIE M'KINVEN, Pursuer (Respondent).—*M'Clure*.
MATTHEW M'MILLAN, Defender (Appellant).—*Strachan*.

No. 76.

Parent and Child—Bastard—Filiation—Proof of paternity.—Evidence produced by the pursuer in an action of filiation which the Court held (*diss. M'Kinven v. M'Millan*) insufficient to establish that the defender was the father of the pursuer's child.

Observations on the nature of the evidence which will be sufficient to establish the paternity of a bastard in an action of filiation.

JESSIE M'KINVEN, Glenbarr, near Campbeltown, raised an action in the Sheriff Court of Argyllshire against Matthew M'Millan, residing at Glenecardoch Farm, Barr, near Campbeltown, for aliment for a bastard

2D DIVISION.
Sheriff of Argyll.

No. 76.

Jan. 13, 1892.
M'Kinven v.
M'Millan.

child, to which she gave birth on 17th December 1890, and of which she alleged the defender to be the father.

The pursuer averred;—"For several years the pursuer and defender have been very intimate, and the defender was courting the pursuer. The defender has had connection with the pursuer from time to time since the year 1885. In particular, the defender had connection with the pursuer on or about the 7th day of February 1890, and on or about the 16th day of March 1890, in or near a field on the farm of Upper Barr."

The defender denied these statements.

At the proof the following evidence was led:—

Pursuer's proof.—The defender deponed,—“I am twenty-four years of age. . . . I remember being at the Sunday school at Barr. The pursuer was there, too, as far as I remember. I cannot say what year that was. I was at the Sunday school for about six years. I left when I was about thirteen years of age. I was not there in 1885. . . . I used to call occasionally to see pursuer's uncle and his wife, just as I was passing. . . . I know Mrs M'Coll, wife of the gamekeeper at Glencreggan. I have met the pursuer in her house more than once. I cannot tell the dates when I met her there. I remember being in Mrs M'Coll's house one night when the thrashing mill was at Rosehill farm. I met the pursuer there that night. We played cards in the house that night. I did not leave along with the pursuer, nor accompany her part of the way home. . . . I did not meet her by appointment outside her uncle's house on the 16th March of that year. . . . (Shewn letter No 10/1 of process.)—That is the letter which I wrote to the pursuer. When I said in that letter that I was paralysed at the contents of her letter, I meant that I did not know what she was writing about; that I was taken by surprise. When I said there that ‘I was absolutely certain of it,’ &c., I meant that I was certain, because I had no connection with her.”

The pursuer deponed,—“I am twenty-three years of age. . . . I first made the acquaintance of the defender in the Sabbath school at Barr. . . . The defender was there in the school in 1885. He used to go home with me part of the way frequently on Sunday. The school was nearly a mile from my uncle's house, with whom I live. The defender frequently had connection with me going home from the Sunday school in the year 1885. I left the school that year. It was in the winter time—I mean December and November—that he used to have connection with me going home from the school. . . . I remember when the thrashing-mill was at Rosehill on the 7th February 1890. I went to Mrs M'Coll's house after the thrashing was over. The defender came in. I left the house with him about half-past seven. He went part of the way home with me. He had connection with me that night on the side of the hill where we used always to meet previously. My uncle gave me a scolding when I came home for being late.” She further deponed that in March 1890 she and the defender made an appointment for a meeting on the hill, and that she had connection with the defender

* “Greenock, 14th August 1890.—Dear Jessie,—I was paralysed by the contents of your letter. If you are with child it is certainly not by me. Before my God and my own conscience, I am prepared to swear that, and under no circumstance will I admit the paternity of it. Were I not absolutely certain of it, I would not say that, but I have said it conscientiously and will stick to it to the bitter end. I am very sorry for you.—Yours, &c. MATTHEW M'MILLAN.”

on 16th March 1890. "Cross.—My uncle is Donald M'Quilkan or Wilkinson. The name of his house is Upper Barr. He is my mother's uncle by marriage. I first met defender seven years ago at the Sunday school. I was then about sixteen. . . . I think it is half a mile, or not quite so much from the Sabbath school to the defender's father's house, where he lives. It will be about a mile and a-half from my uncle's house to the defender's father's house. The road leading to my uncle's house from the Sunday school is an entirely different road from the road leading to the defender's house. I know the defender was in Glasgow in the winter 1884-85. . . . No letters passed between us up to the letters, of which No. of process is one. . . . I never had connection with any other man but the defender."

No. 76.

Jan. 13, 1892.
M'Kinven v.
M'Millan.

Donald M'Quilkan, deponed,—“The pursuer is a grandniece of my wife's. . . . I have known the defender ever since he was born. He has been coming about my house for the last seven or eight years when he was at home. I do not think it was to see me he came. I remember his coming in one night shortly after the New Year three or four years ago. That night he came in, and while he was in she went out. He soon after said he must go. I looked out and saw the two of them going down the road. It was quite dark. She did not come back until about eleven o'clock. I went out and whistled, but they made no reply. I was suspicious of what was going on, and I warned the girl now and again. I watched them many a time, but they were too sly for me. I remember one night about the latter end of February or beginning of March 1890 meeting the defender coming over the hill about half-way between my house and Glencreggan. I asked him what he was doing there, and he said he was going home from Rob. Stewart's. He was a mile out of his course for that. The defender used to come frequently when the pursuer and I were working at the potatoes. I am sure he was just wanting to speak to the pursuer. . . . Cross.—It is customary in the district to visit each other's house in the evenings, and sometimes play cards. There is only one apartment in my house. The defender could not be in my house with the pursuer without my knowing it. It was dark when I whistled on the pursuer and defender on the night shortly after the New Year previously mentioned. I saw them when I whistled. That would be about forty yards away. They did not go out of the house together on that occasion. She would be out about ten minutes before the defender. The pursuer never told me that the defender was courting her at that time. When he visited the potato field the pursuer and I were always together. I was digging the potatoes and the pursuer was gathering them. They were never out of my sight at any time. It was by his looks and slyness that I concluded he came to the potato field to see the pursuer. . . . I may have complained to M'Coll or M'Gougan that I was afraid pursuer was carrying on with flows. I have seen pursuer speaking frequently to a farm-servant, called Brown, about two years ago. . . . Re-examined.—I remember when the thrashing-mill was at Rosehill. I remember the pursuer coming home very late that night. I gave her a scolding for being late.”

Re-cross.—I never saw any familiarities between the defender and pursuer.”

Tenna Taylor deponed,—“I am twenty years of age. I know the pursuer and the defender. I was serving with Thomas M'Corkindale from Martinmas 1889 to Martinmas 1890. M'Corkindale's house is close to the pursuer's uncle's house. I was a great deal in the pursuer's company. I do not know if M'Millan used to go into her house at night. She told the defender was courting her. I have seen him go into the house pretty

No. 76.

Jan. 13, 1892.
M'Kinven v.
M'Millan.

often. It was mostly in the afternoons when he went in. I remember the thrashing at Rosehill in the spring of last year. That was in the month of February. I know the pursuer went to work at the thrashing that day. I was in M'Quilkan's house that night till late, and the pursuer had not come in then. They were wondering what was keeping her. [The witness gave no evidence as to the defender being with the pursuer on this occasion.] . . . I remember going with her one night to M'Coll's house. The defender was there. I cannot say what time of the year that was. . . . Pursuer told me she was in the family-way. She said Matthew M'Millan was the father. Cross.—The defender was not present when the pursuer told me that he was courting her. The night I went to M'Coll's house with the pursuer we came home together, and left the defender there. . . .”

John M'Gougan deponed,—“I am a farm-servant with Mr M'Corkindale at Upper Barr. I know the pursuer and defender. I have seen the defender calling at M'Quilkan's house at all times of the day. . . . Cross.—My house is almost adjoining M'Quilkan's house. I have never seen the pursuer and defender walking together. I have been there all my days. I never saw any familiarities or courtship between them.”

Isabella M'Coll deponed,—“I am the wife of the gamekeeper at Glencreggan. I know the pursuer and the defender. They have both been together frequently in my house. The pursuer and defender never left my house together. Cross for defender.—My husband and I have been eight years at Glencreggan. The pursuer has been going back and forward to my house all that time. It is the custom for the farm-servants—male and female—to come into my house in the winter evenings and play cards. The defender was in the habit of visiting us in the absence of the pursuer. I know that defender was four years at college. He has not been there for the last three years. . . . The pursuer and defender never came to my house together. I never saw any familiarities between them. I never thought they were courting. She never spoke to me of the defender as her sweetheart. She has left the house different times with Hugh Rankine, a joiner. She has told me that Rankine went home with her. M'Quilkan often complained to me about the pursuer staying late at my house, and going home with James Brown.”

Defender's proof.—Donald M'Coll, husband of the preceding witness after giving similar evidence as to the meetings in his house, continued,—“I never saw the pursuer and defender leaving my house in company. I never saw any familiarities between the pursuer and defender. I have never seen him paying any attention to her as his sweetheart. There have been other girls visiting my house and playing cards in the evening. I have repeatedly accompanied the pursuer [defender] part of the way home. It is in a different direction from the pursuer's uncle's house. I have never seen them leaving my house together. I have seen her leaving my house with Hugh Rankine. I remember M'Quilkan once speaking to me about the pursuer's conduct with Brown. . . .”

The defender examined as a witness for himself,—“My acquaintance with the pursuer has been the same as other schoolmates. I have heard what the pursuer said about intimacy with me in the months of November and December 1885. I was at Glasgow attending the college the whole of these months up to the Christmas vacation. It is eight years since I first went to college; I was there five consecutive years. For six summers up to the last summer I was purser in the Campbeltown steamer. I wrote the letter No. 10/1 of process in answer to the first letter I received from pursuer. That is the only letter I wrote to her. . . . I never courted the pursuer. I never had connection with her. I have heard

the evidence of M'Quilkan with reference to seeing him on the hill. On the occasion referred to I was herding hogs for my father. On that occasion I had not been seeing the pursuer. M'Quilkan is a married man. Every time I visited his house either he or his wife was in. I have repeatedly been there when the pursuer was not there. I never made any appointments with the pursuer, as she says in her evidence." No. 76.
Jan. 13, 1892.
M'Kinven v.
M'Millan.

On 29th September 1891 the Sheriff-substitute (Bell) found that the defender was the father of the pursuer's child.*

The defender appealed.

At advising,—

LORD JUSTICE-CLERK.—On the evidence I am of opinion that the pursuer's case is not proved. The Sheriff-substitute uses an expression in his note which, I think, shews that he somewhat misapprehended the considerations which ought to prevail. He says,—“The pursuer's story is a consistent one, and is not contradicted by any neutral witness,” and he further alludes to the circumstance that the pursuer had been seen with the defender *solus cum sola* on a public road on one or two occasions a year or two before the acts of connection averred. If that were to be taken as corroboration—that a young man was seen in a young woman's company in a public place long before the alleged intimacy—no man living in the rural part of the country would be safe from such an accusation, unless he was a woman-hater, who shunned women's society altogether. Another ground of corroboration is said to be found in a letter written by the defender on being charged by the pursuer with being the cause of her pregnancy. It is undoubtedly not a satisfactory letter, but I am not satisfied that there is anything in its terms amounting to an admission of connection. If there is not, it does not help the pursuer's case. Persons sitting down to write a letter are apt to fall into a somewhat stilted form, and there is a distinct denial of paternity. If that is a falsehood there is an end of the matter, but it may be taken as a denial of the paternity, because

* NOTE.—This is rather a narrow case, but I think the pursuer must prevail. The witnesses, M'Quilkan, M'Gougan, and Taylor, all speak to the defender frequently visiting the house of Mr M'Quilkan, where she resided. M'Quilkan and Taylor both speak to the parties being out *solus cum sola*, late at night—the former to an occasion a year or two previous to the specific dates of connection libelled, and the latter in particular to its having occurred on the night of the first date libelled, 7th February 1890, the day of the thrashing at Rosehill. Taylor also says the pursuer told her the defender was courting her, and that she spoke to her of her condition, and attributed it to the defender. The pursuer's story is a consistent one, and she is not contradicted by any neutral witness. Unless the witnesses named are to be disbelieved, her case is aided by their testimony to a height of probability which, with her own evidence, strikes, I think, the rule applied to such cases. It is also of importance that he wrote to the defender himself during her pregnancy, attributing it to him. His letter to her (No. 10/1 of process) in answer does not strike me as that of an innocent man, but the reverse. If he had had nothing to do with the girl he had no need to be ‘paralysed’ by her announcement. It impresses me as that of a man conscious of the truth of the impeachment, but who is taking refuge in denial from the inconvenient consequences of his indulgence; and his explanation of it, in his examination for the pursuer—that he ‘did not know what she was writing about’—is not satisfactory. The language of his letter is that of one who has quite appreciated the force of the communication to which it is an answer. If the case is narrow, it is at least a broader one than *M'Bayne v. Davidson*, Feb. 10, 1860, 22 D. 739, where the paternity was held proved.”

No. 76.

Jan. 13, 1892.
M'Kinven v.
M'Millan.

the writer had never had connection with the pursuer. On the whole matter I think that the Sheriff-substitute has approached the case under an erroneous idea. If it is enough that a pursuer's story is "consistent, and uncontradicted by any neutral witness," then a false story might prevail if only it was consistent, and the defender were unsuccessful in obtaining any independent evidence to negative it. That might well happen. A pursuer of such an action must prove her case like any other pursuer, and she does not prove it unless she bring evidence truly corroborative of her evidence, such as would be held sufficient corroboration of the evidence of a party interested in the issue in any ordinary case. I do not find such corroboration here. Therefore I hold that the pursuer has failed to prove her case.

LORD YOUNG.—The truth as to such cases is certainly known only to the parties. Formerly the evidence of both was excluded, and great difficulty was felt. The result was that if what was known as a *semiplena probatio* was obtained from the competent evidence the woman's oath was admitted to prove the case. That state of the law led to two views upon the true nature of a *semiplena probatio*. Lord President Blair took one, and Lord Mackenzie (and many persons agreed with him) took another. That latter view was very much that which the Sheriff-substitute has adopted in this case. I cannot find any fault with the reasoning in his note to which your Lordship has referred. In the present state of the law we take the whole evidence together, and if we think the woman's story true we give decree. Such an observation as the Sheriff-substitute has made is a commonplace observation in these actions. The fact to which the woman speaks is one which is in its nature a thing which the parties endeavour to conceal. We require some corroboration. But little will do. That these parties seemed to be "keeping company" is important. It is spoken to by the pursuer's granduncle, M'Quilkan. (His Lordship read the evidence of this witness.) The defender denies all this. If we think that he lies, that is a circumstance that we are entitled to act upon. It is not that his lie proves the case, but that his falsehood is a thing which we are entitled to take account of in considering whether we may safely act upon the woman's statement if we believe it. As regards the defender's letter, I do not say that it is an admission, but it does produce in my mind the impression that it was not written by an innocent man to a woman who was trumping up a case against him, and it does lead me to believe the woman rather than the man. I think there is reasonable evidence for the Sheriff's judgment, and that, there being such, it should not be altered. But further, I think it is the proper result on the evidence.

LORD RUTHERFURD CLARK.—The conclusion to which I have come is that the pursuer's case is not proved.

LORD TRAYNER.—I agree in thinking that the pursuer has entirely failed to prove her case. There is no evidence in support of it but her own. The evidence of her granduncle does not, in my opinion, afford the slightest corroboration of the pursuer's statement. He speaks to a circumstance which he says excited his suspicion as to the relation existing between the pursuer and defender, but that circumstance occurred three or four years before the child in question was born, and cannot therefore have, in my opinion, any bearing upon the question before us. Beside this witness's suspicions are not evidence of fact.

I think the Sheriff-substitute has reached the conclusion given effect to in his judgment upon an erroneous idea of the law applicable to cases like the present. Your Lordship in the chair has already referred to the passage in the Sheriff-substitute's note where he says, "the pursuer's story is a consistent one, and she is not contradicted by any neutral witness." Upon that I observe that the pursuer's story, consistent and uncontradicted as it may be, is still the pursuer's story and nothing more. It is not sufficient to prove the pursuer's case unless it be corroborated. The absence of contradiction does not afford corroboration. But what I more especially allude to is the sentence which follows what I have just quoted. The Sheriff-substitute adds, "unless the witnesses named are to be disbelieved, her case is raised by their testimony to a height of probability which, with her own evidence, satisfies, I think, the rule applied to such cases." The rule to which the Sheriff-substitute refers is, I suppose, the old rule, which allowed the pursuer of an action of filiation, who had adduced a *semiplena probatio*, to supplement that evidence by her own oath, and thereupon to obtain decree. A *semiplena probatio* was just such a proof as the Sheriff-substitute describes, namely, such an amount of evidence as created a strong probability that the pursuer's case was well founded. But the Sheriff-substitute seems to have forgotten that that rule no longer exists. It ceased when the law was altered to the effect of allowing the parties to a cause to be examined as witnesses in the cause. I am surprised the Sheriff-substitute should have forgotten this, for it is plainly laid down in the case which he cites, *M'Bayne v. Davidson*. The rule applicable to filiation cases is now the same as that which applies to any other kind of case which depends upon the ascertainment of disputed fact. The pursuer must prove her averments in an action of filiation just as she would require to prove her averments in an action on a contract where the alleged contract, or the alleged breach of contract, or other allegation on which the action is founded, is disputed.

I would like to add one word about the defender's letter, which the Sheriff-substitute thinks is not the letter of "an innocent man." It is, at all events, a distinct denial of the paternity of the pursuer's child. It does not strike me as suggesting any doubt of the defender's innocence. But is it any proof of the defender's guilt? That is the light in which it should be regarded, and I have no hesitation in answering that question in the negative.

THE COURT recalled the interlocutor of the Sheriff-substitute, and assolizied the defender.

A. STEWART GRAY, W.S.—JOHN VEITCH, Solicitor—Agents.

SUSAN ARMSTRONG OR M'QUILLAN, Pursuer (Respondent).—

A. S. D. Thomson.

JAMES SMITH, Defender (Appellant).—*M'Lennan.*

No. 77.

Jan. 15, 1892.
M'Quillan v. Smith.

Title to sue—Title of deserted wife to sue for aliment of illegitimate child—Creditor ad litem.—Held that a married woman whose husband had gone abroad, and had not been heard of for several years, had a title to sue for aliment of an illegitimate child.

SUSAN ARMSTRONG OR M'QUILLAN, Portpatrick, brought an action in the Sheriff Court of Wigtownshire against James Smith, Portpatrick, for payment of inlying expenses and of aliment for her bastard child, born on 19th December 1890, of whom she averred that he was the father.

2D DIVISION.
Sheriff of Wigtownshire.

No. 77.

Jan. 15, 1892.
M'Quillan v.
Smith.

The pursuer averred ;—"The pursuer, who resides with her mother in Portpatrick, was married to Joseph M'Quillan, seaman. He sailed for Australia about seven years ago, and has not since been seen nor heard of by the pursuer, and she has no knowledge as to whether he is dead or alive."

Smith denied that he was the father of the pursuer's child, and pleaded, *inter alia* ;—(1) The pursuer, being a married woman, is not entitled to sue this action without the consent and concurrence of her husband. (2) The child in question being the offspring of a married woman, her husband is presumably the father thereof; therefore it is incompetent to prove the paternity against the defender without making the husband a party to the action.

After a proof, the Sheriff-substitute (Watson) pronounced an interlocutor containing the following findings :—"Finds in fact that the pursuer's husband left this country and sailed for Australia in the year 1883; that since then he has been continuously absent from her, has contributed nothing to her support, and has made no communication to her of any kind, with the exception of one letter received by her about six months after he left; that on 5th July 1885, William Reid, who was acquainted with the pursuer's husband, and to whom she had applied for information regarding him, wrote to the pursuer from Sydney, that he had seen her husband in that town a few days previous to the date of the letter; that since that time the pursuer has not heard anything of her husband, though she has made such endeavours to trace him as might reasonably be expected of her: Finds in law that, in these circumstances, the pursuer is entitled to sue this action alone, and repels the first and second pleas in law stated for the defender," &c.

The Sheriff-substitute further found it proved that the defender was the father of the pursuer's child.

The defender appealed to the Court of Session, and argued ;—A married woman could not sue such an action at her own instance. The action was therefore without any proper instance. At all events she could not sue without the concurrence of a curator ad litem appointed by the Court. Such cases as *Orme v. Differs* where it had been held that a deserted wife could trade and could defend herself against actions, and was liable to diligence, were not in point.¹

On the merits, the defender argued that the paternity was not established.

Argued for the pursuer ;—The rule that a married woman could not sue or be sued alone was certainly not absolute, as the cases of *Chirnside* and *Orme* shewed. The case of *Brodie v. Dyce* involved the present point. The pursuer appeared from the evidence to have been left by her husband, to have attempted to learn where he was, but failed, and to have become obliged to support herself. It was impossible to hold that she could not sue or be sued by herself. On the merits, paternity was clearly established.

The pursuer's counsel intimated that he was willing to have a curator ad litem sisted to the pursuer and put in a minute to that effect.

The Court appointed Mr P. Morison, S.S.C., to be curator ad litem.

¹ *Authorities*.—*Wilkinson v. Bain*, Nov. 9, 1880, 8 R. 72; *Montgomery v. Montgomery*, Jan. 21, 1881, 8 R. 403; *Chirnside* (1789) M. 6082; *Orme v. Differs*, Nov. 30, 1833, 12 Shaw, 149, 6 Scot. Jur. 115; *Cullen v. Ewing*, Nov. 1830, 9 S. 32; *Ritchie v. Barclay*, June 5, 1845, 7 D. 819, 17 Scot. Jur. 427; *Jobson v. Reid*, May 31, 1832, 10 S. 594, 4 Scot. Jur. 465; *Brodie v. Dyce*, Nov. 29, 1872, 11 Macph. 142, 45 Scot. Jur. 92.

At advising,—

No. 77.

LORD JUSTICE-CLERK.—The only real and practical question in this case is, Jan. 15, 1892. M'Quillan v. Smith. whether the pursuer is in a position to sue this action in her own right and without the consent of her husband. Upon the merits of the case there is no doubt that the judgment of the Sheriff-substitute is right.

In the first place, what are the circumstances of the case? The pursuer was married thirteen years ago, and her husband, who was a sailor, left her on a voyage to Australia in 1883, and since then she has never seen him. The last she heard about him was in 1885, when she got a letter from someone saying he had seen the pursuer's husband in Australia, but since then she has heard nothing about him. It has been found, no doubt very properly, that the pursuer has made reasonable endeavours to trace him.

The question then is, whether if the pursuer in such circumstances should prove unfaithful to her marriage vow and have an illegitimate child, she can insist as in her own right in an action calling upon the alleged father to pay his share of the child's support. It must be kept in view that we are not dealing with a question of status at all, the only question that can arise is whether the pursuer can overcome the presumption, which exists in the case of a married woman if she gives birth to a child, that the father of the child is her husband.

Now, it is not doubtful that a woman in such circumstances as the pursuer is placed in here is entitled to deal with other persons in her own right, and to incur debt on her own account, indeed it is almost essential that she should be able to do so, and in law she has such a right, so that with the exception of matters affecting status she can act as if her husband was dead.

Now, this case raises a question of debt, and nothing else. The question is, whether a debt is due to the pursuer by the defender, because she has to take charge of and provide for the upbringing of the child. She calls upon the defender to pay his share of the expenses so caused as a debt which he owes to her. I therefore think we cannot sustain the preliminary pleas of the defender, and should adhere to the interlocutor in the Court below.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT subsequently pronounced this interlocutor:—"Find in fact and in law in terms of the findings in fact contained in the interlocutor of the Sheriff-substitute; therefore dismiss the appeal," &c.

ROBERT BROATCH, L.A., Defender's Agent.

THOMAS HILL, Pursuer (Respondent).—*M'Kechie—M'Clure.*
GEORGE THOMSON, Defender (Reclaimer).—*Dickson—Salvesen.*

No. 78.

Reparation—Slander—Issue—Want of probable cause—Privilege.—Jan. 16, 1892. Hill v. Thomson. Held that, where a pursuer seeks to recover damages for a statement, imputing misconduct to him, which has been made by the defender, in discharge of his duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause.

Opinion (per Lord Trayner) that the same rule applies where the statement is made in exercise of a right.

The Merchant Shipping Act of 1854 * requires cases of wilful disobedience to

* 17 and 18 Vict. c. 104, provides, sec. 243 (4), that "for wilful disobedience

No. 78.

Jan. 16, 1892.
Hill v. Thom-
son.

be entered in the log, which is to be delivered to the shipping-master at the port of destination, and also provides that the person charged shall before reaching port be furnished with a copy of the entry, and that his reply, if he makes any, shall also be noted. Wilful disobedience to a lawful order may be punished by imprisonment for four weeks, with hard labour.

The chief officer of a ship raised an action against the master of it, concluding for damages in respect of an entry in the log, made by the master, that the pursuer had "wilfully and intentionally disobeyed" his orders in allowing a particular seaman to steer. The pursuer stated in his condescendence that he had been ordered by the master, at eight o'clock in the evening, not to allow this particular seaman to steer; that at two in the morning, when the pursuer was on duty as officer of the watch he entirely forgot this order, and allowed that seaman to take the wheel; that the master coming on deck, and finding him at the wheel ordered the pursuer off duty, "without inviting or permitting any explanation"; that the master then made the entry in the log complained of, and handed a copy to the pursuer. He did not aver that he had tendered any explanation either at the time, or when the copy of the entry was handed to him.

Held (1) that the circumstances averred were such as to require the pursuer to put want of probable cause in issue, as well as malice, and (2) that as his averments disclosed a case in which the master had probable cause for his conduct, the action was irrelevant, and must be dismissed.

2D DIVISION.
Ld. Wellwood.

THOMAS HILL, master mariner, raised an action against George Thomson, also a master mariner, concluding for £1000 of damages in respect of an alleged slander, contained in an entry dated 18th September 1891 in the log-book of s.s. "Feliciana," of Glasgow, when the pursuer was serving as first mate on board the "Feliciana," commanded by the defender. She had just completed a voyage from the St Lawrence to Dundee, and had left Dundee for London on 17th September.

The pursuer stated that "about eight o'clock" on the evening of that day, "when a seaman was at the wheel, named James Harty, the defender expressed to the pursuer his wish that Harty should not be permitted to steer the ship when his turn for wheel duty again came round. . . . About two o'clock on the morning of the following day, it again came to Harty's turn at the wheel, when pursuer was in charge of the ship. The said James Harty, who is a seaman of much experience, was thoroughly competent to steer said ship, and had regularly steered her without complaint throughout the voyage from Liverpool out and home. To this circumstance, and to the casual intimation of his order upon the day before by the defender, it was probably owing, but in any case it is the fact, that the pursuer for the time entirely forgot the verbal order he

to any lawful command" any seaman "shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour."

By section 244 it is provided that any of the offences enumerated in section 243 shall on its commission be noted in the log-book, and signed by the master and the mate or one of the crew, and the offender, before the arrival of the vessel at the next port shall "either be furnished with a copy of such entry, or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit." It is also provided that a statement shall be entered in the log that the entry has been so read over, and that the reply, if any, shall also be entered.

Sections 280-1 prescribe the keeping of a log and the manner of it. Section 282 requires the master to enter in the official log, "(3) every offence for which punishment is inflicted on board, and the punishment inflicted." Section 283 imposes penalties for failure to keep the log as required, and section 286 provides that logs are to be delivered to the shipping master, a Government officer, at the port of destination in the United Kingdom, before the crew is discharged.

had received respecting the said James Harty, and permitted him to take the wheel. Sometime thereafter the defender came upon the bridge, and seeing the said James Harty at the wheel, instantly, and without inviting or permitting any explanation, ordered the pursuer off duty, upon the pretext that he had wilfully disobeyed the orders of the defender. The defender, at the time he gave said order, knew well, from his previous experience of the pursuer on board said vessel, that the pursuer was not guilty of wilful and intentional disobedience." No. 78.
Jan. 16, 1892.
Hill v. Thomson.

The pursuer further averred;—"Thereafter, upon the same day, the defender made the following entry in his official log, viz.:—'18 Sept. 1891.—3 h. 20 m. A.M., lat. 52° 52' N., long. 1° 36' E., 9 A.M., Sept. 1891.—This is to certify Mr Thomas Hill, chief officer, wilfully and intentionally disobeyed my orders in allowing James Harty, seaman, to steer the ship in narrow waters, seeing the said seaman was quite unable to steer, and the course he made with the ship could not be relied upon, and it was dangerous while he was at the helm to approach shipping; seeing such was the case, I ordered Mr Hill not to allow him there any more, but in the face of my instructions, and the care of the vessel, he, Mr Hill, allowed him to take the helm again, for which I knocked him off duty. GEO. THOMSON, Master.' The defender handed a copy of said entry to the pursuer. The said entry is false in fact, and a gross slander, in so far as it records that the pursuer was guilty of wilful and intentional disobedience to the defender's orders, and the defender well knew that it was slanderous and mendacious when he made it. The said entry was made, and the punishment foresaid was inflicted maliciously and without probable cause by the defender, with the deliberate intention of injuring the reputation of the pursuer in his profession, and particularly with his employers."

The pursuer pleaded;—(2) The statement complained of having been made by the defender maliciously and without probable cause, and the same being false and calumnious, the pursuer is entitled to solatium and damages, as concluded for.

The defender pleaded;—(1) The pursuer's averments are irrelevant. (2) Privilege.

The Lord Ordinary (Wellwood), on 18th December 1891, repelled the defender's first plea in law, and assigned a day for the adjustment of issues.*

* "OPINION.— The pursuer admits that at eight o'clock p.m. on 17th September 1891 the defender ordered him not to allow Harty to steer the vessel when his next turn came. It is not disputed that this was a legitimate order for the defender to give; and it is not said that it was given with any sinister motive. The defender, as master of the ship and responsible for its safety, was undoubtedly entitled to give that order, and the pursuer was bound to obey it. But when Harty's turn came at two A.M. next morning the pursuer allowed him to take the wheel. He says that he forgot the order given to him by the defender. That may be true; I assume it to be true; but, *prima facie*, the pursuer's failure to obey the order was wilful, occurring, as it did, so soon after the order was given; and if the defender honestly believed it to be wilful, there is no doubt that he had probable cause for the charge he made against the pursuer.

"The pursuer avers, however, and offers to prove, that the defender did not *bona fide* believe that the pursuer's failure to obey the order was wilful, but made the charge of wilful disobedience in order to gratify the malice which he entertained against the pursuer. It may be difficult for the pursuer to establish this, because it will not be sufficient for him to prove antecedent malice unless the evidence of malice is of such a nature as to negative an honest belief in the charge on the part of the defender, which might quite well exist, however malicious the defender was; but I am not prepared to throw the action out without

No. 78.

Jan. 16, 1892.
Hill v. Thom-
son.

The defender reclaimed, and argued;—In the circumstances the pursuer must take an issue of want of probable cause as well as of malice, and, if that were so, since the record disclosed a case of probable cause, the action was irrelevant. Now, the most recent and authoritative case on the necessity of putting in issue the want of probable cause was the case of *Croucher v. Inglis*.¹ Undoubtedly, on the authority of that case, a person who had a duty to inform was entitled to this protection, and, it was urged, so was a person who had a right only, provided that information was given in the proper quarter. In cases of judicial slander want of probable cause must go into the issue.² So, too, in cases of the wrongful use of arrestments.³ These were cases not of duties, but of rights merely. Lord Young in the case of *Shaw v. Morgan*,⁴ had noticed how the tendency of the law in recent years had been to extend the sphere of privilege. That there was a right in the defender here to do what he did was too plain for argument, but it was further submitted that there was a duty imposed upon the master by the Merchant Shipping Act quite as imperative as the moral duty under which the defender in *Croucher v. Inglis* was held to be protected. If then the relations of the parties required want of probable cause to be put in issue, the pursuer's record would not bear any such issue, for it plainly disclosed that the defender had probable cause for his conduct. He found a plain order disobeyed in the very next watch, and no excuse made for it, either at the time or when the copy of the entry was handed to the pursuer. The existence of probable cause was a matter to be determined by the Court and not by the jury.⁵

The pursuer argued;—The case of *Gibb v. Barron*⁶ shewed that the position and rights of a private individual were very different from those of a public officer, and it was only because the Court in *Croucher v. Inglis* thought that a minister was a public officer that they pronounced the judgment they did. Now, the captain here was not a public officer. [LORD RUTHERFURD CLARK.—But is he not bound to make this entry? That might be so, but not to add that the disobedience was wilful and intentional, unless he satisfied himself by some inquiry that that truly was the character of the offence. He was to record facts, and not inferences of his own from these facts. The question whether there was or was not probable cause was a question for the jury, and the Court, if it took upon itself to judge of probabilities, was usurping the functions of the jury.⁷ Recent decisions did not bear out the defender's statement that want of probable cause must go into issue in all cases in which the defender had a right to make the statement complained of, e.g. in judicial slander.]

allowing him an opportunity of proving, if he can, that the charge was not honestly made. If the whole of the essential facts were disclosed, the case might be disposed of now; but the facts of the case cannot be said to be fully before the Court when it is not known whether the charge of wilful disobedience was made in good faith or not."

¹ June 14, 1889, 16 R. 774.

² *Ewing v. Cullen*, Aug. 24, 1833, 6 W. and S. 566, 6 Scot. Jur. 1; *Selbie v. Saint*, Nov. 8, 1890, 18 R. 88.

³ *Wolthecker v. Northern Agricultural Co.*, Dec. 20, 1862, 1 Macph. 211, 35 Scot. Jur. 156; *Brodie v. Young*, Feb. 19, 1851, 13 D. 737, 23 Scot. Jur. 319.

⁴ July 11, 1888, 15 R., Lord Young, at p. 871.

⁵ *Urquhart v. Dick*, June 10, 1865, 3 Macph. 932, 37 Scot. Jur. 134; *Craig v. Peebles*, Feb. 16, 1876, 3 R. 441.

⁶ July 1, 1859, 21 D. 1099, 31 Scot. Jur. 613.

⁷ *Scott's Trustee v. Moss*, Nov. 6, 1889, 17 R. 32.

⁸ *Scott v. Turnbull*, July 18, 1884, 11 R. 1131.

LORD JUSTICE-CLERK.—It is important in this case to see exactly how the facts stand as they are averred by the pursuer. His case is that he, being chief officer on board the “*Feliciana*,” of which the defender was master, received an order from the defender that a certain seaman was not to be put to the wheel ; as a matter of fact in the very next watch, when the pursuer was officer on duty, the captain, coming on deck, found this very seaman at the wheel. The captain at once ordered the chief officer below, and made this entry in his log : “This is to certify Mr Thomas Hill, chief officer, wilfully and intentionally disobeyed my orders in allowing James Harty, seaman, to steer the ship in narrow waters, seeing the said seaman was quite unable to steer, and the course he made with the ship could not be relied upon, and it was dangerous while he was at the helm to approach shipping ; seeing such was the case, I ordered Mr Hill not to allow him there any more, but in the face of my instructions, and the care of the vessel, he, Mr Hill, allowed him to take the helm again, for which I knocked him off duty.” This entry was duly made in obedience to the statute, and was signed by the master and another seaman, a copy of it being then and there handed to the chief officer.

The record does not indicate that the pursuer gave any explanation at all of what was, as his own record states, a breach of the master’s orders.

The pursuer raises this action of damages in respect of the statements thus made about him, and the question between the parties is whether the case is or is not of such a character that the pursuer, besides putting malice in the issue, must also put in it want of probable cause.

To determine that question we must see what are the positions and the relations of the parties on record. There is no doubt at all that the master was bound to record in the log any wilful disobedience of an order of importance touching the safety of the vessel and the crew. The record of any such occurrence may be followed up by proceedings of a criminal nature, for a person guilty of wilful disobedience is, under the Merchant Shipping Act, liable to imprisonment with hard labour. There cannot, therefore, be a doubt that, if the captain believed that his orders had been wilfully and intentionally disobeyed, he was bound to record that. Plainly, then, unless there was a want of probable cause, the master was acting in the execution of his duty.

The next point is whether there is any fact set forth here to warrant the inference that the master had not probable cause for doing what he did. It is stated by the pursuer that the master gave an order relating to an important matter, affecting the safety of the ship, and that, coming on deck in the very next watch he found that this order had been disobeyed. It is impossible to conceive that he had not probable cause for thinking that the pursuer had disobeyed his orders wilfully and intentionally.

I am therefore for holding that the action should be dismissed. Looking to the variation which there has been in the decisions of the Court on the question of what circumstances require the insertion of want of probable cause in the issue, it was necessary to have a very full debate, but I am clearly of the opinion which I have just expressed.

LORD RUTHERFURD CLARK.—I am satisfied that, if we were to adjust an issue here, we must insert the words, “and without probable cause.” But I think that the record discloses in the very clearest manner that there was probable cause, and consequently, I think, the action is irrelevant.

Jan. 16, 1892.
Hill v. Thom-
son.

No. 78. **LORD TRAYNER.**—The first question is, whether the pursuer is bound to put in issue “want of probable cause,” as well as malice, and I agree with your Lordships that he is.

Jan. 16, 1892.
Hill v. Thom-
son.

There seems, as your Lordship has said, to be some difficulty in determining, according to the older cases on the subject, what exactly is the rule or principle on which these words are or are not required to be put in issue. But the recent case of *Croucher v. Inglis* (16 R. 774) seems to afford a rule on the subject, which I am prepared to adopt. I venture to express my concurrence with the opinion there expressed by Lord Shand, viz., that “where there is a duty, or rather a right” on the part of the writer, to write and send the writing complained of, in such a case “the issue which the pursuer takes must embrace malice and want of probable cause.” The more limited view of the Lord President in the same case would, however, if applied here, lead to the same result. For in the present case the defender stood in the position of a public official charged by statute with the duty of entering in his official log any act of wilful disobedience on the part of any member of the crew, and of reporting to the public authorities such entries by delivery of the log itself, within forty-eight hours after his arrival in port. Indeed this case would be covered by the rule which required want of probable cause to be put in issue in all cases where the ground of action was that information had been given to the public authorities that a crime had been committed.

The wilful disobedience of orders on board ship is a crime under the Merchant Shipping Act of 1854, and the defender in reporting it to the public authorities would have been entitled to the protection afforded by the words “want of probable cause,” had there been no duty on him to make the report beyond the duty, which every citizen has, of making such a report.

But the duty on the defender to make the entry now complained of in the log-book, and to report it to the public authority, was more than a moral duty. It is imposed upon him by statute, and a failure on his part to perform that duty would have subjected him in a penalty.

Whether, therefore, the older and more limited rule is applied, or the more recent and wider rule of *Croucher v. Inglis*, I think that the pursuer in this case is bound to put in issue that the report complained of was made, not only maliciously but also without probable cause.

The next question is—Can the pursuer be allowed such an issue in this case? I think not. The pursuer's statements shew beyond any question that the defender had probable cause for believing and saying that the pursuer had been guilty of wilful disobedience, and it is remarkable that the pursuer did not offer to the defender any explanation of his conduct which might have altered or modified the defender's view of that conduct, either at the time when he was ordered off duty on account of his disobedience, or at the time when he was furnished with a copy of the entry made in the log. Without any explanation offered or made, the defender could come to no other conclusion than that the pursuer's disobedience was wilful. I am therefore for refusing any issue, and think that the defender should have absolvitor.

LORD YOUNG was absent.

THE COURT recalled the Lord Ordinary's interlocutor and dismissed the action as irrelevant.

D. MACLACHLAN, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

JAMES M'KERCHAR, Pursuer (Respondent).—*J. G. Millar.*
DUNCAN CAMERON, Defender (Reclaimer).—*R. L. Orr.*

No. 79.

Jan. 19, 1892.
M'Kerchar v.
Cameron.

Reparation—Slander—Newspaper—Innuendo.—Terms of an anonymous letter in a newspaper with reference to the state of a public school which were held to entitle the master of the school to an issue whether it represented that the pursuer was unfit for his post, and that it was the duty of the board to dismiss him.

Reparation—Slander—Privilege.—*Held* (following *Brims v. Reid*, 12 R. 1016) that the publisher of a newspaper, who has refused to disclose the name of the writer of an anonymous letter to the editor, cannot plead privilege in answer to an action of damages for slanderous statements in the letter.

JAMES M'KERCHAR, the head-master of the public school at Ballachulish, brought an action of damages for libel against Duncan Cameron, the printer and publisher of the *Oban Times*, for publishing in the *Oban Times* of 17th October 1891, the following letter:—“Lismore and Appin School Board.—(To the Editor, *Oban Times*.)—Sir,—The reports of schools under this board have not yet been made public, and, as was indicated by ‘Poor Man and Ratepayer,’ in your issue of 3d curt., the ratepayers are getting impatient, and no wonder. It is now rumoured that the report in the case of one or more of the schools is so bad that the board are ashamed to publish it. If to screen one school the whole of the reports are withheld, it is time the ratepayers took steps to enforce their rights. I wonder if it is the case, as it is rumoured, that the Ballachulish School is at the bottom of the poll this year again; if so, how long is this state of matters to be allowed to go on? Are the interests of the public to be sacrificed for the sake of providing a house and salary for a teacher? I am, &c. ANOTHER RATEPAYER.”

The pursuer averred,—“The letter above quoted is of and concerning the pursuer, and falsely, maliciously, and calumniously represents, and was intended by the publication thereof as aforesaid to represent (1) that the report upon the public school at Ballachulish by the Government inspector was so bad that the school board were ashamed to publish it; that, to screen the said school, the whole of the reports of the Government inspector were withheld; (2) that in consequence of the incompetency or fault of the pursuer the said school was at the bottom of the poll this year, as it had been in former years, that is, that it was the worst in point of results of all the schools examined; (3) that the interests of the public in connection with the said school were being sacrificed solely for the sake of providing a house and salary for the pursuer; and (4) that the pursuer was unfit for his post as teacher of a public school, and that it was the duty of the School Board of Ballachulish, in the interests of the ratepayers, to dismiss him from it. The said statements and representations are false and calumnious, and were maliciously made with the view of ruining, or at least seriously injuring, the professional reputation of the pursuer, and destroying his usefulness as the teacher of a public school.” He further stated that he had called upon the defender to disclose the name of the writer of the letter, but that this information had been refused.

The defender in answer stated, *inter alia*,—“Explained that the matters referred to in said letter were matters of public interest and importance to the ratepayers and inhabitants of Ballachulish and neighbourhood. It was believed that the reports of Her Majesty’s Inspector of Schools on the schools under the Ballachulish School Board for the preceding year had been received by the said board before said letter appeared, and they had not then been made public. The said ratepayers and inhabitants had an

1ST DIVISION.
Ld. Kyllachy.

No. 79.

Jan. 19, 1892.
M'Kerchar v.
Cameron.

interest and a right to know the contents of the said reports, and the letter complained of was inserted in said newspaper solely for the purpose of inducing the said board to publish the said reports, as they were bound to do. The contents of said letter are a fair comment on a matter of public importance; they are not defamatory, and are privileged." He added, that for some time there had been a considerable amount of dissatisfaction among the ratepayers of Ballachulish owing to the condition of the school. "The report for the year 1890-91, though then, it is believed, for some time in the hands of the school board, had not been published, and this fact was causing dissatisfaction in the district. It was in these circumstances that said letter was written, its purpose being solely, as above stated, to procure publication of said report. The defender, however, believes and avers that at the date when said letter was written the pursuer was unfit for his post as teacher of said school."

The defender pleaded;—(2) The letter complained of is not defamatory; and, *separatim*, it is privileged. (3) The said letter being a fair criticism on a public matter, and not being slanderous, the defender should be absolved. (4) *Veritas*.

The following was the issue for the pursuer, approved by the Lord Ordinary (Kyllachy),—"It being admitted that the defender published in the *Oban Times* of date the 17th October 1891 the letter set forth in the annexed schedule, whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was unfit for his post as teacher of a public school, and that it was the duty of the school board, in the interests of the ratepayers, to dismiss him from it, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

His Lordship also approved of the counter issue,—"Whether, at or about the date when the letter libelled on was written, the pursuer was unfit for his post as teacher of the said public school at Ballachulish?"

* "OPINION.—I think the issue proposed by the pursuer in this case must be allowed.

"1. As to the reasonableness of the innuendo, I do not require to consider what view the jury may take of the meaning of the letter. They may, when they hear the evidence, consider that what was really meant by the writer was only this—that the school board were perpetrating a job by keeping a school open in this locality. But, in the meantime, I have only to consider whether the innuendo is so extravagant and unreasonable as to make it useless to send the case to trial. I cannot say that I think this is so. On the contrary, I rather think that, *prima facie*, the innuendo is justified.

"2. I am not prepared to hold that to impute to the teacher of a public school that he is unfit for his post is not defamatory and actionable. It is settled that it is defamatory to impute to a professional man incapacity in the exercise of his profession, and I have not been satisfied by anything I have heard that there is a sound distinction between the two cases. There may, of course, be a difference as regards privilege; and malice may be more readily presumed in the one case than in the other; but assuming malice, presumed or proved, I do not see why the imputation complained of should not be actionable.

"3. With respect to the question of privilege, I need only refer to the opinions of the Court in the comparatively recent case of *Brims v. Reid*, 12 R. 1016. Here, as there, the alleged slander is contained in an anonymous letter addressed to a newspaper, the printer of which refuses to disclose the writer's name. That being so, I must hold, as the Court held in that case, that there is no room for the defence of privilege, so as to make it necessary to put malice in issue.

"With respect to the counter issue, I have heard nothing against it, and shall accordingly allow it."

No. 79.

The defender reclaimed.

The three points argued sufficiently appear from the opinions of the Lord Ordinary and of the Lord President.¹ On the case of *Brims*, it was argued for the reclaimer that malice had not been put in issue there because the writer of the article had attacked the private life of the pursuer.

Jan. 19, 1892.
M'Kerchar v.
Cameron.

LORD PRESIDENT.—I think the Lord Ordinary has come to a right conclusion. Upon the first question, it is to be observed that all that the pursuer requires to make out at this stage is that the letter complained of is susceptible of the interpretation he assigns to it. It is quite true that the letter purports to state, or to conjecture, the effect of a report of the Government Inspector of Schools. It is conceivable that, even granting that the school is in a deplorably bad condition, that may not be due to the incompetency of the teacher. It might be accounted for by the paucity of scholars, or by their absence from illness, or to other causes which one may figure. That is quite intelligible. But the writer, in the last sentence of the letter, certainly goes a long way towards indicating a specific cause for the alleged defective state of the school. He says—"Are the interests of the public to be sacrificed for the sake of providing a house and salary for a teacher?" That seems to me to afford ample basis for the pursuer's allegation that he will be able to make out to a jury that the letter contains a covert attack upon his competency. I therefore think that the Lord Ordinary was quite right in allowing the issue.

The next question is whether malice must be inserted in the issue. Several questions of great interest and of wide social importance have been mooted during the discussion,—the question, for example, whether a member of the public, in attacking any person holding any office under any public body, can shelter himself behind the plea of privilege. But I do not think such questions arise, or rather are open for decision in the present case; because the case of *Brims v. Reid* affords us a clear ground of judgment where the defence of privilege is pleadable by reason of the occasion upon which the alleged slander was spoken or written, and the relation of the writer to the subject-matter of which he speaks. What was the position of the writer of this letter? So far from our having any information about him, we have not even been told who he is, and the libel therefore must be held to be the letter of someone who has no ascertainable identity, and no duty or responsibility or relation to the subject. Accordingly, the whole reasoning of *Brims'* case applies, irrespective altogether of the difference in the nature of the attack made upon the pursuer in that action.

What the Court in that case held was that it is impossible to allow the defence of privilege in a case where the libel is an anonymous letter in a newspaper, and the writer is undisclosed. I therefore think the plea of privilege is inadmissible, and that malice ought not to be put in issue.

LORD ADAM concurred.

LORD M'LAREN.—The first defence to this action is that the libel can bear no other meaning than that it is an imputation on the school board, who are blamed

¹ Authorities cited by the Pursuer.—On the question of privilege—Addison on Libels, 203; Kelly v. Tinling, 1865, L. R. 1 Q. B. 699; Parmiter v. Coupland, 140, 6 M. & W. 108; Odgers on Libel and Slander, 40 and 41; Cooper v. Greig, Dec. 10, 1813, Hume's Decisions, 648; Harle v. Catherall and Others, 1866, 14 L. T. (N. S.) 801. On the question of malice—Godfrey v. Thomsons, July 10, 1890, 17 R. 1108.

No. 79. for not having investigated the case. But the letter ends by suggesting that the school board are condoning the inefficiency of the teacher, because they are unwilling to deprive him of his house and salary. I think there can be no doubt that it is a fair question for a jury to consider whether that does not amount to an imputation upon the teacher.

Jan. 19, 1892.
M'Kerchar v.
Cameron.

On the question of privilege, I scarcely think that the present action raises directly the point how far a ratepayer, or an inhabitant in a district, is entitled to indulge in public criticism of the capacity and character of salaried officials within his district, and how far there may be privilege to make such comments. We know that there are many degrees of privilege. There is the privilege of counsel in the conduct of a case, where observations upon the conduct of persons are privileged, even although they may be irrelevant. The exigencies of a defence make it necessary that counsel should sometimes be irrelevant, and they are protected if in such circumstances they should say what may be hurtful to others. There is also the lesser privilege given to persons who are laying information before the public authorities, and there "probable cause" is an excuse. There is the case of an elector at a public meeting, who has a duty to express his opinion as to the fitness of a candidate; and there is the still lower privilege of a master giving a character to a servant. Although a master has no duty, and may refuse to give a character if he likes, yet he is held to be in the exercise of a right provided he gives the opinion honestly and without malice. The present case seems to be even lower than any of these, because it is difficult to see what duty or right there is on the part of a member of the public, as such, to criticise the conduct of a public servant who is in the public employment. But for the reasons given by your Lordship in the chair, founded on the case of *Brims*, I think it is a sufficient and satisfactory ground of judgment that there never can be privilege where the newspaper, which publishes the letter, refuses to disclose the name of its correspondent. There is in such a case no known relation which will raise the plea of privilege.

THE COURT adhered.

J. SMITH CLARK, S.S.C.—SMITH & MASON, S.S.C.—Agents.

No. 80. WILLIAM FORBES WALKER AND OTHERS, Pursuers (Appellants).—

M'Kechnie—Dove Wilson.

Jan. 19, 1892. NORTH OF SCOTLAND STEAM NAVIGATION COMPANY.—*Comrie Thomson—*
Walker v. *Aitken.*
North of Scot-
land Steam
Navigation Co.

Ship—Salvage—Remuneration for services.—In an action for payment of £100 as salvage services rendered near Aberdeen by a small boat about 9 o'clock on the evening of 21st June, to a passenger steamer which had run aground upon a rock in a dangerous neighbourhood in a dense fog, it was proved that the boat had been the first to come to the steamer's assistance, and was instrumental in passing a hawser from the steamer to a tug, which came to her assistance soon after, and which towed her into harbour. The Sheriff-substitute fixed the value of the services at £10, and on appeal by the pursuers the Court (Lord M'Laren) refused to increase the award.

1ST DIVISION. ON 21st June 1891, about nine o'clock in the evening, the steamship "Queen," belonging to the North of Scotland Steam Navigation Company, arrived in Aberdeen Bay on her voyage from the north to Leith with passengers, mails, and goods. There was a dense fog at the time, and the "Queen" lost her way, and was carried past the entrance to the

Sheriff of
Aberdeen-
shire.

harbour southwards towards the rocks off Girdleness. Her master finding his vessel upon a rock fired guns of distress, which were heard on shore. A boat put off from the land end of the north pier, and was taken in tow by a steam-tug, which had also been attracted by the signal guns. The boat was thrown off by the tug when the bar was crossed. The "Queen" was a short distance off, but could not be seen for the fog. After rowing from ten minutes to a quarter of an hour the small boat came first in sight of the "Queen," and went alongside. The tug soon after came in sight, and the master of the "Queen" asked the boatmen to pass a hawser from the "Queen" to the tug-boat. The "Queen" was then towed off the rock, one plate only being damaged. A second tug-boat had come up, and had also assisted.

No. 80.

Jan. 19, 1892.
Walker v.
North of Scot-
land Steam
Navigation Co.
The "Queen."

William Forbes Walker, and five other men, who had manned the boat, sued the owners of the "Queen" in the Sheriff Court at Aberdeen for £100 for salvage services. The pursuers stated that when the services were rendered there was a dense fog, and that a heavy sea was running, and there was a strong tide, and that the risk and danger to the "Queen" and themselves had been great; that the "Queen" had grounded amidships when the tide was full, and near dangerous rocks, but that she came off quite easily when the tow-rope was attached to the tug.

In addition to the facts above narrated, it appeared from the proof that the fog was very heavy, but was the only cause of danger, and there was no wind nor sea.

William Nicolson, master of the "Queen," deponed,—“There was no risk to the small boats so far as the sea was concerned, unless they came upon rocks. . . .” Cross-examined.—“I knew I was on the Girdleness. I was not sure of what shallows might be round about me. I did not know the exact spot. I kept my own boats up for the benefit of my own passengers, in case the ship filled with water before assistance came. I think the tug acted on the safest principle in what she did, by getting a small boat to pass her hawser. Mr Walker offered to pass the rope, and I was quite willing to take his assistance. I could have done it with one of my own boats.”

Alexander Paterson, an Aberdeen pilot, who was in another small boat which had put out, and who was examined for the defenders, deponed,—“There was a bit of swell, but nothing to speak of. . . . The people in our boat were in some danger. We might have got some harm from the 'Queen' or from the 'John MacConnochie,'” the tug-boat, “owing to the thick weather. We might have run among the rocks, as we did not know where we were. Captain Nicolson told me after he had got into the harbour that he was glad to see the boats when they came.”

The “Queen” had about thirty passengers, twenty-eight of a crew, and the Shetland mails on board when the accident happened. Her value was £5500.

The claim of the two tugs for the salvage services they had rendered was settled for £100, and a judicial offer of £10 was made to the pursuers.

After a proof the Sheriff-substitute (Grierson), on 24th November 1891, gave decree for £10 against the defenders, and because of the judicial offer gave decree for £20, 5s. 4d. of expenses against the pursuers.

The pursuers appealed, and argued;—The award of £10 was quite inadequate looking to the risk incurred by the salvors, and the nature of the salvage services rendered. They were the first to come to the “Queen’s” assistance, which was always an important element.¹

¹ Cases cited—The “Clifton,” 1834, 3 Haggard’s Adm. Reps. 117; “Vulcan”

No. 80. Argued for the respondents;—The case was one for remuneration *pro opere et labore*. The services rendered were not proper salvage services. Appeals in cases like the present were always discouraged.

Jan. 19, 1892.
Walker v.
North of Scot-
land Steam
Navigation Co.

LORD PRESIDENT.—It is probably always difficult in such cases for different minds to arrive at the same figure in estimating the value of the services rendered in a case of salvage. The Legislature has confided the settlement of such matters, in the first instance (in cases like this), to the Sheriff-substitute; and in the present case the inquiry seems to have been conducted in a painstaking way, and the facts were fully before him. I think it fair to say that it appears to me his award is somewhat on the meagre side, but at the same time he was possessed of all the facts, and had local knowledge of the existing conditions which we have not.

The services were rendered not in any solitary or remote place, but at the mouth of the harbour of Aberdeen, and they were not such as could not have been rendered by anyone else,—by the “Queen’s” own boats, for instance. The facts are very simple. Walker, who is one of the pursuers, says that he was standing with the other pursuers at the end of the north pier on an evening which he describes as being “such that I have often gone for a pleasure sail upon a sea similar to it.” It is true that there was a dense fog at the time, but the pursuers were thoroughly acquainted with the place, which was just outside the harbour mouth. The service rendered was of the easiest description, viz., the passing of a hawser from the “Queen” to the tug, which was to tow her off, and it was rather as a matter of convenience than of necessity that the assistance of the small boat was asked at all. That is the whole matter, and there is nothing which imparts anything of a peculiarly meritorious nature to the character of the assistance given.

Accordingly, it is only within very moderate limits that a difference of opinion can occur as to what is suitable remuneration for these services. On the one hand, it is the duty of the Court to do nothing which will discourage the laudable helpfulness and courage which ought to prevail at our ports; but on the other hand, it would be a most unfortunate thing if we were to assume a mean standard of courage on the part of the fishing or seafaring population at these places.

I find, however, one solution of the pecuniary value of these services which appears to me to be adequate. I take the pursuers’ own estimate of the consideration they place upon them. They came into Court suing for £100, upon the footing, as set forth in their averments, that the weather was very unfavourable to navigation, and there was a heavy sea and strong tide, causing great personal risk to themselves and their boat. If £100 is the estimate put upon the exaggerated services described in the summons, what is the sum appropriate to the prosaic facts which we find proved in the evidence? Certainly, £25 would be a liberal if £10 is a small award, and that being so, and the question lying within these limits, I think it would be contrary to the policy of the statute to interfere with the award of the Sheriff-substitute.

LORD ADAM and LORD KINNEAR concurred with the Lord President, their

v. “Berlin,” July 6, 1882, 9 R. 1057; the “Effort,” 1834, 3 Haggard’s Adm. Reps. 165; the “Queen Mab,” 1835, 3 Haggard’s Adm. Reps. 242; the “Maria,” 1809, Edward’s Adm. Reps. 175.

Lordships both stating that the case was not one in which the Court ought to interfere with the discretion exercised by the Sheriff-substitute, although if they had been assessing the damages for the first time they might have been inclined to award a higher sum. No. 80.
Jan. 19, 1892.
Walker v.
North of Scot-
land Steam
Navigation Co.
The "Queen."

LORD M'LAREN stated that he had formed a very definite opinion that the sum awarded by the Sheriff-substitute was quite inadequate, and that a sum of between £30 and £50 would have been fair remuneration, taking into account the fact that the "Queen" was in serious peril, and that she might have broken her back if not rescued before the tide receded.

THE COURT dismissed the appeal.

WISHART & MACNAUGHTON, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

DAVID SIMPSON AND OTHERS, Pursuers (Reclaimers).—*Jameson—Watt.* No. 81.
Jan. 19, 1892.
Simpson v.
Trustees of
Moffat Work-
ing-Men's
Institute.
ROBERT HANNAH BEGG AND OTHERS (Trustees of Moffat Working-Men's Institute), Defenders (Respondents).—*D.-F. Balfour—Ure.*
THOMAS KENNEDY AND OTHERS (Proudfoot's Trustees), Defenders (Respondents).—*Asher—Craigie.*

Trust—Charitable trust—Sale of trust property.—In 1885 a working-men's institute was established by voluntary subscription in a small town, the constitution of the institute being embodied in a trust-deed, under which the property of the buildings was vested in trustees. The institute was maintained by annual subscriptions from the members. In 1889 a native of the place, who was resident abroad, died leaving the residue of his estate to the magistrates for the purpose of establishing and maintaining an institution also for the benefit of working-men. The trustees of the earlier institute, believing that it would be impossible for their institute to coexist along with the new endowed institution, entered into an arrangement with the magistrates under which the institute buildings were sold to the magistrates at their cost price, the magistrates undertaking in the disposition to continue the buildings in their former uses. Thereafter certain working-men of the town brought an action against the institute trustees and also against the magistrates, as trustees under the bequest, for reduction of the sale, on the ground that it was *ultra vires* of both sets of trustees, and for interdict against the institute trustees distributing the price among the subscribers. In defence the institute trustees stated, *inter alia*, that they had no intention of distributing the price except with the authority of the Court. The Court *dismissed* the action, holding that the sale was legal and proper in the circumstances, and that, in respect of the statement of the institute trustees, interdict should not be granted.

IN 1885 certain persons resident in Moffat and the neighbourhood sub-1ST DIVISION.
Ld. Wellwood.scribed for the purpose of establishing a reading-room and institute there for the benefit of working-men. A provisional committee having been appointed, a site was obtained and buildings, including a reading-room and a gymnasium, were erected at a cost of £1745. The Institute was opened in 1886.

In the trust-deed, which contained the constitution and rules of the Institute, twelve of the subscribers to the fund, who had been chosen by the body of the subscribers, were named trustees. By the terms of the trust it was provided that the whole property, heritable and moveable, belonging to or which might be acquired by the Institute should be vested in the trustees and their successors in office; the Institute was to be designated "The Moffat Working-Men's Institute"; and "its primary object" was declared to be "to afford facilities to working-men for social intercourse, mutual improvement, instruction, and rational recreation."

No. 81. Only paying members were entitled to the privileges of the Institute, but the committee had power under the rules to admit *bona fide* working-men above the age of eighteen, who were not members, to the reading-room at a small charge for each visit. The trustees had power to revise the constitution, and to readapt it when necessary to the general purposes of the trust. The trust-deed did not give the trustees power to sell heritage.

Jan. 19, 1892.
Simpson v.
Trustees of
Moffat Work-
ing-Men's
Institute.

In 1890 William Proudfoot, a native of Moffat who had settled in Natal, died leaving a last will and testament, by which he left the residue of his estate (amounting to over £12,000) "at the disposal of the provost and bailies of the town of Moffat, Dumfriesshire, Scotland, to be applied to the benefit of the working-men of Moffat. My wishes will be complied with if this money is laid out on a reading-room, in connection with which refreshments on temperance principles are supplied at a low cost."

On hearing of this bequest the Institute trustees, believing it to be impossible that the Institute, which depended on annual subscriptions, could exist, in a place of the size of Moffat, alongside of a free institution with identical objects, proposed to the Magistrates of Moffat, as trustees under the Proudfoot bequest, that the Institute should in future be managed by a joint trust composed of the magistrates and some of the Institute trustees, the Proudfoot funds being applied in support of the Institute. To this the magistrates objected, on the ground that it would be *ultra vires* of them, under the Proudfoot bequest, to allow any other persons to be joined in the management of the funds. They, however, proposed that the Institute buildings should be made over to them on payment of their cost price. To this proposal the Institute trustees agreed after obtaining the assent of all the subscribers, and the buildings were disposed for £1745 to the magistrates, who in the disposition practically undertook that the buildings should be used in like manner as before.

On 20th May 1891 David Simpson, stonedyker, Moffat, and eight other persons, designing themselves as "working-men resident in Moffat, as individuals, and as a committee chosen at a meeting of the working-men of Moffat, held within the Baths Hall there, on 2d May 1891, to represent them," brought an action against Robert Hannah Begg and others, the trustees of the Institute, and also against Thomas Kennedy and the other magistrates of Moffat, as the Proudfoot trustees, concluding for reduction of the sale of the Institute; for declarator that the defenders the Institute trustees were not entitled to sell the property of the Institute to the other defenders and to apply the price otherwise than for the purposes of the trust; for decree ordaining the Institute trustees to repay the sum of £1745 to the other defenders, failing which, for decree ordaining the other defenders, the Proudfoot trustees, personally to repay the said sum to their own trust; and for interdict against the Institute trustees paying over the said price to the subscribers to the Institute funds.

The pursuers (after setting forth the circumstances already narrated) stated;—(Cond. 5) "The defenders the Proudfoot Endowment trustees have thus paid away out of the funds, which they hold for the benefit of the working-men of Moffat, a sum of £1745 for a property which already belonged to, or was held for the benefit of, the working-men of Moffat, and this they have done in spite of very strongly expressed opposition thereto by the working-men of the town. The working-men being desirous, if possible, to avoid disputes that might end in litigation, tried to get a guarantee that the proceeds of the sale of the institution, which was built by public subscription for the benefit of the working-men of Moffat, should be applied for their behoof. They have ascertained, however, that the magistrates have paid over this large sum of money to the Institute trustees without any restriction as to the purpose to which it would be applied.

and their suspicions that the fund would be misapplied have been confirmed by a statement which has been issued by the said Reverend A. R. MacEwen, on behalf of the Institute trustees, in which he says that the said sum of £1745 belongs to the subscribers, and may be claimed by them, and it is believed that the Institute trustees are about to raise an action of multiplepinding to distribute the said sum among the subscribers." (Cond. 6) "Immediately on the sale of the Institute becoming known, great dissatisfaction was created among the working-men of Moffat. There was no necessity for the sale. As it was suitable for its purpose, the working-men already had it, without £1745 of their funds being given for it. The price paid by the Proudfoot trustees for the Institute was much beyond its value, and known by both sets of defenders to be so. The sale was never consented to or approved of by the working-men of Moffat, who alone had the beneficial interest in the subjects."

The defenders the Institute trustees in their defences stated, *inter alia*; — "That had the present proceedings not been commenced, they would have raised an action of multiplepinding for distribution of the proceeds of the sale. The defenders are now, and all along have been, anxious that the balance of the price should be utilised for the benefit of the community of Moffat, and they have reason to believe that this end will be attained."

The defenders the Proudfoot trustees stated "that they bought said Institute after very careful consideration as to how they might best carry the intentions of the testator, Mr Proudfoot, into effect, and after consideration of different representations made to them. . . . The defenders, when they purchased said building, saw none more suitable in Moffat that they could obtain. It had been used, and was and is eminently adapted for the very purpose contemplated by the testator. . . . In acquiring it, they were influenced by the fact that in Moffat it was useless and inexpedient that there should be two reading-rooms for the benefit of working-men. The population of Moffat is 2000 or thereby. . . . The price (£1745) paid by the defenders for the said building, including furnishing within the previous years, was what the same originally cost."

The pursuers pleaded;—(1) The sale of the property belonging to the Moffat Working-Men's Institute, by the trustees thereof, to the trustees of the Proudfoot Endowment, being *ultra vires* of the Institute trustees, and illegal, the same, and the deeds constituting it, ought to be reduced. (2) The trustees of the Proudfoot Endowment having, without authority or right, paid away funds held by them for the benefit of the working-men of Moffat in the purchase of what was already held in trust for them, the said purchase was *ultra vires* and illegal, and ought to be set aside. (3) The defenders the trustees of the Moffat Working-Men's Institute are bound to apply the whole funds and property of the Institute to the benefit of the working-men of Moffat, in terms of the constitution and rules of the Institute trust, and decree of declarator to that effect ought to be pronounced. (4) The Institute trustees are not entitled to sell the property of the Institute and apply the proceeds otherwise than to the purposes of the trust under which they act, and the pursuers are entitled to have it so found and declared. (5) The said sale being set aside, the defenders the trustees of the Moffat Working-Men's Institute are bound to repay the price of the subjects to the trustees of the Proudfoot Endowment, and decree of repetition ought to be pronounced as concluded for. (6) Failing decree of repetition as craved, or in the event of the Institute trustees failing to make payment to the trustees of the Proudfoot Endowment of the said sum of £1745, 2s. 4d., the defenders the said Thomas Kennedy, James Hall Black, and Robert Knight, are liable as individuals, jointly

No. 81.

Jan. 19, 1892.
Simpson v.
Trustees of
Moffat Work-
ing-Men's
Institute.

No. 81.

JAN. 19, 1892.
SIMPSON v.
TRUSTEES OF
MOFFAT WORK-
ING-MEN'S
INSTITUTE.

and severally, to pay the said sum to the trustees of the Proudfoot Endowment. (7) The subscribers to the said Institute have no right to payment of the funds of the Institute, and the defenders the Institute trustees ought, in any event, to be interdicted from paying over to them any part of the price of the Institute, and from applying it otherwise than for the benefit of the working-men of Moffat.

The Institute trustees pleaded ;—(1) No title to sue. (2) The pursuers' statements are irrelevant and insufficient to support the conclusion of the summons. (3) The transaction challenged having been within the powers of the defenders, they are entitled to absolvitor, with expenses.

The Proudfoot trustees pleaded ;—(1) No title to sue. (2) Action incompetent, and, *separatim*, irrelevant. (3) The said disposition having been granted by the said trustees after the consent and concurrence of the subscribers to said Institute had been obtained to the sale, the present action ought to be dismissed, with expenses. (4) On a sound construction of said last will and testament, the present defenders were entitled to acquire said Institute for the purposes set forth in the disposition thereof in their favour, and decree of absolvitor ought to be pronounced, with expenses.

On 11th August the Lord Ordinary (Wellwood) pronounced this interlocutor :—" Dismisses the action, reserving to the pursuers all claims competent to them as to the application of the sum of £1745, 2s. 4d., being the purchase price of the subjects described in the summons, and decerns : Finds the defenders entitled to expenses." *

* "OPINION.— . . . The case is peculiar, and I think a broad view must be taken of it. The pursuers have plainly no interest to object to the sale of the Institute to the Proudfoot trustees, taken by itself, because the Institute is still to be carried on as before, free of charge, I understand, and by a body of trustees possessed of ample funds.

"The pursuers' interest, if they have a title to enforce it, lies in the application of the purchase price. The defenders maintained that the Institute was merely a voluntary association, which could be dissolved at any time with the consent of the subscribers and the paying members—if indeed the consent of the latter was required. This is a doubtful proposition, because the subscribers appear to have created what, *ex facie*, is a permanent trust for the benefit of working-men. But I do not think it necessary to decide this point, which involves a question with the original subscribers, because I hold that the pursuers have no interest, and therefore no title to object to the transference above, or, to put it otherwise, that they have not stated any relevant grounds for setting the sale aside.

"In judging of the reasonableness of the sale, it is right to remember that it was effected with the unanimous consent of all who, for the time, had a voice in the management, or share in the benefits of the Institute, viz., the trustees, the subscribers, and the paying members of the Institute; that the pursuers were none of these—they never even availed themselves of the opportunity of becoming members of the Institute; that the purposes of the constitution did not include the unconditional admission of working-men—payment being essential even to membership; and that the trustees could, at any general or special meeting, have raised the annual payments as they thought fit, or in other ways revised and readapted the constitution when necessary to the general purposes of the Institute; thus, even if, strictly speaking, the trustees had no power to sell without authority of the Court, the circumstances were such as would, in all likelihood, have ensured such authority being given. Owing to the threatened formation of a rival free reading Institute, the trustees found themselves obliged to abandon the particular scheme which had been selected for the improvement and recreation of working-men. If the Proudfoot trustees had established another reading-room, the Institute trustees could not

The pursuers reclaimed, and argued;—The pursuers had a title to sue. No. 81.
 It was true that they were not members of the Institute, but they belonged to the class intended to be benefited, and that was enough in the case of a charitable trust.¹ The sale of the Institute was *ultra vires* of the Institute trustees. They held the buildings for a specific purpose, which had not failed, and as it was not alleged that the buildings had become unsuitable for that purpose, they had no power to sell them. It was irrelevant that the institution which the Proudfoot trustees were directed to establish might have the effect of practically extinguishing the Institute. That was not a ground entitling the Institute trustees to sell at their own hands and then extinguish the trust;² although if in the result things turned

Jan. 19, 1892.
 Simpson v.
 Trustees of
 Moffat Working-Men's
 Institute.

have carried on the Institute, because subscribers would naturally have dropped off. They, therefore, made the best bargain they could, and succeeded in recovering the cost of the Institute. What is to be done with that money is another matter, which I do not mean to prejudge. The pursuers have an interest, and may have a title, to be heard hereafter as to its application.

"In regard to the demand that, standing the sale, the Proudfoot trustees should replace the money, a separate or additional view may be taken as to the pursuers' position. They are entitled, no doubt, to see that the Proudfoot residuary funds are administered for their benefit; but their averments of misappropriation of the funds on the part of the trustees are not, in my opinion, relevant. What is the practical result of the transaction complained of? The working-men of Moffat have, as I have said, not only still got the full benefit of the Institute, but they have got it, I understand, free of charge. So far, they have actually benefited by the change, and have no interest to complain. But, they say, the Proudfoot trustees need not have spent £1745 or any other sum in buying the Institute. They should have co-operated with the other defenders, and arranged some joint scheme by which this outlay should have been saved. The question, however, is not whether the Proudfoot trustees would have acted more judiciously and more beneficially for the working-men had they done so; but whether they acted illegally in doing what they did. Now, the trustees thought that they were virtually directed and certainly entitled to apply the residue as suggested by the testator; and they have also thought that they were not entitled, in so doing, to divide the control of the reading-room to be established with any other body of trustees. Assuming that the Institute trustees had full power to sell, and were willing to do so, could the Proudfoot trustees have been restrained from buying? Would a Court of law have compelled the two sets of trustees to frame a joint scheme? I think not. I think it was fairly within the discretion and powers of the trustees to resolve not to content themselves with simply supplementing the existing Institute, and not to join a mixed trust of doubtful legality. If so, no loss was caused by the purchase of the Institute which could legally have been prevented. Two rival Institutes could not have existed together; the non-paying establishment would have ruined the other, which in that case also would have had to be sold in the end.

"Assuming that the pursuers have a title to question the actings of the Institute trustees in regard to the future application of the £1745, no sufficient grounds exist for, at present at least, granting interdict as craved; because the Institute trustees do not intend to pay the money back to the subscribers without the order of the Court. A multipiepinding may perhaps be necessary if any of the subscribers demand repayment of their subscriptions. But, so far as I can see, most of the subscribers are anxious, even though not bound, to apply the money for the good of the working-men. I venture to express the hope which I formerly expressed, that, instead of prolonging this litigation, parties may amicably arrange as to the application of the money."

¹ Ross v. Governors of Heriot's Hospital, Feb. 14, 1843, 5 D. 589, 15 Scot. Jur. 298.

² M'Laren on Wills, sec. 2102.

No. 81.

Jan. 19, 1892.
Simpson v.
Trustees of
Moffat Work-
ing-Men's
Institute.

out as they alleged would be the case, that might be a ground for coming to the Court for directions.¹ Then the Proudfoot trustees were not entitled to buy the buildings with their trust money. Their duty was to establish an Institute in terms of their trust, not expend the trust money in buying buildings already dedicated to a practically identical purpose. The only object in paying the money was that it might be handed over to the original donors, or given over to some other trust than the original Institute trust, for if the money was to be retained for the original trust it might as well not have been paid at all, and the buildings handed over for nothing.

Argued for the Institute trustees;—The pursuers had no title to sue. They had neither contributed to the funds of the Institute nor made use of its benefits. The sale was within the power of these defenders. In the whole circumstances, it was inexpedient to continue to apply the money to the original purposes, and the trustees had under their deed power to alter the application of the money. The subscriptions had been voluntary, and there was no irrevocable dedication of the money to this one purpose.² It was not proposed to do anything with the money except under the authority of the Court.

The Proudfoot trustees argued that in buying the buildings they were acting within their powers.³

At advising,—

LORD PRESIDENT.—Various interesting and important topics were touched upon in the debate before us although not very fully argued, but the questions requiring discussion under the summons are comparatively limited. With the exception of one conclusion, the summons is directed solely against the sale of the building of the Working-Men's Institute of Moffat by the trustees to whom it belonged, to the trustees of the Proudfoot Endowment. Now, I can not say I think that the legality of this sale is open to successful attack, even if there had been conceded to the pursuers for the sake of argument almost the trust law upon which they found.

I shall take first the case of the trustees of the Working-Men's Institute who are the sellers. Let it be that a perpetual trust has been constituted for the purpose set out in the printed rules, let it be that the pursuers have a good title to insist for fulfilment of these trust purposes, although I pronounce upon neither proposition,—even upon these assumptions it seems to me that in the event which has happened and which is set out by the pursuers, namely, the establishment of the Proudfoot Endowment, the continuance of the Working-Men's Institute as a reading-room was demonstrated to be impossible, and that if the trustees had not made the bargain they did they would very soon have had to close the Institute, probably after losing money or running into debt. This conclusion seems to me irresistible, for the simple reason that in this very limited community it would be idle to expect that the Proudfoot Endowment which afforded for nothing to exactly the same class exactly the same thing only on a larger scale, would not extinguish the paying membership of the Working-Men's Institute. The trustees of the Institute did, what I thi

¹ Downie, June 10, 1879, 6 R. 1013; Ewart's Trustees v. Andrews, June 1886, 13 R. (H. L.) 69.

² Connell v. Ferguson, Feb. 19, 1857, 19 D. 482, 29 Scot. Jur. 228; Bain Black, July 12, 1849, 11 D. 1286.

³ Milne's Trustees v. Cowie, Jan. 25, 1853, 15 D. 321, 25 Scot. Jur. 213.

judicious trustees were bound to do when they looked the facts in the face and realised the trust property, whatever might become their resulting duty as regards the proceeds. Up to this point, therefore, I think, so far as they are concerned, their conduct is unassailable. If, as is suggested, they have made a good pecuniary bargain, that is so much the better for them and their trust.

No. 81.
Jan. 19, 1892.
Simpson v.
Trustees of
Moffat Work-
ing-Men's
Institute.

Turning now to the Proudfoot Endowment trustees, I say that it became their duty under their trust to find a habitation for their Institute, and seeing one ready to hand, owing to the vicissitude already stated as actuating the Institute trustees, they seem to have acted very prudently in seeking to buy it instead of building a new one with the certainty of the other soon standing empty. Moreover, looking to the terms of their truster's direction, I think they were quite entitled to take into account, after they did so, the desirableness of preventing what would have been a foolish and wasteful rivalry, injurious to the interests of the working-men of Moffat, for whose benefit Mr Proudfoot had left his money. Accordingly, even if the Proudfoot trustees did not drive a hard bargain with their sellers, I can find no legal objection to their thereby conducing to the furtherance of the testator's object. Here again, therefore, so far as the purchase goes, I see no breach of trust on the part of the Proudfoot Endowment trustees. To complete the case as regards them, I may add that I do not think they had any concern with the application of the price by the Working-Men's Institute trustees, being entitled to assume that it would be dealt with as the law directs. So far, therefore, as those conclusions of the summons go which dealt with the sale of the building as distinguished from the application of the price, I think that on the merits the pursuers have no case even on their own shewing of the facts.

Now, largely as the question of the application of the price figured in the argument, there is only one conclusion of the summons which deals with the matter, and that is the conclusion for interdict against the trustees of the Working-Men's Institute paying over any part of the price to the subscribers (by whom is meant the original contributors to the capital). But before considering the legal merits of this question, we must be satisfied (this being a conclusion for interdict) that the defenders are in course of doing or propose to do what is sought to be interdicted. Now, so far is this from being the case that the defenders have not done this, and disclaim any intention of doing it unless under the decree of Court. Under these circumstances the only course we can take in regard to this conclusion is to dismiss it, and for this reason we have no occasion to discuss the legal grounds upon which this application of the money can be challenged or supported. I am therefore for adhering to the Lord Ordinary's judgment.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

G. BROWN TWEEDIE, Solicitor—DAVIDSON & SYME, W.S.—CUTHBERT & MARCHBANK, S.S.C.—Agents.

No. 82. DONALD MACKAY (Inspector of Kilmuir-Easter), Pursuer (Appellant).—

M^r Kechnie—Kennedy.

Jan. 21, 1892.
Mackay v.
Munro.

JOHN MUNRO (Inspector of Lochbroom), Defender (Respondent).—

R. V. Campbell—Dickson.

Poor—Derivative settlement—Forisfiliation—Imbecile.—Held (following the cases of *Fraser v. Robertson*, 5 Macph. 819, and *Lees v. Kemp*, *supra* p. 6), that a girl, twenty-three years of age, who was living in her father's house and was unable from mental weakness to maintain herself, although able to do some light work under supervision, was not forisfiliated, and followed her father's settlement.

2D DIVISION.
Sheriff of Ross.

THE inspector of the parish of Kilmuir-Easter in Ross-shire raised an action in the Sheriff Court against the inspector of Lochbroom to recover certain advances made for the relief of a girl, Mary Mackenzie, who was living in Kilmuir-Easter with her father, who also for some time had been receiving out-door relief there. Lochbroom, as the parish of the father's birth, was admittedly liable for the payments made on his behalf. The question between the parishes was whether the daughter followed her father's settlement, and was therefore chargeable to Lochbroom along with him, or was chargeable independently of him either to her own birth parish which was Edderton, or to any parish of residential settlement which she might have.

The pursuer pleaded that as the advances had been made for an emancipated daughter of Mackenzie, the defender was liable.

The defender pleaded;—The said Mary Mackenzie being forisfiliated or emancipated, has her settlement elsewhere than in the parish of Lochbroom.

On a proof it was shewn that Mary Mackenzie, who was born in 1840, had attended school for about a year, and had acquired "a glimmering of the alphabet." She had done a little household work at home, made porridge, and baked the bread. She had also at times done some field work, earning in one year 12s., and in another year £1, 17s. Any other small sums she had earned had been paid to her rather out of compassion by neighbouring farmers than as a recompense for her work. Her fellow-workers and others deposed that she was very lazy, and unless she was constantly watched would throw down her hoe, or whatever it was she was working with, and go home. Most of the witnesses spoke of her as a silly weak woman. She lived in a state of "phenomenal filth," and often went about the country begging. In the beginning of 1890 she was delivered of an illegitimate child.

Dr Mackenzie of Inverness, who was examined for the defender, deposed in cross-examination,—“(Q.) Do you mean to say that this person, apart from her parents, is able to make a living for herself? No; I would scarcely say that. (Q.) Then you admit that she would have to be cared for? (A.) We have all to be cared for. I have to be cared for every day. (Q.) Is she able to earn her own livelihood? I have heard to-day that she has been occasionally employed, and is able to earn something, and if provided with proper requisites, she could always do so. . . . Would you take her yourself as a domestic servant? (A.) Decidedly not. (Q.) And who do you think would take her? (A.) I have seen scores like her in houses.”

Dr Adam of Dingwall, also examined for the defender, deposed in cross-examination,—“Is she silly? (A.) She answered my questions readily, but she was very ignorant. (Q.) Then you do not think she weak-minded? (A.) I would say that her mental development is weak. (Q.) Then do you admit from what you heard to-day that she is weak?”

minded? (A.) I must go by what I discovered on my examination of her. (Q.) Do you think she is weak-minded? (A.) I think her intellect is not up to the average. I could not certify her as an imbecile.”

No. 82.
Jan. 21, 1892.
Mackay v.
Munro.

The Sheriff-substitute (Hill), on 3d August 1891, found it proved that Mary Mackenzie was of weak mind, “but that it has not been proved that her mental capacity is such as to make her incapable of acquiring a settlement for herself,” and therefore assolized the defender as regarded the amount of advances applicable to her.

On 26th October 1891 the Sheriff-depute (Jameson) adhered.*

The pursuer reclaimed, and argued;—The present case was ruled by *Fraser's* case,¹ and, had the Sheriff-depute had an opportunity of seeing a report of the case of *Lees v. Kemp*,² he would have recognised its authority as ruling the present case in accordance with *Fraser's* case. In the case of *Cassels v. Somerville*,³ on which the other side relied, there was no question as here whether in fact the pauper had had a home of her own. The question there was as to capacity to acquire a settlement, and that capacity was possessed by anyone who had a mind at all. There the pauper was forty-nine years of age, and for years had lived away from home, supporting himself, not indeed by his own industry, but on the help of friends. But here the question was, had the pauper ever as matter of fact legally left the *familia*, and set up for herself? In such a case much more was required than merely mind sufficient to acquire a settlement. There must be ability to maintain one's self outside the father's house. The facts here were on all-fours with those in *Fraser's* and *Lees's* cases.

Argued for the defender;—Forisfiliation was not incompatible with still living under the father's roof.⁴ The question was whether the girl was capable of acquiring a settlement for herself, and the cases of *Watson*,⁵ *Cassells*,⁶ and *Nixon*⁷ had decided that persons of no higher mental capacity than the pauper in the present case could acquire a separate settlement. She could not perhaps support herself, but she could do something, and had done something for her support. Derivative settlement had to be

* “NOTE.— . . . The case of *Fraser v. Robertson*, 5 Macph. 819, seems to settle that a person is not necessarily forisfiliated for poor-law purposes by attaining the age of twenty-one. I confess I find some difficulty in reconciling this doctrine with some observations in the case of *Craig v. Greig and Macdonald*, 1 Macph. 1172. But I think that there is every presumption in favour of the forisfiliation of a child who has attained majority, unless it is shewn that he or she is absolutely and entirely dependent on his or her father for support. It is not necessary for forisfiliation that a child should leave his or her father's house, if he or she works outside of it on his or her own account.—See *Dempster v. M'Whannell and Deas*, 7 R. 276. In the present case it is proved that Mary Mackenzie did such work as she was fit for, outside her father's house, and was sometimes away begging on her own account. Further, it is to be noticed that her father personally did little or nothing for her support, he being a pauper himself. In these circumstances I think that Mary Mackenzie having attained majority, must be held to have been sufficiently forisfiliated for poor-law purposes, and that as an adult pauper she became chargeable to her own parish of birth or her parish of residence if she had such, in place of her father's parish of birth. . . .”

¹ *Fraser v. Robertson*, June 5, 1867, 5 Macph. 819, 39 Scot. Jur. 455.

² Oct. 17, 1891, 19 R. 6.

³ June 24, 1885, 12 R. 1155.

⁴ *Erskine*, i. 6, 53.

⁵ *Watson & Caie v. Macdonald*, Nov. 19, 1878, 6 R. 202.

⁶ *Cassells v. Somerville & Scott*, June 24, 1885, 12 R. 1155.

⁷ *Nixon v. Rowand*, Dec. 20, 1887, 15 R. 191.

No. 82.

Jan. 21, 1892.
Mackay v.
Munro.

proved, the rule being that at twenty-one, or perhaps at puberty, every one attained a settlement for themselves.¹ The exception of derivative settlement was introduced in the first place to keep children of tender years in family with their father. It would be absurd to extend that exception to the case of a daughter who was herself a mother. The other exception was that of which the cases of *Lees* and of *Fraser* were illustrations, viz., the perpetual pupil. But the pauper here was of higher mental development than that. The case of *Fraser* might also have been decided as it was without holding the child to be still *in familia*, for the child might in that case have been held not to have lost the residential settlement of its father, which it had acquired for itself, and in its own right. Lord Kinloch's opinion favoured this view.

LORD JUSTICE-CLERK.—The facts of this case are pretty clear, and there cannot be any substantial difference of opinion about them. The only evidence which is of a character such as to present any difficulty is the evidence of the two doctors. But I do not attach any importance to that evidence. Both the style and the character of it are eminently what is called "professional," and is not at all satisfactory. The most favourable course for these gentlemen is to dispose of the case without taking any note of their evidence, and I think that is the course we ought to follow. Turning to the evidence of fact obtained from those persons who were in daily contact with this woman, it is quite plain that she was not able to be entrusted with the conduct of her own affairs. She was able to do, and did a certain amount of work; many persons of very deficient mental powers are able to do a good deal of work under close supervision. But at the same time, if she had been turned out into the world to shift for herself she would certainly have been a lamentable failure. She did some work in her father's house and some field work, but when she was at the field work, unless she was constantly watched, she would throw away her time or whatever she was working with, and leave her work. I am satisfied that the farmer who employed her did so largely from charitable motives. That is my decided impression of the evidence.

Therefore, if this is a question of forisfamiliation, the girl here was not forisfamiliated, but remained a child in her father's house. The whole history of the law in regard to imbeciles indicates that they are to be looked upon as unable to take up responsibility as they grow up. This woman is still a child in law, unable to pass out of the stage of pupillarity into the stage of personal responsibility.

This is the case of *Lees* over again. I think the Sheriff has erred, and that the aliment must be paid by the parish of the father's settlement.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think that this woman, although of full age, was not forisfamiliated, and that by reason of mental weakness. The case is substantially the same as the cases of *Fraser* and *Lees*.

LORD TRAYNER.—I agree. I think this case is really ruled by the cases of *Fraser* and of *Lees*.

The girl here was of very weak mental capacity; it is not proved that she ever did, or ever could maintain herself; she has lived all her life with her father, in his house, and as a member of his family.

¹ *Craig v. Greig and Macdonald*, July 18, 1863, 1 Macph. 1172, Lord Barrow p. 1191, 35 Scot. Jur. 670; *Adamson v. Barbour*, May 30, 1853, 1 Macph. 15 D. (H. L.) 46, 25 Scot. Jur. 419.

Therefore she is not forisfamiliated, and not being forisfamiliated she takes her father's settlement. No. 82.

LORD YOUNG was absent.

Jan. 21, 1892.
Mackay v.
Munro.

THE COURT recalled the Sheriff's judgment, and gave decree for the sums in question.

PRINGLE, DALLAS, & Co., W.S.—DOVE & LOCKHART, S.S.C.—Agents.

PETER TAYLOR, Complainer (Reclaiming).—*C. N. Johnston—Crabb Watt.* No. 83.
EARL OF MORAY, Respondent.—*Mackay—C. K. Mackenzie.*

Jan. 23, 1892.
Taylor v. Earl

Landlord and Tenant—Decree of removing—Enforcement of charge upon decree—Delay.—*Held* that a charge upon a decree, dated 20th November 1890, ordaining a tenant to remove at Whitsunday following was timeously enforced three weeks after that term, and suspension on the ground of the lapse of time between the decree and its enforcement *refused*.

Landlord and Tenant—Holding—Agricultural Holdings (Scotland) Act, 1883, (46 and 47 Vict. c. 62), sec. 35.—*Held* (following *Mackintosh v. Lovat*, 14 R. 282), that the Agricultural Holdings Act, 1883,* did not apply to subjects of about three-quarters of an acre in extent, one-third of which was occupied as a dwelling-house and garden and the remainder as a grass park,—the rent of the whole being £3, and the annual value of the land 15s.,—in respect that the house and garden were the principal subjects, and not accessories to the land, and could not be regarded as either agricultural or pastoral.

PETER TAYLOR was tenant from year to year under the Earl of Moray of certain subjects situated in the parish of Alves and county of Elgin. In November 1890 Lord Moray brought an action of removing against him in the Sheriff Court at Elgin, and on 20th November following the Sheriff-substitute, in respect of no appearance, ordained Taylor to remove "at and against the term of Whitsunday next 1891," and the officers of Court to charge him to do so at that term, "if the charge to remove be given forty-eight hours before that term, or within forty-eight hours after the charge, in case the same is not given forty-eight hours before that term." The form of decree used was that prescribed by the Act of Sederunt of 27th January 1830, schedule C.

1ST DIVISION.
Ld. Kyllachy.

Taylor continued to possess his holding until, on 18th June 1891, he was charged upon the decree to remove within forty-eight hours.

He then brought a suspension of the charge, pleading (1) that the decree and charge were inept and invalid, for these reasons . . . (c) Assuming the validity of the decree, the petitioner allowed his remedy thereunder to lapse; (d) The complainer, being tenant of a holding in the sense of the Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), got no notice, in terms of sec. 28 thereof. (2) *Esto* that the Removal Terms (Scotland) Act of 1886 applies, the complainer got no valid warning.

He denied that the Removal Terms (Scotland) Act, 1886, under which the action of removing had been brought, applied to his tenancy, and averred that in any case he had not received the forty days' notice to remove provided by that Act. He alleged that he was a "tenant" within the meaning of the Agricultural Holdings (Scotland) Act, 1883, and that his tenancy was a "holding" within the meaning of that Act, and that he was entitled to have notice under it if it was desired to bring his tenancy to an end.

In answer to the complainer's averment regarding the Agricultural Holdings Act, 1883, the respondent denied that it applied, and founded on the 35th section of the Act.*

* The Agricultural Holdings (Scotland) Act, 1883, sec. 35, provided,—

No. 83.

Jan. 23, 1892.
Taylor v. Earl
of Moray.

It was proved that Taylor (a travelling grocer) had occupied the subjects in question from Whitsunday 1878, at a rent of £3 per annum. The subjects consisted of a dwelling-house, stable, and pig-house, certain sheds in which he kept his travelling van and empty boxes, a piece of garden ground extending to 11 poles, and a field surrounding the garden extending to 2 roods and 7 poles—the whole subjects embracing an area of three-quarters of an acre. The complainer lived in the house, and kept his horse in the stable, and his van in one of the sheds in the garden. He occupied the field as a grass park, the field in which the horse fed not having been ploughed up since 1884. The value of the land was put at 15s. a-year.

Receipts for payment of rent for 1887, 1889, and 1890 were produced, bearing to be “for crop” for these years, and the entry in the Valuation-roll, description column, was “house and land Crook of Alves.”

The Lord Ordinary (Kyllachy), on 16th December 1891, repelled the reasons of suspension, and found the charge orderly proceeded.*

“Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord.”

* “OPINION.— . . . The first question the complainer raises is this, and Mr Watt stated it very distinctly. He said that, although the charge was in conformity with the decree, yet it came too late; because, while the decree authorised a charge either before or after the term of removal, yet that merely permitted a latitude of a day or two beyond the term, and did not authorise the postponement of the charge for a period of three weeks. In other words, the term being allowed to pass,—and three weeks after it being allowed to pass,—the tenant was entitled to assume that the decree was passed from, and that he was to be allowed to remain in possession for another year. That is the first point. Now, I say nothing against the argument that a decree of removal may be passed from. It may well be that if the charge under such a decree is delayed for a lengthened period beyond the term of removal the tenant is entitled to infer that he is to remain in possession for another year. But this case does not seem to me to raise any question of that kind. Three weeks is certainly not an undue period for the necessary steps to be taken, and for the decree to be put in force and therefore I am not prepared to hold that there was any undue delay in enforcing the charge, or that there has been anything so far irregular in the proceeding.

“But then the complainer takes this second point; and he says rightly it is a point of more general importance. He contends that this is a subject to which the Agricultural Holdings Act of 1883 applies, and he maintains that, assuming that the Act did apply, he did not have the statutory warning. Now, it is admitted that if the Agricultural Holdings Act applied, the warning was not sufficient. It was sufficient in point of time, because it was given fully six months before the term of removal, but it was given, it is said, not in the statutory form prescribed by the Act, but in the form of a summons of removal; and therefore the question comes to be whether the Agricultural Holdings Act applied to subjects of this description. Now I am of opinion that it does not. I consider that the Agricultural Holdings Act, by the 35th section, excludes from its operation holdings of this description. This is not a subject which, in my opinion, is either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral. To the extent of a third of its area it is occupied by the travelling grocer as a dwelling-house and garden; and it is, I think, impossible to contend that the house and garden are here, as in the case of an ordinary farm, mere adjuncts or accessories of an agricultural or pastoral subject. On the contrary, it is, I should say, clear that the field or park, or whatever it may

The complainer reclaimed, and argued;—1. From 20th November 1890 until he was charged on 18th June 1891, there was nothing to indicate that the landlord meant to enforce the decree. The terms of the decree ordaining him to remove “at and against the term of Whitsunday” fell to be strictly construed, and were referable to Whitsunday only. The landlord could not arbitrarily select a day for enforcing the decree. Tacit relocation applied against a landlord who omitted to take steps to carry his rights into effect.¹ 2. The subjects were a “holding” in the sense of the Agricultural Holdings Act, 1883, and the complainer had not received the statutory notice there provided. They were occupied as a croft in the ordinary way, and although not cultivated as arable land latterly, they were at least wholly pastoral, and satisfied the terms of the 35th section of the Act (quoted *supra*). Their size was immaterial, and so was the nature of the occupant’s employment, admitting that he sometimes worked for his living in other ways than by crofting. The receipts which had been produced shewed the respondent’s view of the nature of the subjects, and were supported by the Valuation-roll entry. The case of *Mackintosh*² was distinguishable, as the subjects there were clearly of the nature of house property.

No. 83.

Jan. 23, 1892.
Taylor v. Earl
of Moray.

The respondent was not called upon.

LORD PRESIDENT.—I cannot say that I entertain any doubt on the questions in this case. I agree on both points with the Lord Ordinary.

On the first point his Lordship observes,—“I say nothing against the argument that a decree of removal may be departed from.” With that I agree. I can figure cases in which the lapse of time between the granting of the decree and its enforcement was so great as to give rise to a presumption of waiver on the part of the landlord, requiring to be rebutted by explanation. I can also figure cases where the lapse of time, and the fact that the tenant had acted in the belief, created by the landlord’s delay, that he was to be allowed to remain on his holding, would present a composite case, giving rise to a plea of bar against the landlord if he attempted to enforce his decree. But, if we were to decide in favour of the complainer in this case, our decision would necessarily be taken as meaning that, in all cases, unless a decree ordering a tenant to remove at the Whitsunday term was put in force before the 18th June, the landlord must be held to have waived his right to enforce it. I am not prepared to be a party to such a decision. I think it is unwarranted by authority, and would be injurious in its effect on tenants against whom decrees of removal had been obtained, as it would close the door to any indulgence being granted them by their landlords.

As regards the question whether the Agricultural Holdings Act applies to such a holding as the complainer’s, the Lord Ordinary has dealt with that question thus—“This is not a subject which, in my opinion, is either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral. To the extent of a third of its area it is occupied by this travelling grocer as a dwelling-house and garden; and it is, I think, impossible to contend that the house and garden

called, is a mere adjunct or accessory of the house; and that being so, the house is the principal subject, and it cannot, by any stretch of construction, be held to be an agricultural or pastoral subject within the meaning of the Agricultural Holdings Act. In short, I think this case is *a fortiori* of the case of *Lovat v. Mackintosh*, decided in 1886, and I therefore refuse the note of suspension, with expenses.”

¹ *Robertson & Co. v. Drysdale*, Feb. 21, 1834, 12 S. 477.

² *Mackintosh v. Lord Lovat*, Dec. 18, 1886, 14 R. 282.

No. 83.
Jan. 23, 1892.
Taylor v. Earl
of Moray.

are here, as in the case of an ordinary farm, mere adjuncts or accessories of an agricultural or pastoral subject. On the contrary it is, I should say, clear that the field or park, or whatever it may be called, is a mere adjunct or accessory of the house; and that being so, the house is the principal subject, and it cannot, by any stretch of construction, be held to be an agricultural subject within the meaning of the Agricultural Holdings Act. In short, I think this case is a *fortiori* of the case of *Lovat v. Mackintosh*, decided in 1886." These sentences express my views so accurately, and comprehensively, that I propose to add only one observation. Mr Watt asked whether the size of a holding could be held to affect the question whether it was a subject within the meaning of the Agricultural Holdings Act. My answer is, Yes; if the size of the holding bears so small a proportion to the size of the house that the land is an adjunct or accessory of the house, then the legal quality of the holding is determined, and it is seen that the subject is not wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. The complainer puts his case upon tacit relocation, but tacit relocation operates only where neither party has given notice within forty days of the stipulated termination of the lease that he means to take advantage of that termination. It has no application here unless it can be said that the landlord departed from the right which his decree gave him, in such a way as to indicate that he meant to allow the tenant to remain in his holding for another year. The only circumstance upon which the plea is founded is that, instead of putting his decree into force immediately on the arrival of the term, which might have been an extremely harsh proceeding, he delayed doing so until 18th June. If it had been said that the tenant had been induced by this delay after the date at which he was ordained to remove had passed to expend money or labour upon the cultivation of his land, and therefore that his position had been altered to his prejudice by the landlord's delay one could have understood that there might have been some ground for the contention that the landlord had lost the right to enforce his decree. But there is no allegation that the tenant did anything whatever in the belief that the decree was not to be enforced. All that is relied on is the mere lapse of time. I agree that it is possible to imagine cases where the delay may have been long enough to ground a plea of bar, but it is quite out of the question to maintain such a plea in the present case.

I agree also on the second question. We are asked to consider this point on the assumption that both parties are agreed that the decree of removing is not good if the subject occupied by the complainer falls under the provisions of the Agricultural Holdings Act, in respect that warning was not given in the form prescribed by the statute. I desire to reserve my opinion on that point. It is unnecessary to consider it, because I think the Agricultural Holdings Act is inapplicable for the reasons stated by your Lordships and by the Lord Ordinary.

LORD M'LAREN was absent.

THE COURT adhered.

CHARLES GARROW, Solicitor—MELVILLE & LINDSAY, W.S.—Agents.

JAMES MIDDLETON (Hewat's Marriage-Contract Trustee), Pursuer
(Respondent).—*Wallace.*

No. 84.

WILLIAM CARRUTHERS SMITH, Defender (Appellant).—*W. Campbell—
Hunter.*

Jan. 27, 1892.
Hewat's Trustee v. Smith.

Possession—Reputed ownership—Marriage-contract—Conveyance of moveables to trustees retenta possessione.—By antenuptial marriage-contract H. (the husband) conveyed to trustees his dwelling-house and "all and sundry the whole household furniture, . . . pictures, and other effects" therein. The trustees were infeft in the house, which was occupied by H. and his wife, who also enjoyed the use of the furniture, pictures, &c. After some years H. became insolvent and compounded with his creditors. S., his brother-in-law, became security for part of the composition. In security of this obligation H. conveyed to S., by written agreement (with power of sale), and delivered, his pictures, including six which were in his house at the date of the marriage-contract. S. had no notice or knowledge of the terms of the marriage-contract. In an action by the trustee under the marriage-contract to have the pictures or their value restored to the trust, *held* that as S. had obtained the pictures under an onerous contract without knowledge of the conveyance in the marriage-contract, he was not bound to restore them.

JAMES MIDDLETON, M.D., trustee under an antenuptial contract ^{2D DIVISION.} between Richard G. Hewat, tea-merchant, residing in Portobello, and his wife Mrs H. A. Middleton or Hewat, raised an action in the Sheriff Court ^{Sheriff of the Lothians and Peebles.} at Edinburgh against William C. Smith, Hope Street, Leith Walk, for delivery to him as such trustee of six pictures, or £250 as the value thereof.

The pictures in question had been delivered by Hewat to the defender, who was his brother-in-law, in the circumstances after narrated, and the pursuer maintained that they belonged to him as trustee. Mr and Mrs Hewat were married in 1883. By antenuptial contract, dated 3d December 1883, Hewat conveyed to trustees, *inter alia*, his house at Bellfield, Portobello, and "All and Sundry the whole household furniture, silver plate, bed and table linen, books, pictures, and other effects of every description in his house at Bellfield, Portobello." The purposes were for the liferent use of the spouses and the survivor, and for division among the children of the marriage.

The marriage-contract trustees were infeft in the house. The spouses continued to reside in it, and to enjoy the liferent of the furniture and pictures, including the six pictures in dispute.

About the beginning of the year 1890, Hewat became embarrassed in his circumstances, and he offered to his creditors a composition payable in three instalments. Security for the third instalment was required. Hewat applied to the defender to become cautioner.

The defender refused to be cautioner unless he obtained security. The security offered was a sum in cash, a quantity of tea, and a number of pictures belonging to Hewat, including the six in question. It was arranged in March 1890 that in consideration of the security thus offered the defender should be cautioner for part of the third instalment.

A written agreement, dated 21st and 26th March 1890, was entered into between the defender and Hewat, narrating that the former had agreed to sign the composition bills to the extent of £540, and in security had arranged to obtain immediate possession of, *inter alia*, Hewat's pictures; that he was to be entitled to hold the securities till relieved of his engagement; and to realise the whole or part of them at such price as he thought proper, and retain the funds so realised, and that the realisation might proceed at once.

Hewat then had his pictures removed from Bellfield House to a sale-

No. 84. room, where they were delivered to the defender. The pictures so removed included the six in question and some others which he had acquired after his marriage. A sale of pictures took place on 19th April 1890, at which the defender sold the pictures, and among them five of the six which were the subject of the action.

Jan. 27, 1892.
Hewat's Trustees v. Smith.

The pursuer averred that these six pictures belonged to Hewat at the date of the marriage, and were in Bellfield House at and prior to the execution of the marriage-contract, and had been conveyed to the trustees in virtue of that contract; that the arrangement between Hewat and the defender was illegal, and had only recently come to his notice; further, that the defender was well aware of the terms of the marriage-contract.

The defender denied that he was aware of the terms of the marriage-contract. He stated further that he had had to meet the whole of the bills for the third instalment of composition, and after computing the value of the securities had suffered loss to the extent of £50 or £60.

He pleaded;—(3) The conveyance in said marriage-contract being granted by Mr Hewat of moveables *retenta possessione*, and the moveables sued for having been delivered by Mr Hewat to the defender, who received them without notice or knowledge of said conveyance, the defender is not bound to deliver them to the pursuer, or to account to him for the value thereof, until he is relieved of the obligation referred to in his answers, of which he holds them as security.

The proof was somewhat conflicting as to whether the defender knew of the terms of Hewat's marriage-contract. It is sufficient to say that the Sheriff-substitute (Rutherford) was of opinion that he had such knowledge, but the Court held that he had not. The Sheriff-substitute pronounced an interlocutor in which (after findings in fact to the effect before stated) he found in law "(1) that the defender, being in the knowledge of the said antenuptial contract of marriage, was not entitled to rely upon Mr Hewat's possession of the pictures aforesaid as a ground of credit, or to assume that Mr Hewat was at liberty to deal with the pictures as he pleased; and (2) that the defender is bound to account to the pursuer for the said pictures, or the value thereof: Therefore repels the defences, and decerns and ordains the defender to deliver to the pursuer the picture which is still in his possession, as aforesaid, *videlicet*, a picture entitled "London Bridge," by Mr F. C. Noble: *Quoad ultra*, continues the cause that parties may be heard as to the sum payable by the defender in lieu of the other pictures mentioned in the prayer of the petition," &c.

The Sheriff-substitute subsequently gave decree for delivery of the unsold picture, and for £66, 3s. as the value of the other five.

The defender appealed to the Court of Session, and argued;—It was not proved on the evidence that the defender knew the terms of Hewat's contract of marriage. If not, the Sheriff-substitute's ground of judgment was removed. If the defender received the pictures in good faith, without notice of the alleged conveyance in the marriage-contract, he was not bound to deliver them to the pursuer unless and until the pursuer relieved him of his security.

Argued for the respondent;—It could not be said upon the evidence that the pictures had been specially mentioned to the defender as conveyed in the marriage-contract, but there was ample evidence that he knew that the whole furnishings of Hewat's house were conveyed in the contract. That was sufficient. Further, the principle of *Orr's Trustee v. Tullis*¹ applied to the case.

¹ July 2, 1870, 8 Macph. 83, 42 Scot. Jur. 566.

LORD JUSTICE-CLERK.—I think the Sheriff-substitute has fallen into error. No. 84.
 When Hewat became a party to his marriage-contract there were six particular pictures in his house, and these he is said to have conveyed to the marriage-contract trustees by that deed. He fell into difficulties and he endeavoured to get Smith, the defender, who is his brother-in-law, to assist him. In the course of this endeavour Hewat agreed to convey these six pictures, along with a number of others, as a security for the advances which he was to receive. They were handed over, and the defender sold them in order to save himself from loss. But the pursuer, the marriage-contract trustees of Mr and Mrs Hewat, now says that these six pictures were not the property of Hewat, but that, like everything else in Hewat's house at the date of the antenuptial contract they became the property of the marriage-contract trustees, and that the defender must either give up the pictures or account for the value of them.

Jan. 27, 1892.
 Hewat's Trustees v. Smith.

Now, it was not contended that Hewat and the defender had entered into a fraudulent scheme to defraud the marriage-contract trustees of property falling under their trust. On the contrary, the whole transaction was gone about in good faith. And that being so, the true state of the law regarding it is, as I think, accurately set forth in the defender's third plea, which is: "The conveyance in said marriage-contract being granted by Mr Hewat of moveables *retenta possessione*, and the moveables sued for having been delivered by Mr Hewat to the defender, who received them without notice or knowledge of said conveyance, the defender is not bound to deliver them to the pursuer, or to account to him for the value thereof, until he is relieved of the obligation referred to in his answers, of which he holds them as security." I think that plea sound in law, and directly applicable to the facts. I am therefore for recalling the judgment of the Sheriff-substitute. I think we should assoilzie the defender.

LORD YOUNG.—I agree. I think that the defender was a *bona fide* onerous holder of the pictures.

LORD RUTHERFURD CLARK.—I think it out of the question to impute fraud to the defender. He obtained these pictures for value in an honest transaction. I agree that he should have decree of absolvitor.

LORD TRAYNER concurred.

THIS interlocutor was pronounced:—"Find in fact (1) that Mr Hewat remained in possession of the furniture and other effects conveyed in his contract of marriage; (2) that the defender received the pictures mentioned in the prayer of the petition in security of an onerous obligation without notice or knowledge of the conveyance in said marriage-contract: Find in law that the defender is not bound to deliver the said pictures to the pursuer or to account for the price or value thereof: Therefore sustain the appeal, recall the interlocutor of the Sheriff-substitute appealed against, assoilzie the defender from the conclusions of the action," &c.

LINDSAY MACKERSY, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

ROBERT S. SMITH, Appellant.—*Sol.-Gen. Murray—A. J. Young.*
 WILLIAM PETRIE, Respondent.

No. 85.

Revenue—Inhabited house duties—Hotel stables and coach-house—House Tax Act, 1808 (48 Geo. III. c. 55), Schedule B, rule 2—Inhabited House Duty Act, Petrie.

Jan. 27, 1892.
 Smith v.

No. 85. 1851 (14 and 15 Vict. c. 36), *Schedule—Customs and Inland Revenue Act, 1878* (41 Vict. c. 15), *sec. 13, subsec. 1.*—*Held* that stables and a coach-house, which

Jan. 27, 1892. were occupied in connection with the business of a hotel by the hotel-keeper,
Smith v. but which were separated from it by a passage over which the public had a right
Petrie. of way and three adjoining feuars a servitude of passage, were not exempt from
inhabited house duty, but fell to be assessed along with the hotel.

Douglas v. Young, November 14, 1879, 7 R. 229, *followed*.

Exchequer
Cause.

1st DIVISION.

AT a meeting of the Commissioners for General Purposes for the Forfar district of the county of Forfar, William Petrie, hotel-keeper, Forfar, appealed against the assessment made upon him for the year 1891-92 of £1, 19s. for inhabited house duty, at the rate of 6d. per pound on £78 sterling, the annual value of the Salutation Hotel and stables and coach-house occupied by him at East High Street and South Street, Forfar, so far as the assessment included the stables and coach-house.

The assessment appealed against was levied in terms of the Inhabited House Duty Act, 1851 (14 and 15 Vict. c. 36), and the House Tax Act, 1808 (48 Geo. III. c. 55).*

The Commissioners sustained the appeal, and a case was stated, at the request of the Surveyor of Taxes, for the opinion of the Court of Exchequer.

The following facts were set forth in the case:—(Second) The hotel of which, along with the stables and coach-house adjoining, Mr Petrie was proprietor and occupier, has a frontage both to East High Street and South Street, Forfar, with a bar entrance at the junction of those streets. The kitchen door of the hotel enters from a passage running from South Street to East High Street at the back and side of the hotel. The said passage separates the hotel from the stables and coach-house, which are under an entirely separate roof from the hotel building, and are situated at the back corner thereof. The carriage entrance to the stables and coach-house is from East High Street, the said passage being only a foot passage from South Street.

(Third) The general public have a right of way over this passage, and it is subject to a servitude of passage in favour of three feuars having properties adjoining.

(Fourth) In addition to the hotel business, the appellant carries on a horse-hiring business, and puts up horses at livery in the said stables.

* The schedule annexed to the Act 14 and 15 Vict. c. 36, provides,—“For every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year, . . . and also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine, or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk, or consumed, shall not be such shop or warehouse as aforesaid, . . . there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence. . . .”

By section 2 of that Act certain of the powers and provisions of former Acts were continued, *inter alia*, those set forth in Schedule B of 48 Geo. III. cap. 55.

Schedule B of the Act 48 Geo. III. cap. 55, provides (rule 2),—“Every coach-house, stable, brew-house, wash-house, laundry, wood-house, bake-house, dairy, and all other offices, and all yards, courts and curtilages, and gardens, and pleasure-grounds belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house, provided no more than one acre of such gardens and pleasure-grounds shall in any case be so valued.”

(Fifth) The value of the hotel was £58 per annum, and the value of the stables and coach-house was £20 per annum. No. 85.

The appellant claimed relief from the assessment as far as it included the stables and coach-house, on the ground that the hotel and the stables and coach-house were distinct tenements, separated from each other by the public right of way and servitude of passage above mentioned.* Jan. 27, 1892.
Smith v.
Petrie.

The Surveyor of Taxes, on the other hand, contended that the hotel and stables and coach-house formed one assessable subject, and were all chargeable under the second rule of Schedule B of the Act 48 George III. cap. 55, and in support of his contention he referred to the case of *Douglas v. Young*, November 14, 1879, 7 R. 229.

Argued for the appellant;—The point here raised was settled by *Douglas v. Young*,¹ in which it was decided that the mere severance of one portion of let premises from another portion did not affect their unity as an assessable subject.

There was no appearance for the respondent.

LORD PRESIDENT.—I think this case has been wrongly decided by the Commissioners, and that we must sustain the appeal. The case of *Douglas v. Young* certainly comes very near it, the only points of difference between them being (1) that in this case there is a passage between the hotel and the stables, while in *Douglas*' case they were separated by a court or yard; (2) that in *Douglas*' case the court seems to have been occupied partly by the hotel-keeper and partly by other persons, while here the public have a right of way, and three adjoining feuars a right of servitude over the passage. These, however, are very unsubstantial distinctions, and do not take this case out of the rule laid down in *Douglas*' case.

I think the stable and coach-house are occupied along with the hotel, and it being now settled law that a hotel is a dwelling-house, I think the stables and coach-house must be held to be an adjunct of a dwelling-house, notwithstanding the fact that they are separated by the passage.

LORD ADAM concurred.

LORD M'LAREN.—I think the stables and coach-house belong to the dwelling-house. This case is, I think, ruled by *Douglas*' case, which was a case of a hotel not occupied by the landlord's family personally, for he had a separate dwelling-house, but only as a hotel in the strict sense of the word.

I do not think I should ever have found out for myself that such an hotel was an inhabited house in the sense of the Act. But the point has been conclusively settled in *Douglas*' case, and we must accept it as binding.

LORD KINNEAR.—I concur with your Lordship in the chair.

THE COURT pronounced this interlocutor :—"Reverse the determination of the Commissioners : Sustain the assessment, and decern, and remit to the said Commissioners to refuse the appeal."

SOLICITOR OF INLAND REVENUE, Agent.

* The Customs and Inland Revenue Act, 1878 (41 Vict. c. 15), sec. 13, subsection 1, provided that "where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit," the occupier shall be free from payment of inhabited house duty.

¹ *Douglas v. Young*, Nov. 14, 1879, 7 R. 229.

No. 86. ANDREW M'EWAN AND OTHERS (John Carter's Trustees), First Parties.—

Dickson—Ure.

Jan. 29, 1892.
Carter's Trustees v. Carter.

THOMAS CARTER AND OTHERS, Second Parties.—*Johnston—Dewar.*

BARBARA AGNES CARTER OR LITTLE AND OTHERS, Third Parties.—

Dickson—Ure.

Succession—Settlement—Conditio si sine liberis decesserit.—Where the terms of a testamentary deed shewed that the testator had contemplated the contingency of legatees dying and leaving issue by making certain legacies payable to the issue of legatees in the event of their predecease, *held* that the *conditio si sine liberis* was not to be implied in the case of a legacy where he had made no such provision.

Question whether the *conditio si sine liberis* can be implied in favour of the issue of a conditional institute.

1ST DIVISION. BY trust-disposition and settlement, dated 7th May 1862, John Carter conveyed to trustees his whole heritable and moveable estates. He directed them in the third purpose to hold his whole property (except money in bank and cash in hand) for behoof of his wife in liferent. In the fifth purpose he directed his trustees to pay certain legacies, viz. :—“To my son John Carter personally the sum of £500 sterling, but declaring that this legacy shall not be payable to him unless upon his return to this country within ten years after the death of the survivor of me and my said wife: And also declaring that at the end of the said ten years the said sum of £500 shall be divided equally among my surviving children. To my daughter Margaret Carter and her heirs the sum of £500 sterling to my daughter Catherine M'Ewan Carter and her heirs the sum of £500 sterling, to my son Thomas Carter and his heirs the sum of £500 sterling, and to my daughter Agnes Barbara Carter and her heirs the sum of £500 sterling.” In the seventh purpose he directed his trustees, six months after the death of the longest liver of himself and his wife, and after paying the foresaid provisions, to make over to his son James Carter and his heirs and assignees, heritably and irredeemably, the lands of Castlehill and others.

As regarded the residue of his estate, he directed as follows :—“Lastly, I hereby nominate, constitute, and appoint my son James, and my daughters Margaret, Catherine M'Ewan, and Agnes Barbara to be my residuary legatees: And I direct and appoint my trustees, at the first term of Whitsunday or Martinmas that shall happen six months after the death of the longest liver of me and my said spouse, and after payment of or provision for the legacies, bequests, and annuity above written, or which may hereafter be made by me, to pay and deliver over the residue and remainder of my said means and estate to my said son James, and my said daughters Margaret, Catherine M'Ewan, and Agnes Barbara, and that equally among them, share and share alike, declaring that the shares of such of my said residuary legatees as shall die without leaving lawful issue shall belong to the survivors of my said residuary legatees equally.”

The testator died on 19th January 1864, survived by his widow and by his sons James and Thomas, and by his three daughters. John Carter, the testator's son, went to America in June 1856, and had not been heard of for many years. At the time of his father's death it was not known whether he was living or not, and since then no tidings had been heard of him. Agnes Barbara Carter, one of the testator's daughters, died in 1868, without issue, and James Carter, the testator's son, died on 4th January 1877, survived by five daughters.

The testator's widow died on the 26th September 1881.

Ten years having elapsed since Mrs Carter's death on 26th September

1881, a question arose as to who was entitled to the legacy of £500 left to John Carter. No. 86.

A special case was accordingly presented to the Court by (1) Mr. Carter's trustees, (2) the testator's surviving children, (3) the five daughters of James Carter. Jan. 29, 1892.
Carter's Trustees v. Carter.

The second parties maintained that they were now entitled to receive payment equally among them of the legacy.

The third parties maintained that they were entitled to the share of the £500 which would have fallen to their father, James Carter, if alive.

The questions of law were,—“(1) Are the second parties entitled to receive payment equally among them of the said sum of £500? or (2) Are the third parties entitled to receive the share thereof which would have fallen to the testator's son James, if now alive?”

Argued for the third parties;—This was a plain case for the application of the *conditio si sine liberis*. The legacy was by a father to his children as a class, and his presumed intention let in the *conditio*.¹ There was a direct bequest to the class merely burdened with a condition founded upon a chance of John's returning home within ten years. The case of *M'Call*² had no application. It was dealt with as a case relating to a specific legacy bequeathed conditionally upon the legatee's survivance of a certain event. In *Morrison's Trustees*³ the *conditio* plainly did not apply, because the person instituted had died in the knowledge of the testator prior to the date of the settlement. It was by no means established that the *conditio* did not apply to legacies, as was maintained by the second parties. In *Douglas' case* there were opinions both ways.⁴

Argued for the second parties;—(1) The question was one as to the testator's intention.⁵ The terms of the settlement here shewed very clearly that the testator had fully before his mind when he made it the possibility of his children dying leaving lawful issue. The provision in question was one of a series of bequests given in severalty to different members of his family, and they were each and all, with the exception of the provision in question, payable to them and their heirs. But (2) James died four years before his mother. He was never instituted, and did not survive the date of vesting. His issue were not then entitled to take in virtue of the *conditio* a share which he would have taken if he had survived. The words were that John's bequest should be divided, not “among my other children,” but among “my surviving children.”⁶ (3) The *conditio* applied only to provisions, and not to a simple legacy such

¹ Grant, &c. v. Brooke, &c., Nov. 3, 1882, 10 R. 92; Gault's Trustees v. Duncan, &c., March 20, 1877, 4 R. 691.

² M'Call v. Dennistoun, Dec. 22, 1871, 10 Macph. 281, 44 Scot. Jur. 160.

³ Morrison's Trustees v. Macdonalds, Nov. 29, 1890, 18 R. 181.

⁴ Douglas' Executors, Feb. 5, 1869, 7 Macph. 504, 41 Scot. Jur. 268; cf. Hall v. Hall, March 17, 1891, 18 R. 690.

⁵ Gillespie v. Mercer, &c., March 8, 1876, 3 R. 561, per Lord Gifford, p. 565; Berwick's Executor, &c., Jan. 23, 1885, 12 R. 565, per Lord President, p. 570; Greig v. Malcolm, March 5, 1835, 13 S. 607, per Lord Corehouse, p. 611; M'Call v. Dennistoun, 10 Macph. 281, 44 Scot. Jur. 160.

⁶ Morrison's Trustees v. Macdonalds, Nov. 29, 1890, 18 R. 181; Thornhill v. Macpherson, Jan. 20, 1841, 3 D. 394, per Lord Medwyn, 407; Young et al. v. Robertson et al., Feb. 14, 1862, 4 Macq. 314, 337, 34 Scot. Jur. 270, Patena. Ap. 1108; Walker v. Park, Jan. 20, 1859, 21 D. 286, 31 Scot. Jur. 151; Graham's Trustee v. Graham, May 26, 1868, 6 Macph. 820, 40 Scot. Jur. 452.

No. 86. as this was.¹ (4) The *conditio* had never been held to apply to the issue of a person instituted only in the second order.² *Gauld's Trustees*³ was different. It referred to a provision of residue divisible among a class.

Jan. 29, 1892.
Carter's Trustees v. Carter.

LORD PRESIDENT.—It appears to me that the case of *Greig v. Malcolm*, to which the attention of parties was called by Lord Kinnear, affords a sound rule of judgment here. The *conditio si sine liberis* is applicable where the terms of the settlement are such as to conduce to the conclusion that the testator has not taken into account that one of his children may die survived by issue. But if it should turn out upon an examination of the whole deed that the testator has had that contingency in view, and has provided for it, then the room for the application of the condition disappears.

The doctrine as put by Lord Corehouse in the case of *Greig v. Malcolm*, 13 S. 611, is this,—“This doctrine, which we have borrowed from the Roman law, proceeds entirely on the presumption that the testator, having overlooked or forgotten the contingency of the institute having children has left children unprovided if they come into existence. But this presumption may be defeated by opposite presumptions or evidence, and there can be no stronger evidence to that effect than a clause in the settlement by which the testator does make a provision for the issue of predeceasing legatees, because it incontestibly shews that he had them in view when he made the substitution.” Now, applying the principle to the settlement before us, it is important to observe that in the clause of the deed dealing with residue there are these words,—“Declaring that the shares of such of my said residuary legatees as shall die without leaving lawful issue shall belong to the survivors of my said residuary legatees equally.” That shews that the contingency of his children dying leaving lawful issue was fully in the mind of the testator when he made the deed.

I think, therefore, the result is that Mr Johnston's argument must prevail and he has fortified it by pointing out that the testator has very carefully discriminated between the various provisions in this very matter. The legacy with which we have to do is one of a series of legacies in the proper sense. In it there is no mention of issue or heirs, but in the other legacies we find that they are granted “to my daughter Margaret Carter and her heirs,” “to my daughter Catherine M'Ewan Carter and her heirs,” and so on.

It therefore appears to me that this deed is one giving ample scope for the application of the doctrine laid down by Lord Corehouse, and that it is impossible to hold that this clause can be read as containing an implied provision in favour of the children of the predeceasing son.

Many cases have been cited which go to shew that the current of decision has run strongly in favour of the application of the *conditio*. None of these cases, however, gainsay the justice and efficacy of the rule laid down by Lord Corehouse.

I am therefore of opinion that the argument of the third parties cannot receive effect.

LORD ADAM.—I agree with your Lordship. I think the case of *Greig*

¹ Douglas' Executors, 7 Macph. 504, per Lord Justice-Clerk, p. 508, and per Lord Neaves, p. 510, 41 Scot. Jur. 268.

² Young v. Robertson, *supra*, p. 409, note 6.

³ Gauld's Trustees v. Duncan, &c., 4 R. 691.

Malcolm rules the present case. It proceeds upon the principle that the *conditio si sine liberis* applies where there is a presumption that the testator in making his will has overlooked the children of his direct descendants.

No. 86.

Jan. 29, 1892.
Carter's Trustees v. Carter.

When we look at this deed it is impossible to conclude that the testator has overlooked the children of his son James. The terms of the other clauses of the deed shew this. I therefore think the principle does not apply here.

It is not necessary to say more; but I have been unable to follow the argument that the *conditio* affects this case at all. Here we have a clause substituting a certain person conditionally to another who is already institute, because John Carter is the institute in this clause beyond all doubt, and the surviving children of the testator only take conditionally on his non-appearance within a certain time. Therefore, what is proposed here is that the *conditio* should be held to apply to the case of the issue of persons who are not instituted in the first place.

I am aware of no case which will support this, and doubt the soundness of the proposal.

LORD M'LAREN.—I think that in considering this class of cases it must be kept in view that our law allows perfect freedom of bequest not only in the original limitations of a will, but in conditional institutions and other rights of a subsidiary character intended to have effect in certain contingencies.

We must therefore be careful not to give this useful principle, the *conditio si sine liberis decesserit*, an extension which would practically have the effect of making all conditional institutions alike, and of depriving a testator of the liberty allowed to him by the law.

I make this observation because in the opinion which was returned by the consulted Judges in the recent case of *Hall*, 18 R. 690, we expressed the view that there had been a tendency to extend the *conditio* beyond its proper limits.

I agree with your Lordship that the principle to be kept in view in applying the *conditio* is that it involves an equitable extension of the scope of the bequest to persons who have been altogether overlooked in the testator's scheme of settlement. Such extension is founded on the relationship of the parties, and on the presumption that the testator had not intentionally disinherited persons having a claim on his goodwill.

If that is the true principle of the *conditio*, I think all the elements of this case go to exclude its application.

First of all, what is claimed by the third parties is not a part of a general family bequest. The testator gives his heritable estate to his eldest son, and provides that the residue is to be shared by his three daughters and another son. No share of the residue is given to his son, John Carter, as he had been abroad for a long time, and had not been heard of by his family.

But this bequest of £500 to the absent son is one of a series of pecuniary legacies given in severalty to different members of the family, and therefore it is not a part of the family provision. But, again, it is not claimed by the issue of the person to whom it was originally given, but by the children of a deceased brother. The claim is therefore contrary to the direction of the testator, who contemplated the case of his son not returning to claim the legacy, and who says in the deed that it is in that event to be shared by his surviving children.

I agree with Lord Adam in his expression of a doubt as to whether the benefit of the equitable rule can ever be claimed by the issue of one who is only insti-

Jan. 29, 1892.
Carter's Trustees v. Carter.

tuted in the second order. My doubt, however, reaches a certainty that the rule has no application to this case, because it has been expressly ruled in a series of decisions which have been quoted to us, including the carefully expressed judgment of Lord Westbury in the case of *Young v. Robertson*, who lays it down that the issue only take their parents' original share, and not what their parents would have taken under a clause of survivorship.

Further, I agree that the phraseology here used excludes the *conditio*, and that, perhaps, is only another way of putting what I have already observed, that the clause is inconsistent with the claim put forward by the third parties.

LORD KINNEAR.—I agree with your Lordships in thinking that the third parties' claim cannot be sustained, and upon the grounds stated.

I also agree in thinking that it is at least doubtful whether the *conditio sine liberis decesserit* can be applied in favour of the children of legatees who are themselves claimants only on the failure of some prior legatee whom the testator preferred to them.

In the present case the children to whom the condition, according to its ordinary construction, would have applied would be the children of John Carter, because he is the institute, and the children to be benefited by the condition are the children of the institute, *si institutus decesserit sine liberis*. But it is proposed that the children of a person conditionally instituted on the failure of John Carter should have the benefit of the presumption upon which the condition is founded.

I am not satisfied that the presumption could arise in such a case; but I think with Lord Adam that it is unnecessary to decide that point, because the grounds of judgment stated by your Lordship in the chair are perfectly clear and sufficient.

THE COURT found and declared that the second parties were entitled to receive payment equally among them of the £500, and answered the second question in the negative.

RONALD & RITCHIE, S.S.C.—W. J. JOHNSTONE, S.S.C.—Agents.

No. 87.

NAPIER, SHANKS, & BELL, Pursuers (Reclaimers).—*Dickson*—Napier.
P. G. HALVORSEN, Defender (Respondent).—*W. Campbell*—Ure.

Jan. 29, 1892.
Napier,
Shanks, & Bell
v. Halvorsen.

Jurisdiction—Foreigner—Arrestment jurisdictionis fundandæ causa.—Arrestments *ad fundandam jurisdictionem* were used against a foreigner in the hands of his shipping-agents in Leith. The defender pleaded no jurisdiction, alleging that at the date of the arrestment the ~~arrestees were not his debtors~~. The pursuers denied this averment, and a proof was allowed. The evidence shewed that at the date of the arrestment the balance on an accounting was in favour of the arrestees. The pursuers maintained that it was enough that at the date of the arrestment there was a relationship between the defender and arrestees which made the latter liable to an accounting, even though ultimately it should be found that there was a debit balance against the defender.

The Court *sustained* the plea of no jurisdiction.

1st Division.
Ld. Stormonth
Darling.

ON 3d June 1891 Messrs Napier, Shanks, & Bell, shipbuilders, Glasgow, used arrestments in the hands of Breyen, Richardson, & Company shipping-agents in Leith, to found jurisdiction in an action against P. G. Halvorsen, shipowner, Bergen, for the amount of the third instalment of a marine engine supplied to him for a steamer called the "Britannia."

In his defences Halvorsen stated;—"No sums belonging to the defender were attached by the arrestments in the hands of Breyen, Richardson

& Company, who act as the agents of the 'Britannia' in Leith, and who were not indebted to the defender at the time of said arrestment. In these circumstances, the Court of Session has no jurisdiction over the defender." (Ans. 3) for the pursuers, "Denied."

No. 87.

Jan. 29, 1892.
Napier,
Shanks, & Bell
v. Halvorsen.

The defender, *inter alia*, pleaded;—No jurisdiction.

The defender was allowed a proof of his averments on the question of jurisdiction, and the pursuers a conjunct probation, from which it appeared that, at the date when the arrestments were used, Messrs Breyen, Richardson, & Company, who acted as agents for the defender and the other owners of the "Britannia," were not due the defender anything, and that the defender owed them a small sum. The state of the accounting between them appears from the note to the Lord Ordinary's interlocutor, *infra*. A final settlement took place on 12th August 1891.

On 7th November 1891 the Lord Ordinary (Stormonth Darling) found, *inter alia*, that no sums belonging to the defender were attached by the arrestment founded on; therefore sustained the first plea in law for the defender, and in respect thereof dismissed the action, and decerned.*

* "OPINION.— . . . The second question is, whether the pursuer has validly attached funds belonging to the defender in the hands of Breyen, Richardson, & Company, of Leith, and there the main argument for the pursuers was, that however the account between these parties may have stood at the date of the arrestment, there was in point of fact no settlement between them till 12th August following, and accordingly that, at the date of the arrestment, there was an obligation on Breyen, Richardson, & Company to account to the defender. Now, I quite subscribe to the doctrine that in a question of jurisdiction, which is necessarily of a somewhat summary character, Courts of law are not in the habit of entering upon prolonged and elaborate investigations as to the state of accounts between parties in order to ascertain how the balance stood at any particular date. That would be unsuitable and out of all proportion to the end in view; but, on the other hand, it appears to me to be an everyday practice to shew, where it can be shewn shortly and conveniently, that at the date when the arrestments were used there were no funds in the hands of the arrestee. Now, that is what has been done here. It is clearly proved, as I think, that Breyen, Richardson, & Company began the year 1891 with a claim against the defender of £4, 10s. In the month of February that claim was turned into a debt by the receipt on their part of £5, 12s. 6d., . . . and that therefore left a sum of £1, 2s. 6d. due by them to Halvorsen and the other part-owners of the ship. Well, then, if that small balance of £1, 2s. 6d. had remained at the date of the arrestment, I do not doubt that, small as it is, it would have been sufficient to found jurisdiction. But it is proved by Mr Breyen (and his evidence is uncontradicted) that that balance was wiped out by a number of small disbursements, amounting together to £2, 13s. 7d., and consisting chiefly of postages and telegrams, which had been laid out for behoof of Halvorsen and his co-owners before the date when the arrestments were used. Now, if that be so, then unquestionably when the arrestment came to be used Mr Breyen's firm were not due anything to the defender. On the contrary, the defender was due a small sum to them, and it does not seem to me to make any difference that, for convenience sake, no actual settlement of the accounts between these parties took place till the month of August. I am throwing out of view some other items which still further swell the balance in favour of Breyen, Richardson, & Company. If necessary, I should hold that these sums were fairly debited against the former owners of the ship, because some of them had reference to this very vessel. But it is unnecessary to go into that. The uncontradicted evidence before me is, that the small balance of £1, 2s. 6d, was, before the date of the arrestment, entirely wiped out by disbursements made on behalf of the defender and the other part-owners of this vessel, thereby leaving a balance the other way in favour of Breyen, Richardson, & Company. . . ."

No. 87.

Jan. 29, 1892.

Napier,

Shanks, & Bell

v. Halvorsen.

Argued for the pursuers;—In order to render an arrestment operative to the effect of founding jurisdiction it mattered not how the accounts between the defender and arrestee stood at the date of the arrestment. It was enough if the arrestee was, when the arrestment was used in his hands, under an obligation to account to the defender, even although it should ultimately on a settlement of accounts be found that the arrestee was due money to the defender.¹

Argued for the defender;—The result of the authorities was that an arrestment to found jurisdiction must attach something. But here the proof had shewn there was nothing. The pursuers' argument was repugnant to common sense. The rationale of *Douglas' case*² was that it appeared from the record that there was a claim by the defender against the arrestee which if prosecuted would *prima facie* result in money. In *Baines' case*,³ again, the arrestee was in possession of certain bonds of face value which made him the defender's debtor.

LORD PRESIDENT.—The question to be decided here is whether jurisdiction was founded against the defender by the arrestments used in the hands of his agents in Leith.

The statement of the pursuers as to the funds arrested is a general one. They say,—“The defender is a foreigner, but he is subject to the jurisdiction of the Court of Session by virtue of arrestments used against him *ad fundandam jurisdictionem*.” They then produce an execution of arrestments *ad fundandam jurisdictionem* in the hands of Breyen, Richardson, & Company, the defender's agents in Leith, on 3d June 1891. The answer of the defender on the subject is,—“No sums belonging to the defender were attached by the other arrestment in the hands of Breyen, Richardson, & Company, who act as the agents of the ‘Britannia’ in Leith, and who were not indebted to the defender at the time of said arrestment,” and the answer of the pursuers to this is “Denied.” The pursuers thus make no specific averments as to the nature of the assets arrested but meet the defender's statement by a general denial.

Mr Dickson maintained that the cases go this length, that if there is disclosure on the admission of the defender any relationship which would give claim to an accounting, that that is sufficient to support the validity of the arrestments.

Now, how stand the cases? The only two cited as bearing directly on the subject are *Douglas v. Jones* and *Baines & Tait*. In *Douglas' case*, the decision of the Court proceeded on the record; and the facts on record were that the defender was a partner at the date of the arrestment of a certain company and the arrestment covered visible assets belonging to the company of a visible value. The Court then said that they must determine the question according to the ostensible facts of the case, and these were that the defender was a partner of a company which had visible assets. Deciding the case on these facts, the

¹ *Baines & Tait v. Compagnie Générale des Mines d'Asphalte*, March 1879, 6 R. 846, per Lord Ormidale, p. 849; *Douglas v. Jones*, June 30, 1889 S. 856, 3 Scot. Jur. 564; *Lindsay v. London and North-Western Railway Co.*, Jan. 27, 1860, 22 D. 571, 32 Scot. Jur. 221, per Lord Curriehill, pp. 5 and 594 of 22 D., and per Lord Deas, 22 D. 595; *Stewart v. North*, July 1889, 16 R. 927, affd. July 14, 1890, 17 R. (H. L.) 60.

² *Douglas v. Jones*, 9 S. 856.

³ *Baines & Tait v. Compagnie Générale des Mines d'Asphalte*, 6 R. 846.

held that there was a claim which might be prosecuted by the partner, and which would *prima facie* result in money. It is true the defender was interested to dispute the validity of the arrestment, and asserted that while he had a claim it would not result in money, but, as I read the judgment, the Court held that there was nothing to instantly verify that statement. No. 87.
Jan. 29, 1892.
Napier,
Shanks, & Bell
v. Halvorsen.

The case of *Baines & Tait* was still simpler. There the person in whose hands the arrestments were used held Roumanian bonds of a face value which made him to the amount of £4000 debtor to the defender. There again, *prima facie* of the facts, the arrestee was in possession of value. That distinguishes the case from the present, because it shews that the arrestment covered something. In the present case the parties have joined issue upon the question of fact whether the agents at Leith were indebted to the defender at the date of the arrestment; the case comes before us on the proof thus taken, and it is impossible for us to disregard the results of that inquiry.

The result of the inquiry is as clear as can be, indeed it is barely disputed. If we take the issue between the parties as being whether the agents were indebted to their principal at the date of the arrestment, a negative answer must be returned. We are, in the result, in the same position as if it had appeared from the pursuers' own averments upon record that there was a balance in favour of the agents.

If therefore I am right in saying that we are not to discard the proof, we shall follow *Douglas'* case and apply the same rule by considering the facts of the case. In *Douglas'* case the Court were dealing with the record, and in the present we are dealing with proved and ascertained facts; and in holding that the arrestments attached nothing we are acting in conformity with previous cases, because we are deciding according to the facts before us.

There is nothing in the cases to countenance the argument that the arrestments will be good wherever there is a claim of accounting between the parties no matter on which side the balance may be, and even admitting (or it being proved) that the balance is against the party asserting such claim. The argument is repugnant to common sense, and I cannot assent to it.

We must then, I think, adhere to the Lord Ordinary's interlocutor.

LORD ADAM.—The defender in this case is a Norwegian, and the question for consideration is whether jurisdiction has been founded by arrestments used in the hands of certain agents of the defender in this country. There is thus raised a question of fact and a question of law.

The question of fact is, whether there was a balance due by the agents to the defender. There was a proof on the matter, and the result is that it is proved that at the date of the arrestments the agents were not due any sum to the defender. Therefore upon the facts the arrestments fail.

But then the question of law has been strenuously argued, and Mr Dickson maintained that where it appears that there is a possible claim of accounting between the principal and the agent the arrestments would be valid, and that even though it should turn out that the balance was the other way.

I must say I know of no case that goes so far, and certainly neither *Douglas'* nor *Baines'* cases give countenance to such a view.

I do not dispute that there may be a *prima facie* case for sustaining the arrestment, and that the Court may do so without awaiting the result of the accounting. But I know of no case in which the jurisdiction has been sustained where

No. 87. it is ascertained in point of fact, as here, that nothing is covered by arrestment. *Baines'* case was entirely different from the present, for there property of a large face value belonging to the defender was in the hands of the arrestee.

Jan. 29, 1892. Napier, Shanks, & Bell v. Halvorsen. On the whole matter I agree with your Lordship that we ought to adhere to the Lord Ordinary's judgment.

LORD M'LAREN.—The question here is, whether jurisdiction has been constituted against the defender by arrestments used in the hands of his agents in Leith.

I know of no decision which has gone the length of excluding inquiry into the state of the cash account between the parties for the purpose of seeing whether there are funds subject to arrestment.

If the balance due to or by the arrestee depends on something which cannot be immediately ascertained, *e.g.* on profits or commission to be estimated at the end of the financial year, or on the value of securities which the arrestee or agent holds primarily for his principal, but also as a collateral security to himself, the Court will not enter into an inquiry for the purpose of framing a hypothetical balance. But where there is only a cash account the difficulty does not arise, because the balance can be immediately ascertained by summation and subtracting the sum of the one side of the account from the other. I apprehend that when this can be done, and there are in fact no disputed items of account, it ought always to be done. I should not hold a Court competent to sustain jurisdiction in respect of an account which brings out a debit balance against the defender. That is what has happened here, and I agree with your Lordship that the case can be clearly distinguished from other cases which have been cited to us where either in respect of judicial admissions or on the facts disclosed, it was held to be impossible to ascertain the state of the balance, and the jurisdiction by arrestment was accordingly sustained.

LORD KINNEAR.—I also agree. I think any difficulty in the matter arises from a misapprehension of what was decided in the cases of *Douglas* and *Baines*. There is no doubt that if there are primary grounds for holding that the arrestee has funds in his hands belonging to the debtor there may be a perfectly good arrestment *jurisdictionis fundandæ causâ*, even although it is possible that, if proof were taken, the balance might be found to be against the arrestee. But there must at least be a *prima facie* case which cannot be disproved immediately or without a collateral litigation. This is very clearly illustrated by the case of *Douglas v. Jones*. There the defender was a partner in a mercantile firm possessed of property, and had therefore a share in all the property of the firm, and had also a right and interest in every outstanding debt which was due to the company. It was therefore held that it was no sufficient answer to allege that if an accounting was gone into between him and the company of which he was a partner, he would be found to be in the company's debt. The Lord Justice-Clerk (Boyle) says,—“I know it is said that on an investigation would be shewn that Jones had no interest in the company effects, but at the time the arrestments were laid on he was a partner”; and he then proceeds, “it is a sufficient answer as to jurisdiction to aver that after a long litigation I will shew that there were no funds of mine to arrest? If there is *prima facie* evidence of funds, the arrestment is sufficient to make him liable to our jurisdiction.” The conclusive distinction between that case and this is that we have

not here to consider the question on a *prima facie* case that a debt exists, but on a concluded proof that there is no such debt. I think it perfectly clear from the proof that there is no such debt. We are in the same position as if the pursuer had admitted on record the facts which are established against him by the proof.

No. 87.

Jan. 29, 1892.
Napier,
Shanks, & Bell
v. Halvorsen.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

PETER BEATTIE (Inspector of Poor of Barony Parish).—*Lees—Ure.*

No. 88.

JAMES MUIR (Inspector of Poor of Bothwell).—*J. A. Reid.*

Jan. 29, 1892.
Beattie v.
Muir.

Poor—Relief—Claim of relieving parish against parish of settlement.—When a pauper has been relieved in the asylum or poorhouse of another parish than his own the relieving parish is entitled to charge against the parish of settlement in addition to a sum for bed, board, fuel, &c. (1) a proportion of management expenses to cover the proportional expense of the staff employed in attending to the wants of the paupers in such asylum or poorhouse; and (2) a proportion of the interest actually paid for the current year by the relieving parish on the debt outstanding on capital account for building the poorhouse or asylum respectively; but nothing in respect of such part of the cost of erecting the buildings as had been paid off by the relieving parish.

Hay v. Melville, 20 D. 480, commented on.

Opinion (per Lord Stormonth Darling) that a parish maintaining a pauper lunatic belonging to another parish in a poorhouse asylum is entitled to include in its charge for maintenance a proportion of the annual cost of a farm connected with it as a curative agent.

THE Inspector of Poor of Barony Parish, Glasgow, raised this action against the Inspector of Poor of the parish of Bothwell for moneys expended on behalf of three paupers belonging to the defender's parish, under the 71st section of the Poor-Law Act, 1845,* and the 76th section of the Lunacy Act, 1857,† viz., on account of Hugh White, a pauper lunatic maintained in the parochial asylum, £35, 12s. 9d., and on account of Elizabeth Shaw and the child of Bridget M'Guire, paupers maintained in the poorhouse, £5, 14s. 7d.

2^d DIVISION.
Ld. Stormonth
Darling.

1. Advances for a pauper lunatic, Hugh White, amounting, with interest, to £43, 4s. 9d., under deduction of the Government lunacy grant, £7, 12s. The principal item in the account was a charge of 13s. per week for the pauper's board in Woodilee Asylum from 17th August 1887 to 17th October 1888. A state shewing the charges taken

* The Poor-Law Amendment Act, 1845 (8 and 9 Vict. c. 83), enacts, by section 71, that where in any case relief shall be afforded to a poor person found destitute in a parish or combination, it shall be lawful for the parochial board of such parish or combination to recover the moneys expended in behalf of such poor person from any parish or combination within Scotland to which he shall ultimately be found to belong, or from his parents or other persons who may be legally bound to maintain him. . . .

† The Lunatics Act, 1857 (20 and 21 Vict. c. 71), enacts by sec. 6,—“ All the expenses attending the taking and sending a pauper lunatic to any district asylum in and from any parish which is not the parish of settlement of such lunatic, including the sum paid for the order of admission of such lunatic, and the maintenance of such lunatic therein, shall be recoverable by the party or parish defraying such expense from the parish of settlement of such lunatic. . . . ”

No. 88. into account in fixing the rate of board was produced, and is quoted below.*

Jan. 29, 1892.
Beattie v.
Muir.

In his defences the defender stated that he refused to pay the charge of 13s. per week on the ground that under the statutes he was only liable to repay "the moneys expended on behalf of the pauper," and that the rate charged exceeded these. In particular he objected to the following items of charge per week, as in state No. 7 of pro.* (1) medicines, 1½d. in respect the pursuer's parish participates in the medical relief grant, "which covers medicines"; (2) salaries and wages (less tradesmen), 2s.; (3) farm, 1s. 0½d.; (4) interest at 3 per cent on total indebtedness, 4s. 2½d. (which the defender avers is charged in lieu of rent) to the extent of 3s. 0½d., being the amount by which that charge exceeds the rate of rental as shewn by the Valuation-roll, or at all events, was not entitled to charge as rent more than 3 per cent per annum on the actual amount of indebtedness as at 14th May 1888. In any view, the defender objected to the charge of 13s. in so far as it exceeded the charges appearing in the annual accounts of the pursuer's parish for the years ending 14th May 1888 and 14th May 1889, or at least in so far as the said charge of 13s. exceeded the charges returned by the pursuer to the Board of Supervision as the total average weekly cost of lunatic poor.

A joint minute was lodged, in which the following admissions were made:—

"(1) Medicines, £173, 13s. 5d.—This sum is composed of—

1. Medicines,	.	.	.	.	£37	7	0
2. Wines and spirits,	.	.	.	.	16	1	0
3. Tobacco and snuff,	.	.	.	.	120	3	11

£173 13 5

" . . . The only part of the medical relief grant received in respect of medicines was about one-half of the first item, £37, 7s. 9d., viz., £13s. 3d., or two-thirteenthths of a penny per head per week.

"(2) Salaries and wages (less tradesmen), £2768, 10s. 5d.—The sum is the correct amount of the expenditure on the salaries and wages of the staff of officials at the asylum. The sum includes the salaries of the

* "State. Year ending 14th May 1888 (No. 7 of process). Lunatic Poor.
Daily average 539.

	Cost per Year.	Cost per Week.
1. Provisions,	£4958 4 6	£0 3 6
2. Medicines,	173 13 5	0 0 1
3. Fuel, light, and water,	996 6 0	0 0 9
4. Clothing,	801 4 11	0 0 7
5. Salaries and wages, less tradesmen,	2768 10 5	0 2 0
6. Furniture, furnishings, and bedding,	506 14 1	0 0 4
7. Sundry supplies and expenses,	764 19 10	0 0 5
9. Law charges,	5 15 0	
10. Farm,	1464 4 4	0 1 0
	£12,439 12 6	£0 8 11

Total indebtedness, £210,477, at 3 per cent,

6,314 6 2 £0 4 2
£0 13 1

"Year ending 14th May 1889 (No. 6 of process). Lunatic Poor.
Daily average 551.

	£13,152 0 3	0 9
Total indebtedness, £212,642, at 3 per cent,	6,379 0 0	0 4
		£0 13

medical officers, amounting to £602, 10s. which is included in the claim for the medical grant, the proportion of which, received as applicable to said sum of £602, 10s. would thus be £295, 7s. 1d., or at the rate of 2½d. per head per week. No. 88.

Jan. 29, 1891.
Beattie v.
Muir.

"(3) Farm, £1464, 4s. 4d.—That the farm expenses (excluding rent) for the year 14th May 1888 was £1464, 4s. 4d., being at the average rate of 1s. 0·54d. per head per week, and the value of farm produce, &c., used in the asylum, as stated in the pursuer's accounts, amounted for said year to £2760, 4s. 7d., being at the average rate of 1s. 11·63d. per head per week.

"(4) Interest at 3 per cent on total indebtedness.—This item consists of interest or a charge of 3 per cent on the total cost incurred by the pursuer's board in acquiring and building the asylum, and the capital expenditure thereon, and represents the amount charged for lodging or house accommodation as made by the pursuer in this case. The total actual cost on capital account incurred and expended by the pursuer's board as aforesaid, up to 14th May 1888, amounted to £210,477, 15s. 6d., 3 per cent on which is £6314, 6s. 7d., or 4s. 6·06d. per head per week. This amount of £210,477, 15s. 6d. has been borrowed from time to time by loans, and is being paid off by instalments from year to year. The actual indebtedness outstanding at last mentioned date on these loans amounts to £145,916, 13s. 6d., 3 per cent on which is £4377, 10s., or 3s. 1·48d. per head per week. The total cost on capital account incurred and expended as aforesaid, up to 14th May 1889, amounts to £212,642, 5s. 6d., 3 per cent on which is £6379, 5s. 7d., or 4s. 5·42d. per head per week, while the actual indebtedness outstanding at said date amounts to £141,081, 13s. 6d., 3 per cent on which is £4322, 9s., or 3s. 0·19d. per head per week.

"(5) The average weekly cost per head for the year ending 14th May 1888, as appearing from the state of maintenance account of the pursuer's accounts for that year, is, after deducting the value of farm produce used in the asylum, 7s. 10·64d., and for the immediately succeeding year the cost, appearing as aforesaid, is 8s. 1·24d. As appearing in the annual report of the Board of Supervision for the year ending 15th May 1888, the cost per head is 9s. 8½d., and for the immediately succeeding year 9s. 9½d. The pursuer does not admit that the items which go to make up the said average weekly cost include all the items chargeable by him against other parties.

"(6) The assessed value of the asylum establishment as entered in the valuation-rolls for the years 1887-88 and 1888-89 was £2577."

The defender objected to the charge for tobacco and snuff.

The pursuer claimed also (2) £5, 14s. 7d., advances on account of two paupers Elizabeth Shaw and the illegitimate pupil child of Bridget M'Guire, who maintained in Barony Poorhouse, the former from 21st February to 1st June 1889, the latter from 30th June to 21st August 1888, when it died. The pursuer made a charge of 5s. 6d. per week for each of these paupers. The pursuer stated that the charge included "charges for maintenance, management, medical relief, funeral expenses, and lodging or house accommodation. A state shewing the charges taken into account in fixing the rate of board at 5s. 6d. per week is herewith produced."*

* "State. Year ending 14th May 1889 (No. 6 of process). Branch 2.—Indoor Poor. Daily average 1065.

		Cost per Year.	Cost per Week.
1. Maintenance,	.	£6291 11 8	£0 2 3¼
2. Clothing,	.	919 13 9	0 0 4
Carry forward,		£7211 5 5	£0 2 7¾

No. 88.

The defender objected "to the following items of charge per week as set forth in state No. 6 of process:—

Jan. 29, 1892.
Beattie v.
Muir.

"(1) Land charges, 1d.

"(2) Funeral charges, 0½d.

"(3) Salaries of officials, 1s. and

"(4) Property account, 6d. (which the defender avers is charged in lieu of rent), in respect said charges are not warranted by section 76 of 8 and 9 Victoria, chapter 83, and the rules of the Board of Supervision.

"In any view, the defender objects to a higher charge than 4s. 1½d., or 4s. 5d. respectively, being the total average weekly cost of ordinary indoor poor as appearing in the said annual accounts of the pursuer's board for the years ending 14th May 1888 and 14th May 1889 respectively, or at least in so far as said charge of 5s. 6d. exceeds 4s. 9½d., being the rate returned by the pursuer to the Board of Supervision as the average weekly cost of ordinary poor for the year ending 14th May 1889, after deducting the charge of 5d. for medical relief, which the pursuer does not claim to be a proper charge against the defender."

In a joint minute the parties made the following admissions:—

"(1) Land charges, £264, 1s. 4d.—This item consists of feu-duty, ground-annual, &c., payable for poorhouse and grounds; but it appears that while that sum was paid there was received by the pursuer the sum of £345, 3s. 1d. from feu-duties, ground-annuals, &c., as set forth on page 6 of Barony Board accounts, and the parties agree that this amount should be placed to the credit of the said account, No. 6 of process, branch 2.

"(2) Funeral charges, £99, 12s. 10d.—The parties admit that the defender ought not to be charged with funeral expenses, in respect that the pursuer charges these against the parish of settlement in each case.

"(3) Salaries of officials, £2737, 7s. 9d.—This item consists of the salaries of the official staff connected with the poorhouse, excluding (1) the medical officers, and (2) tradesmen, gardeners, and sewing-mistress.

"(4) Property account, 3 per cent on £62,106 = £1863—per week, 6d.—This item consists of interest or a charge of 3 per cent on the capital account for the total cost of the poorhouse, including furniture and furnishings, up to 14th May 1889, and the charge represents the amount charged for lodging or house accommodation made by the pursuer in this case. The total actual cost of the poorhouse, including as aforesaid, and capital expenditure thereon up to 14th May 1889, amounted to £62,107, 12s. 8d., 3 per cent on which is £1863, 4s. 6d., or 8·07d. per head per week, while the total indebtedness outstanding on said account at same

	Brought forward,	Cost per Year.	Cost per Week.
		£7211 5 5	£0 2 7¼
3. Bedding,		256 9 5	0 0 1
4. Furnishings,		374 17 11	0 0 1½
5. Fuel, light, and water,		1956 14 2	0 0 8½
7. Miscellaneous,		592 10 9	0 0 2½
8. Land charges,		264 1 4	0 0 1
10. Funeral charges,		99 12 10	0 0 0½
11. Salaries of officials,		2737 7 9	0 1 0
12. Children's trip,		122 10 0	0 0 0½
13. Concerts,		2 13 10	...
		£13,618 3 5	£0 4 11¼
Property account, £62,106, at 3 per cent (licensed No. 1415),		1,863 0 0	0 0 6
			£0 5 5½"

date amounts to £17,910, 3 per cent on which is £537, 6s., or 2-32d. per head per week. The assessed value of the poorhouse as entered in the Valuation-roll for the same year was £2298." No. 88.

On 19th December 1891 the Lord Ordinary (Stormonth Darling) decreed against the defender for the sum of £33, 3s. 4d.* Jan. 29, 1892. Beattie v. Muir.

* "OPINION.—Counsel on both sides explained that what they desired in this case was not so much an ascertainment of the sum due by the defender to the pursuer in respect of the particular paupers mentioned on record, as a determination of the principles on which the parish of a pauper settlement is bound to reimburse the relieving parish for the relief afforded (1) in a parochial lunatic asylum, and (2) in a poorhouse. The questions raised are thus of general interest to poor-law authorities.

"The material sections of the Act 8 and 9 Vict. c. 83, are the 70th, 71st, and 72d, and I shall first state what I conceive to be the result of these sections, as bearing on the matter in hand.

"Destitute persons are entitled to be relieved by the parish in which they apply for relief, first by the inspector till the first meeting of the parochial board, and then by the board until the parish of settlement is ascertained, and the pauper's claim upon it is admitted or otherwise determined, or until he is removed. Where relief is thus afforded, the relieving parish is entitled to 'recover the moneys expended on behalf of such poor person' from the parish of settlement, or from parents or other persons legally bound to maintain him. If within a reasonable time after notice the parish of settlement does not either remove the pauper or make provision to the satisfaction of the relieving parish for his constant weekly subsistence, the relieving parish may remove him to the parish of settlement at the expense of the latter, unless from sickness or infirmity he is incapable of being removed, in which case the relieving parish is bound to go on relieving him, and may recover from the parish of settlement the amount so expended, provided such amount does not exceed the rate expended for the relief of other poor persons in the relieving parish.

"There are in these sections various expressions denoting the relief to be afforded, *e.g.*, 'sufficient means of subsistence,' 'such interim maintenance as may be adjudged necessary,' 'necessary means of support,' 'constant weekly subsistence'; but the very variety of these expressions serves to indicate that there is no magic in any one of them, and they seem to me to be all synonymous with the single word 'relief,' which, of course, means relief according to law.

"It is obvious that the inquiries necessary for the determination of the question of settlement may often be of a protracted nature, and that thus, apart altogether from any voluntary arrangement for the continuance of relief by one parish to a pauper belonging to another, the relieving parish may often be compelled, by force of the statute, to give relief to an extraneous pauper for a very considerable time. The pauper lunatic in the present case remained in the pursuer's asylum for fourteen months, and one of the ordinary paupers for four months.

"*Prima facie*, it seems to me that the policy of the statute, as expressed in these sections, is to make no distinction between paupers belonging and paupers not belonging to the relieving parish, and, in the case of the latter, to lay on the parish of settlement the full burden of the relief afforded, subject only to the condition that the relieving parish shall not make a profit out of the transaction by charging a higher rate than the rate expended on its own poor.

"When the relief afforded is out-door relief no difficulty can arise, except as regards the cost of the inspector's office and staff. For it is plain that, in the case of out-door relief, the weekly payments cover board, lodging, service (if any), and generally the whole expenses incurred in maintaining the pauper, with the single exception I have mentioned.

"It is otherwise where the pauper is accommodated in a poorhouse or lunatic asylum. There it is impossible to ascertain precisely, or otherwise than by way of average, what the cost of maintaining any particular pauper is; and the

No. 88.

Jan. 29, 1892.
Beattie v.
Muir.

The defender reclaimed. The only point in which he asked an alteration of the Lord Ordinary's judgment was as to the 2s. per week for salaries

moment an average comes to be struck the question arises, What heads of expenditure are to enter the average?

"The extreme view for the parish of settlement would be that, as the relieving parish has its poorhouse or asylum built, furnished, and provided with a staff of officials and servants for the accommodation of its own poor, no extra expense is incurred by the admission of an extra parochial pauper beyond the food which he consumes and the clothing (if any) which is supplied to him; and that, therefore, the average rate should be limited to those articles of actual consumption. I could understand that view, although I should think it very inequitable, and not warranted by any words in the statute.

"But the defender does not put his case so high as that. He concedes that, in the case of the asylum, he must pay an average rate covering not merely provisions, clothing, and medicines (so far as not met out of the medical grant), but fuel, light, and water, furniture, furnishings, and bedding, sundry supplies and expenses, and a sum corresponding to rent. In the case of the poorhouse, he conceded the same charges, except rent, which he disputes altogether.* As regards both asylum and poorhouse, the principal items which he challenges are those covering the salaries and wages of officials and servants connected with the two institutions.

"I can find no intelligible principle in these distinctions. I do not understand why the defender should be willing to pay for the roof which covers a pauper lunatic, and not for the roof which covers an ordinary pauper. I am equally at loss to know why, in the case of the latter, he should pay for his bed and not for his bedroom. And, as regards both classes of paupers, I fail to see why he should pay for the kitchen-range in which their food is cooked and not for the services of the cook who uses the range.

"The defender seeks to justify his position by referring to the case of *Hay v. Melville*, 20 D. 480. But it is necessary to examine precisely how far that judgment went. It arose out of a case of out-door relief, and had nothing to do with relief afforded in a poorhouse or asylum. A system had sprung up under which inspectors of poor repudiated all responsibility for paupers belonging to other parishes, and failed to visit or take charge of them. The Board of Supervision had condemned this system, and had insisted that it was the duty of inspectors to treat paupers from outside parishes exactly as they treated their own. The City Parish of Edinburgh, being dissatisfied with the board's decision, raised an action to have it found either that they were not bound to visit and inspect such paupers, or that, if they were so bound, they were entitled to charge a commission for doing so. There was also a question about the right of removal, which need not here be noticed; but apart from that the only two propositions established by the judgment were (1) that the relieving parish was bound to take entire charge of the pauper, and perform all the duties of inspection; and (2) that it was not entitled to make any charge for inspection against the parish of settlement.

"Had the second point not been raised in the rather invidious connection of the relieving parish first refusing to do what it was clearly bound to do and alternatively proposing to make a charge 'in name of commission and agency' for performing its statutory duty, I confess I think there would have been a great deal to be said for the view that the parish of settlement, whose paupers were to be dealt with exactly as if they belonged to the relieving parish, should reimburse that parish in a rateable share of the cost of inspection and management. But the judgment is authoritative, and has long been acted on, and the pursuer of this action acknowledges its authority by not proposing to make any charge applicable to the cost of the inspector's office and staff.

"It by no means follows that the parish of settlement is to be exempt from bearing its fair share of the general cost of a poorhouse or asylum, including the

* In the Inner-House the defender did not maintain this.

and wages forming the "management" charge. On this point he argued that the case of *Hay v. Melville*¹ settled that the whole expenses of the

No. 88.

salaries and wages of officials and servants attached to the establishment. These charges correspond to items which in the case of out-door relief are admittedly due, and in *Hay v. Melville* were not disputed. They seem to me to form as truly part of 'the money expended in behalf of' the pauper as the food which he consumes, or the clothing which he wears.

Jan. 29, 1892.
Beattie v.
Muir.

"It remains for me to deal with some of the subsidiary questions raised by the parties.

"Under the head of 'medicines' supplied in the asylum, the defender objects to being charged with a proportion of the item for tobacco and snuff, on the ground that these are luxuries. I have not been informed under what circumstances, or to what extent, they are supplied to inmates of the asylum, and I think I must assume that the charge for them is lawfully made, that is to say, is such that no ratepayer of the Barony Parish could successfully challenge it. If so, I think the defender must bear his proportion of it.

"The same observation applies to the charge for farm expenses. It happens that no charge can properly be made under this head for the two years in question, because there was a profit on the working of the farm. But if it were otherwise, I should assume that the outlay was lawful as for a curative agent, and I am informed not only that the Board of Lunacy requires, as a condition of granting its annual license to an asylum, that a considerable extent of arable land should be attached to it, but that the particular farm connected with the Woodilee Asylum is regarded by the board as not more than sufficient for its requirements.

"There are three methods of ascertaining the annual cost of house accommodation, whether in the case of asylums or poorhouses, and I have felt some difficulty as to which of these ought to be adopted. The first method, being that claimed by the pursuer, is to take the total cost on capital account incurred by his board from the beginning in acquiring and building the asylum or poorhouse, and to charge 3 per cent thereon. The second method is, to take the same percentage on the actual indebtedness outstanding on capital account, in the two years over which the claim extends, after allowing for the repayments of capital which have been made from time to time out of the yearly rates. The third method (being that favoured by the defender in the case of the asylum, for as regards the poorhouse he denies liability altogether), is to take the assessed value as entered in the Valuation-roll. I have come to the conclusion that the second method is the right one, on the ground that it represents the actual cost of the buildings at the date of contribution. It may be said that the repayments of capital have been made mainly at the expense of the relieving parish, and that the parish of settlement ought to bear its share of them. But sec. 72 of the Act of 1845 provides that, where a lunatic, from sickness or infirmity, is incapable of being removed, the relieving parish shall be entitled to recover a sum not exceeding the rate expended for relief of its own poor, which means, I think, the rate expended in the year of charge. It would be absurd to hold that the rate was different in the case of detention through sickness or infirmity from that recoverable down to the time when liability was established, and if so, sec. 72 affords a reason for taking the cost of house accommodation as it stands at the date when the liability to contribute arises. The first method would result in the relieving parish making a profit out of the transaction, and the third seems to me to be purely arbitrary. In the case of the poorhouse, as it happens, the sum in the Valuation-roll is higher than 3 per cent on the total cost, and a great deal higher than 3 per cent on the actual indebtedness.

"The defender appeals to the form of annual return issued by the Board of Supervision (No 22 of process), in which a distinction is drawn between 'management' and 'maintenance,' and under the former head are included, in the case

¹ Feb. 3, 1858, 20 D. 480, 30 Scot. Jur. 259, *præsertim* opinions of Lord Cowan and Lord Mackenzie.

No. 88.
 Jan. 29, 1892.
Beattie v.
Muir.

staff by which a pauper was relieved must be borne by the parish itself, and could not be charged against the parish of settlement.

The pursuer argued ;—No expense for inspection had been included in the charge which the pursuer made. *Hay v. Melville* went no further than to disallow that expense. But it did not follow that the expense of caring for the pauper and nursing him should not be borne by his own parish.

The pursuer took advantage of the reclaiming note to contend further that the proper basis for the claim for house accommodation was not, as the Lord Ordinary had held, a percentage on the actual indebtedness on capital account of the pursuer's parish, but a percentage on the capital expended. The pursuer's parish had paid off part of that from assessment. But the whole expense, not the balance left unpaid, was what his parish had had to spend in order to be in a position to relieve the paupers.

LORD JUSTICE-CLERK.—I think that the Lord Ordinary has come to a right result. The only difficulty is with reference to the case of *Hay v. Melville*. I am clearly of opinion that it does not so bear upon the present question as to lead us to think that the Lord Ordinary has fallen into error. Every parish must have its inspector, and that whether there are any persons on the roll of paupers in the parish at any particular time or not. The inspector's salary must be paid whether there is any pauper to be maintained or not. The case of *Hay v. Melville* settled that the duties of inspection must be carried out by the parish, and that that duty includes the looking after a casual pauper belonging to another parish, and that the relieving parish makes no charge for that in settling with the pauper's own parish. As to the question whether the maintenance of a pauper is to include charges necessarily going to maintenance, such as the wages and salaries of the necessary officials who fulfil the duty of maintenance, I think that these charges are part of the expense of maintenance. They are necessarily incurred in performing the duty of maintaining the paupers.

The only other question is whether the parish which gives relief is entitled to charge for the building in which the pauper is maintained. When a parochial board is required in the discharge of its statutory duty to erect a new building for its paupers, they are required to recover from the ratepayers, first,

of a poorhouse or parochial asylum, the salaries of officials and other 'establishment charges.' But this return is made for statistical purposes, and not for the ascertainment of the contribution due to a relieving parish by a parish of settlement, the amount of which must, I think, be determined, in the first place, by the actual outlay (as here set forth in the states appended to the joint minute of admissions), and in the second place, by the terms of the statute.

"The result of my opinion on the disputed items is as follows:—

"1. As regards the asylum.—From the item of 'medicines,' 2/13ths of a penny per week must admittedly come off, as being covered by the medical grant. The rest remains. From the item of 'salaries and wages,' 2½d. per week admittedly comes off for the same reason, and the balance remains. The charge for 'farm' must be struck out, in respect that there was a profit in each of the two years in question; otherwise I should have allowed it. The item of 'interest on indebtedness' must be limited to interest at 3 per cent on the actual indebtedness in each of the two years.

"2. As regards the poorhouse.—The 'land charges' and 'funeral charges' admittedly come off, for the reasons stated in the joint minute. The 'salaries of officials' stand. The 'property account' must be limited to 3 per cent on the actual indebtedness, as in the case of the asylum."

sum which may be represented as equivalent to the expense of rent; and second, a sum which is applied to form a sinking fund, whereby the expense of building is paid off and the building eventually freed from debt. That just means that when the whole of the sinking fund has been raised, and the debt has been paid off, then in future that board is not put to expense for maintenance under that head. But the parish must deal with the pauper belonging to another parish in this matter exactly as it deals with the paupers belonging to its own district. If the expense of buildings has ceased to be a part of the annual cost of dealing with pauperism, and no longer constitutes a proportion of the estimated charges on which assessment is levied, then it has ceased to be in any sense part of the expense of maintenance, and no charge can be properly made against another parish in respect of the cost of such buildings.

I concur in the judgment of the Lord Ordinary.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I agree entirely with the Lord Ordinary. I think that there is a fair question, looking to the expressions of opinion in *Hay v. Melville*, whether the expenses known as the expenses of management ought to be taken into account in settling with the relieving parish. It is a question of some consequence in the adjustment of future accounts between parishes. I think that the case of *Hay v. Melville* does not decide that question as the parish of Bothwell contends.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—CURROR, COWPER, & CURROR, W.S.—Agents.

WILLIAM NELSON, Pursuer (Appellant).—*Rhind—Baxter*.
SCOTT, CROALL, & SONS, Defenders (Respondents).—*Comrie Thomson—Salvesen*.

H. & D. CLELAND, Defenders (Respondents).—*Sym*.

No. 89.

Jan. 30, 1892.
Nelson v.
Scott, Croall,
& Sons.

Reparation—Master and Servant—Responsibility of auctioneer selling in the premises of another to his own servant.—Held (per Lord Justice-Clerk, Lord Young, and Lord Trayner) that an auctioneer selling goods in the premises of another is not responsible for the sufficiency of these premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency.

Reparation—Master and Servant—Sale by auction—Liability of customers to auctioneer's servant.—At a sale by auction of the bankrupt stock of a coach-builder within his premises, an accident occurred to a person engaged in lowering by a hoist a lot of goods which had been sold. In an action of damages raised by him against A, the auctioneer, and against B, the purchaser of the lot, the pursuer averred that at the time of the accident he was in A's employment, that the accident would not have happened had the hoist been provided with a proper brake; that the goods had been loaded on the hoist under the superintendence of B, who grossly overweighted it, or permitted it to be overweighted; that B had been an apprentice with the coachbuilder and knew, or ought to have known, that the hoist was overweighted. The pursuer pleaded that the auctioneer was responsible to him for the hoist being defective in not having a proper brake, and that B was liable for the hoist being overweighted.

Held (1) that the pursuer had not stated a relevant case against A, the Lord Justice-Clerk, Lord Young, and Lord Trayner, holding that an auctioneer is not responsible to his servants for the sufficiency of appliances in the premises of an employer, Lord Rutherford Clark holding that the pursuer's statement that

No. 89.

Jan. 30, 1892.
Nelson v.
Scott, Croall,
& Sons.

2D DIVISION.
Sheriff of the
Lothians.

the hoist was overweighted exonerated the auctioneer, as it was not alleged that he was responsible for this ; and (2) (*dub.* Lord Rutherford Clark) that there was no relevant ground of action stated against B.

THIS action was raised in the Sheriff Court at Edinburgh by William Nelson, coachman, residing there, to recover damages for personal injuries alleged to have been sustained by him while assisting at a sale by auction conducted by Messrs Scott, Croall, & Sons, of the Royal Horse Bazaar, Edinburgh, within the premises of the late firm of Drew & Burnett, coachbuilders, Edinburgh. The action was directed against Scott, Croall, & Sons, and H. & D. Cleland, purchasers at said sale.

The pursuer averred,—(Cond. 2) “The pursuer was employed by the defenders Scott, Croall, & Sons, in the beginning of April last, to prepare the bankrupt stock, carriages, and other material, belonging to the late firm of Drew & Burnett, coachbuilders, which was to be sold by them by public auction, on 23d April 1891. The said stock was conveyed by means of a hoist from the ground floor to the upper storey of Drew & Burnett’s premises in Fountainbridge, Edinburgh. The hoist is an ordinary carriage hoist, and is worked by a chain and passing over an overhead pulley, and round a drum on the ground floor. A carriage pole was the only brake appliance for said hoist, a bolt was driven through it to prevent its being pushed out by the drum while in motion.” (Cond. 3) “On 23d April 1891, the day of the sale, the pursuer was engaged as the servant of the defenders Scott, Croall, & Sons, in lowering the several lots to the ground floor after the sale, and while letting down the second lot (which had been bought by the defenders Messrs Cleland),” the pole which was used as a brake broke, in consequence of which the pursuer was seriously injured. “The goods had been loaded on the hoist under the superintendence of Mr

Cleland, who is a partner of the defenders H. & D. Cleland, who (the pursuer afterwards ascertained) grossly overweighted it, or permitted it to be overweighted.” (Cond. 4) “There was no means of lowering the goods to the ground floor excepting the said hoist, which the defenders Scott, Croall, and Sons are responsible for, both at common law and under subsection 1 of section 1 of the Employers Liability Act, 1880. The hoist in question was for carriages only, and was not suitable for the work the defenders put it to. It was on 23d April 1891 being used by the defenders Scott, Croall, & Sons and by no one else, and had it not been for its faulty construction in not being supplied with a brake, the accident to the pursuer would not have happened. Further, the accident to the pursuer would not have happened had the hoist not been overweighted. It is usual for such machines to have brakes. The said Cleland who superintended the loading of the hoist was well aware of the way in which it was worked, as he served his apprenticeship with the said Drew & Burnett. It was he who ordered the pursuer to lower the hoist, and he saw that the pursuer was to brake it with the pole used for the purpose. He knew, or ought to have known, that the weight was far too heavy to allow it to be lowered in safety by the pole, but though he was aware that the pursuer did not know the weight of the load he permitted him to proceed to lower it in the way he did.”

The pursuer pleaded ;—(1) The hoist in question having been in use by the defenders Scott, Croall, & Sons at the time of the accident, they were responsible to their servants for its sufficiency, and are liable at common law to the pursuer in reparation. (2) If not liable at common law, they are under the Employers Liability Act, 1880. (3) In respect of the fault of their said servant, as condescended on, the defenders Messrs Cleland are also liable to the pursuer in reparation and damages.

Both defenders pleaded that the pursuer's record was irrelevant. On 23d December the Sheriff-substitute (Rutherford) assoilzied the Clelands, and allowed the pursuer a proof of his averments against Scott, Croall, & Sons. No. 89.
Jan. 80, 1892.
Nelson v.
Scott, Croall,
& Sons.

The pursuer appealed.

Scott, Croall, & Sons argued;—There was no relevancy in the action as directed against them. The pursuer himself said that the hoist was an ordinary hoist, and it did not require to be of the very most recent construction. But it was not the property of Scott, Croall, & Sons, and they had nothing to do with it. Would an auctioneer be liable if, at a roup in a private house, the floor of a room collapsed (as it had once done in Picardy Place, at Lord Eldin's roup), and injured a number of customers? Plainly not.¹ But that was in law the same case as this. If the accident was due to overweighting there was no averment that Scott, Croall, & Company were parties to the overweighting.

Argued for Clelands;—There was no relevant case against them either. The hoist was not theirs, nor under their management, nor was the pursuer their servant. [LORD RUTHERFURD CLARK.—But he says you took possession of the hoist, loaded it, and told him to lower it, when you knew it was overloaded.] The averment of overloading would require to be much more specific.

Argued for the pursuer;—(1) The auctioneer was liable under section 1 of the Employers Liability Act for the sufficiency of the hoist, for it was being used in his business. (2) As regarded Cleland, there was a case of personal fault analogous to the fault of a person who drives over another in the street. It was a case of delict as against them.

LORD YOUNG.—This is an action of damages directed against two sets of defenders, Messrs Cleland, who are coachbuilders at Belford Bridge, and Scott, Croall, & Sons, auctioneers. The Sheriff-substitute has assoilzied the former set, but has sustained the action as against the others.

I shall begin with the case against Scott, Croall, & Sons. Their connection with the matter is of a simple and most intelligible kind. They were employed as auctioneers to sell off a bankrupt's stock on these premises. The trustee on the bankrupt estate required the services of a man to superintend the raising of the goods from the place beneath to the place above, where the auctioneer was to sell them, and the lowering of them again after the sale. Scott, Croall, & Sons employed the pursuer, who was a coachman out of place and altogether a proper and competent person for the job, and paid him. While he was lowering the second lot the hoist gave way. It is stated that part of Scott, Croall, & Sons' plant, for the sufficiency of which they were responsible, was, and proved to be, insufficient for its purpose, and that Scott, Croall, & Sons, whose plant it was, should be responsible for that insufficiency. That is the only ground of action against them.

That then puts us to consider what is the responsibility of an auctioneer who is employed to sell off goods on the premises of his employer. Is he responsible for the sufficiency of the premises, or for the sufficiency of the appliances for bringing forward and removing the goods that are to be sold? I am speaking, of course, of the common law, apart from all special contracts, and I am of opinion that an auctioneer, employed to sell goods in the premises of a customer, is under no such responsibility whatever. There might be specialties,—I am

¹ M'Gill v. Bowman & Co., Dec. 9, 1890, 18 R. 206.

No. 89.

Jan. 30, 1892.
Nelson v.
Scott, Croall,
& Sons.

not put to imagine them,—which would impose such a liability, but there is no such specialty here. It is just the same case as that of an auctioneer selling pictures and furniture in a private house, where one of his men meets with an accident from the faulty condition of the stairs, which give way while he is carrying some of the furniture down them. The case is entirely distinguishable, and must be distinguished from the case of an auctioneer selling on his own premises, when he shall be responsible for the state of the premises and appliances both to customers and to his own servants.

I am of opinion, therefore, that there is no relevant case against Scott, Croall, & Sons. They had no duty or liability to see to the sufficiency of the hoist, or to see that it was properly loaded.

Then with respect to the Clelands, they were customers, who had bought goods. It is alleged that one of them had been an apprentice in these very premises, and knew about the hoist, and knew that it was insufficient. I do not think that that can be taken as a fact which will found an action against him. I think it was for the pursuer, who was sent to superintend this hoist, to see that it was not overloaded. If it is overloaded, and an accident results, he will have no action against the purchaser because he had been an apprentice in these premises. That is no ground of action. This was a case of mistaken judgment as to what the hoist would carry. There was no actionable wrong which can be founded on. The customer was not in any contract relation or other relation to the pursuer which will render him responsible to him.

On the whole matter, I am of opinion that there is no relevant ground of action stated against either defender.

LORD RUTHERFURD CLARK.—I think that Scott, Croall, & Sons should be assolizied. But I do not proceed on any general ground. I prefer to proceed on the averment that the hoist broke because it was overweighted. Scott, Croall, & Sons were not responsible for that, and therefore the action against them is irrelevant.

I have had considerable difficulty as regards the Clelands, but, on the whole, I think that there is no relevant case against them either.

LORD TRAYNER and the LORD JUSTICE-CLERK agreed with LORD YOUNG.

THE COURT recalled the Sheriff-substitute's interlocutor, and assolizied both defenders.

JOHN VEITCH, Solicitor—MACPHERSON & MACKAY, W.S.—J. & J. ROSS, W.S.—Agents.

No. 90.

Feb. 4, 1892.
Smith v.
Wilson.

ROBERT SMITH, Appellant.—*W. C. Smith*—*A. S. D. Thomson*.
JOHN WILSON, Respondent.—*Gunn*.

Bankruptcy—Election of Trustee—Appeal—Competency—Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), sec. 71.—At the election of a trustee in a sequestration, it was objected to an affidavit and claim that a bill by which it was vouched was prescribed, and that an acknowledgment of indebtedness endorsed on the bill, being holograph, did not prove its own date.

The Sheriff disallowed the vote on the ground that the acknowledgment did not bear to be holograph. In an appeal on the ground that the Sheriff had exceeded his jurisdiction in giving effect to an objection which had not been stated, *held* that the Sheriff had not exceeded his jurisdiction, and that the appeal was incompetent under the 71st section of the Bankruptcy Act, 1856.

Farquharson v. Sutherland, 15 R. 759, distinguished.

THE estates of Robert Neilson, draper, Lauder, were sequestrated by the Lord Ordinary on the Bills on 16th November 1891, and the creditors met to elect a trustee on 27th November following. Five creditors to the amount of £525, 13s. 8d. voted for Mr John Wilson, and Robert Smith, a creditor to the amount of £342, 0s. 5d., for himself. No. 90. Feb. 4, 1892. *Smith v. Wilson.*

Objections were taken to the votes on both sides. Wilson lodged a note of objections to Smith's affidavit and claim. One of the items objected to was an alleged debt of £200, with £41, 0s. 2d. of interest which was vouched by a prescribed bill dated 10th October 1885, accepted by the bankrupt, and bearing this indorsation:—"I acknowledge that I am still due the amount of this bill, and interest from 10th October 1887. . . . 7th November 1891. ROBERT NEILSON." (Obj. 1). "The sum of £200 and interest thereon, £41, 0s. 2d., amounting together to the sum of £241, 0s. 2d., is sought to be vouched by a bill which has suffered the sexennial prescription, but which prescription is sought to be elided by a holograph acknowledgment endorsed thereon, bearing date 7th November 1891. The said bill having prescribed is not a sufficient voucher, and the said acknowledgment, which bears date shortly prior to sequestration, being holograph, does not prove its own date." 1st Division. Sheriff of Roxburgh, Berwick, and Selkirk.

The Sheriff-substitute (Dundas), on 5th January 1892, pronounced this interlocutor: ". . . For the reasons mentioned in the subjoined note, hereby declares the said John Wilson to have been duly elected trustee . . ."

Smith appealed.

Argued for him;—The appeal was competent, notwithstanding the exclusion of review by the 71st section of the Bankruptcy Act, 1856, because the Sheriff had exceeded his jurisdiction. The objection which he had sustained had not been stated, but had emanated from the Sheriff himself.¹ His interlocutor must therefore be recalled, as he had no jurisdiction to deal with any objections other than those stated by the parties, which must be specific, and formed the record upon which he must proceed.² On the merits the Sheriff had gone wrong, because an acknowledgment of indebtedness did not require to be either holograph or tested. At all events, the language of the objection stated that it was holograph. There was *prima facie* proof of the debt upon the bill and acknowledgment taken together, which was enough for the purposes of a trustee's election.³ The case should, therefore, be remitted to the Sheriff with instructions, as provided by the 170th section of the Bankruptcy Act, 1856.

Argued for Wilson;—The appeal was incompetent, as the Sheriff's interlocutor was final under the 71st section of the Bankruptcy Act, 1856.⁴ The affidavit and claim had been objected to here, although the

* "NOTE.— . . . I am satisfied that Mr Smith's objection to the claims of . . . is sound in law, and I am equally satisfied as to Mr Wilson's objection to the prescribed bill. It is said that the bill is set up again by the holograph acknowledgment on the back of it. I can only say that the writing does not bear to be holograph, and I do not think it necessary to express any opinion as to what would be the effect of it if it were so."

¹ Farquharson v. Sutherland, June 16, 1888, 15 R. 759.

² Lockhart v. Mitchell, July 12, 1849, 11 D. 1341, 21 Scot. Jur. 513; Dyce v. Paterson, March 11, 1847, 9 D. 993, Lord Ivory's opinion, p. 1004, 19 Scot. Jur. 504.

³ Thoms v. Thoms, Dec. 20, 1867, 6 Macph. 174, 40 Scot. Jur. 99.

⁴ Galt v. Macrae, June 9, 1880, 7 R. 888; Wylie v. Kyd, June 21, 1884, 11 R. 968.

No. 90.

Feb. 4, 1892.
Smith v.
Wilson.

specific objection given effect to by the Sheriff-substitute might not have been stated in terms.

LORD PRESIDENT.—This is an appeal against the judgment of a Sheriff-substitute declaring the election of a certain person as trustee in a sequestration. The 71st section of the Bankruptcy Act, 1856, enacts that “the judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay ; and such judgment shall be final, and in no case subject to review in any Court or in any manner whatever.” It is, therefore, incumbent on the appellant to make out that the Sheriff’s judgment discloses an excess of jurisdiction so as to oust it from the privileged position assigned to such judgment by the statute. If we have regard to the note appended to the interlocutor of the Sheriff-substitute, it appears that the scrutiny upon which the judgment proceeded was an examination of the votes tendered and of the vouchers by which they were supported. In one instance the Sheriff-substitute has sustained an objection to a claim on the ground that, the debt being instructed by a prescribed bill with an alleged holograph acknowledgment on the back, he could not give effect to such a voucher, because the acknowledgment did not bear to be holograph. When this is seen to be the nature of the judgment, I think it comes to be one of the most ordinary adjudications upon the merits of a vote, the very question which the Legislature by the 71st section of the statute has declared shall not be appealable.

But it has been argued that the Sheriff-substitute was not entitled to consider any legal point or plea which was not set forth in the written note of objections which was lodged. That, as it appears to me, is just an invitation to us to review the judgment of the Sheriff upon each vote, and the objection on the ground of excess of jurisdiction comes to this, that while the vote in question was objected to on grounds which were stated, the ground to which the Sheriff-substitute gave effect was not specifically set forth, although it arose *ex facie* of the voucher produced. I think the Sheriff was within his jurisdiction in so proceeding, and that we ought, therefore, to refuse this appeal as incompetent.

LORD ADAM.—I am of the same opinion. I only wish to say that I do not think the present case at all resembles that of *Farquharson*. If the Sheriff had sustained an objection to a vote to which no objection had been lodged, the case would have been different. But that is not so, and the vote which has been rejected here is one which was formally and properly objected to.

LORD KINNEAR.—I am entirely of the same opinion. I think the case of *Farquharson* is not in point. In that case the Sheriff refused to exercise the jurisdiction given him by the statute, because he declined, on a ground that had not been pleaded, to examine a number of votes and the vouchers tendered in their support, and therefore the Court called upon him to perform his statutory functions and examine these votes and vouchers. In the present case the Sheriff seems to me to have done exactly what he was bound to do, for he has considered the objections raised and has decided upon them. It is suggested that he has gone beyond his jurisdiction, because he has disposed of an objection on a ground not stated to him. The objection is to the amount of a creditor’s claim, and is rested on the ground that part of the

claim is sought to be vouched by a bill which has suffered the sexennial prescription. It was answered that prescription had been elided by a holograph acknowledgment endorsed on the bill. To that it was replied that the acknowledgment did not set up the bill, because it did not prove its own date; and the Sheriff decided that it did not set up the bill, because it did not prove itself to be holograph. Whether that was right or wrong, it was certainly a decision of the question submitted to him for his judgment, viz., whether the bill, together with the acknowledgment, was or was not a good voucher, and it appears to me of no consequence whether in so deciding he proceeded on grounds that were stated in argument or on grounds that occurred to himself.

But then it is said that the ground of the Sheriff's decision is contradicted by an admission made by the objector. It is unnecessary to consider whether the judgment could have been set aside if it had proceeded on a ground of fact which was contrary to what was stated by one party and admitted by the other, because in this case the supposed admission does not appear to me to be an admission in fact at all. What the objector says is, that the acknowledgment "being holograph" does not prove its own date. Now, it is not the fact of its being holograph which prevents the document from proving its own date, but the fact that it is not tested, and the objection seems to me to mean no more than this—that assuming the document to be holograph, it is ineffectual for the reasons stated. Whether the objection is well founded or not, it is not for us to consider, because I do not think it doubtful that the Sheriff has decided the question on grounds which were competently before him.

THE appeal was refused as incompetent.

T. TEMPLE MUIR, S.S.C.—WHIGHAM & COWAN, S.S.C.—Agents.

GEORGE GRANT AND OTHERS (Low's Trustees), Pursuers.
MRS JANE LAWRIE OR WHITWORTH AND OTHERS, Defenders (Appellants).
—Lord-Adv. Pearson—Kemp.
JAMES HENRY BROWN AND OTHERS, Defenders (Appellants).—
Johnston—C. N. Johnston.
WILLIAM H. LUNDIE AND ANOTHER, Defenders (Appellants).—Asher—
W. C. Smith.

No. 91.

Feb. 4, 1892.
Low's Trustees v. Whitworth.

Succession—"Family"—*Conditio si sine liberis*.—A bequest to the "family" of A held not to include the grandchildren of A.

A testator directed one-half of the residue of his estate to be paid to "the families of my two sisters." Both sisters left children who survived the testator, but one of the children of the elder sister had predeceased the date at which the testament was made, leaving a family. Held that this family did not take any part of the residue.

Succession—*Division per stirpes or per capita*.—A testator gave the interest on the residue of his estate equally among his two sisters and a sister-in-law, "the families of the annuitants to get the interest of their mother until the death of the last annuitant," when the residue was to be divided into two parts, one part going to the Free Church, the other to "the families of my two sisters." All three annuitants had families, and the children of the sister-in-law and one of the sisters enjoyed their mothers' interest during the survivance of the longest liver of the sisters. On the death of the last annuitant held that the half of the residue should be divided between the families of the two sisters *per stirpes*.

JOHN LOW died at Aberdeen on 26th July 1872 leaving one holograph 2D DIVISION. testamentary writing dated 22d May 1869, and another dated 22d April Sheriff of Aberdeen-shire. 1872. After his death doubts were raised as to whether the second of

No. 91.

Feb. 4, 1892.
Low's Trustees v. Whitworth.

these writings was a testamentary writing or a mere memorandum. To solve these doubts a special case was presented to the Second Division of the Court, and, on 21st June 1873 (11 Macph. 744, 45 Scot. Jur. 452), the Court held that it was also a testamentary writing, and must receive effect.

By the former of these deeds Mr Low provided,—“ I desire the interest on the residue of my estate to be divided into three equal parts (after deducting an allowance to the party who may be appointed as factor for the trust), and given to my two sisters, Margaret Lawrie and Mary Brebner, and my sister-in-law, Mrs Low, in half-yearly payments. The families of the annuitants to get the interest of their mothers until the death of the last annuitant, when at the ensuing money term the residue of my estate is to be divided into two parts—the one half for the families of my two sisters (excluding the *jus mariti* of their husbands), and the other half to the Treasurer of the Free Church for the Sustentation and College Funds equally.”

By the second deed he provided,—“ I desire to bequeath as follows:—
“ Annuities,—

to my sister Margaret,	.	.	.	£200 p. ann.
May,	.	.	.	200 p. ann.
Mrs Low,	.	.	.	100 p. ann.
				<hr/> £500

free of legacy-duty.

to my nieces,—

Eliza Lawrie or Brown,	.	.	.	£1000
for family, equally.				
Sophia Lawrie or Clark,	.	.	.	1000
Mary Lawrie or Pithie,	.	.	.	2000

&c., &c., &c.

Mr Low was survived by his sister-in-law and both his sisters. The longer lived of them, Mrs Brebner, died on 15th February 1891. During her survivance Mrs Low's and Mrs Lawrie's children enjoyed the income their respective mothers had enjoyed.

Mrs Lawrie, his elder sister, had eight children. The eldest of them Mrs Brown, had predeceased the execution of the first settlement, leaving a family. The seven other children of Mrs Lawrie, one of whom was Mrs Whitworth, survived the testator.

Mrs Brebner, who had first been married to Mr Lundie, left two children by her marriage with him, and one by her marriage with Brebner.

The estate having become divisible by the death of Mrs Brebner, multiplepointing was raised in the Sheriff Court of Aberdeenshire to determine who were entitled to the half of the residue destined to the “families” of the testator's sisters, the questions being, 1st, whether Mrs Lawrie's grandchildren, *i.e.*, Mrs Brown's children, were entitled to a share of the residue so destined? and, 2d, whether the division among the “families” should be *per stirpes* or *per capita*?

The pursuers and real raisers were the trustees of Mr Low. The defenders who lodged defences were, first, Mrs Whitworth and the other surviving children of Mrs Lawrie, who pleaded that on a sound construction of the testamentary writings the fund *in medio* was divisible equal *per capita* among the children of Mrs Lawrie and Mrs Brebner who survived the testator—Mrs Brown and her children being excluded from participation in respect that she predeceased the testator, and, *separately*, that her children were provided for by the testator in his said testamentary

writings with a special legacy of £1000, in such a manner as to shew that the testator did not intend them to participate in the residue of his estate. The other claimants were, second, James Henry Brown and others, children of Mrs Brown and grandchildren of Mrs Lawrie; and, third, William H. Lundie and others, the children of Mrs Brebner. They maintained that on a sound construction of the testamentary writings the fund was divisible between the families of Mrs Lawrie and Mrs Brebner *per stirpes*.

The Sheriff-substitute (Brown), on 29th September 1891, pronounced this interlocutor:—"Finds on a sound construction of the testamentary writings of the deceased John Low that the residue of his estate, forming the fund *in medio*, falls to be divided among the families of his two sisters, Margaret Lawrie and Mary Brebner, excepting the family of the deceased Eliza Lawrie or Brown, the eldest daughter of the said Margaret Lawrie, *per stirpes*: Finds that the said Eliza Lawrie or Brown having predeceased the date of the deed of settlement was not instituted under it, and therefore that the claimants who derive through her take no benefit under the deed: Finds further, that the family of the said Eliza Lawrie or Brown are excluded from participating in the residue of the deceased John Low by the special bequest of £1000 made for them under the deceased's second testamentary writing." The Sheriff-substitute then ranked and preferred the claimants in terms of these findings.*

No. 91.

Feb. 4, 1892.
Low's Trustees v. Whitworth.

* "NOTE.—The two questions involved in this case are concisely and clearly stated in the summons of multipointing by which the several claimants have been brought into Court, and the facts out of which they arise are of quite simple character. One of these, taking the order in which they were presented in argument, is, whether the Brown family, being the children of Eliza Lawrie or Brown, a niece of the testator, have any interest in the residue of the estate forming the fund *in medio*? I am of opinion they have not, and that they are excluded on two grounds. The first of these is, that the parent of the claimants having predeceased the date of settlement, she was never instituted under it; and, therefore, there is no room for the operation of the *conditio si institutus sine liberis decesserit*. This doctrine was fully recognised in the two leading cases, *Sturrock v. Binny*, Nov. 20, 1843, 6 D. 117, 16 Scot. Jur. 100, and *Rhind's Trustees v. Leith and Others*, Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120, and was referred to and adopted in *Blair's Executor v. T aylor*, Jan. 18, 1876, 3 R. 362, and in the very recent special case *Hall v. Hall*, March 17, 1891, 18 R. 690. I assume that all the circumstances concur that would otherwise admit the condition, viz., that the testator stood *in loco parentis*, and was making a family settlement, and that the legatees were not *nominatim* instituted, but it seems not doubtful on the authorities above quoted that the family of Eliza Lawrie or Brown have no claim to the residue as deriving right through her. The second ground on which I reject the claim of the Brown family is, that a special provision was made for Eliza Lawrie or Brown's family in view, undoubtedly, of the fact that they did not otherwise take under the settlement. An argument, indeed, was maintained in favour of the claimants on the terms of this special provision, it being urged that Eliza is dealt with by the testament precisely as her sisters Sophia and Mary are—a further indication of the intention of the testator that her family should also share in the residue being that a legacy is left to the Rev. John Brown as nameson. I am unable to adopt this view, because, on the contrary, I think it is clear that, in view of the predecease many years before of Eliza Lawrie or Brown, the codicil of 22d April 1872 left the legacy of £1000 to her family, the testator simply emphasising by the terms of his bequest that he had not forgotten his dead niece. In the view I thus take of the case, it is not necessary to consider the doctrine laid down in *Irvine v. Irvine*, July 9, 1873, 11 Macph. 892, 45 Scot. Jur. 546.

"The second question is, whether the division of the residue destined to the families of the testator's two sisters is to be *per capita* or *per stirpes*? This is

No. 91.

Feb. 4, 1892.
Low's Trustees v. Whitworth.

Mrs Whitworth and James Henry Brown both appealed, the former on the question of the division *per stirpes*, the latter on the question of the exclusion of the grandchildren from the benefits given to the "families" of the testator's sisters.

Argued for Mrs Whitworth;—(1) The Sheriff was right in excluding the grandchildren for the reasons stated by him, and further because "families," although an elastic word, meant, *prima facie*, children only.¹ The case of *Williams* cited on the other side² was rightly explained by Jarman³ as an exceptional case depending on the particular context. In Scotland the point was said to have been directly decided in the case of

a point undoubtedly of more difficulty, but after the best consideration I have been able to give it, I have come to be of opinion that the latter is the true rule of distribution. By the first writing the testator directed that the interest on the residue of his estate should be divided into three equal parts and given to the two sisters already mentioned and to his sister-in-law. By the second codicil these interests are converted into fixed annuities, but I apprehend that does not in any way affect the rule of division that now falls to be applied. What is important to note is how the testator, in the first place, deals with the interest of the residue. He gives that in three equal parts, and provides that the families of the annuitants are to get the interest of their mothers until the death of the last annuitant. The rule of construction is undoubted, that when a share of residue, whether original or lapsed, is given in *liferent* and *fee* to a person named and the children respectively, the division is *per stirpes*. There are here two *liferents*, and the question practically is, whether that is ousted by throwing into the *fee* the *liferent* of a third person? But for the increment the division of the *fee* would certainly be *per stirpes*, and looking to the whole conception of the settlement, and the manner in which the families of the testator's two sisters are dealt with in the first part of the deed, I think it would require words of a particularly distributive character to justify the division *per capita*, for which the other claimants contend. The very contrary is the case, for the testator continues to use the word 'families,' providing that the enlarged *fee* is to go to them equally. Both parties relied on the case of *Richardson v. Macdougall*, March 26, 1868, 6 Macph. (H. L.) 18, 40 Scot. Jur. 466, reported in the Court of Session in this branch of it Feb. 6, 1866, 4 Macph. 373, 38 Scot. Jur. 187.

"I cannot see, however, how the supporters of a *per capita* division make out that they take any advantage from this case, because the doctrine expounded by the Lord Justice-Clerk as to the division of the *fee* was undoubtedly upset in the House of Lords. The judgment is distinctly so rubricked, and the point is specially dealt with in the opinions of the Lord Chancellor and Lord Westbury. But the Lord Justice-Clerk, as Lord President in the case of *Home's Trustees v. Ramsay and Others*, Dec. 11, 1884, 12 R. 314, makes it quite clear how he understood the judgment of the House of Lords when he says that under a destination of residue in *liferent* and *fee* to a person named, and to children respectively, the distribution as *per stirpes* is settled by the case of *Richardson v. Macdougall*. I quite recognise the specialty in *Home's Trustees v. Ramsay and Others*, quoted as an authority by the claimants who have been preferred, that the share of a daughter dying without issue was given in *liferent* to her surviving sisters, and that it is necessary in the present case to go beyond the general principle which has been referred to to the deed itself to gather the testator's intention; but it seems to me, for the reason already assigned, that there is a clear indication of what that is, and that the general rule of law and the intention blend together. Reference was further made by the successful claimants to *Laing's Trustees*, 18th Nov. 1879, 7 R. 244, and to the case of *Cumming*, 13th Jan. 1891, 18 R. 380."

¹ *M'Laren*, i. 726 and 639-40; *Pigg v. Clarke*, 1876, L. R., 3 Ch. D. 672; *Gregory v. Smith* (1852), 9 Ha. 708.

² *Williams v. Williams*, 1851, 1 Sim. N. S. 358, 20 L. J. Ch. 280.

³ II., p. 97.

Irvine,¹ but that case proceeded on the *conditio* which was not applicable here, for the reasons stated by the Sheriff-substitute. Again, the word "families" clearly meant children only in the earlier clause providing for the interest, for it was there correlative with "mothers." (2) The division should be *per capita*, not *per stirpes*. There was no bequest of life-rent and fee to a parent and her children respectively, as the Sheriff-substitute seemed to think. There were three annuities in the first place, and these three annuities falling out, the capital went one-half to the Free Church the other half to the families of two of the annuitants, leaving out the family of the third. There was thus a direct bequest of the fee to the families, and that being so, a different principle, recognised both in England² and Scotland,³ applied by which the bequest was divided *per capita* among the individuals composing the favoured class. Keeping this fact in view, the authorities cited by the Sheriff-substitute were really authorities in the appellant's favour. In England this distinction between cases in which there was a gift to a family of the fee of a sum which had been previously liferented by the head of that family and cases where there was a direct gift to the family was clearly kept in view, and the result was different in the two classes.

The appellants James Henry Brown and others argued;—Families included descendants, however remote. That was settled by *Irvine's* case. The grandchildren came in, according to that case, as representing their parents. In England the term was elastic, and this idea of representation was by no means excluded.⁴ That provision was made in the codicil for Mrs Brown's children to some extent might have been important had it not been that similar provision was made for children of others who were clearly to share in the residue. On the question of division *per stirpes* or *capita* these appellants offered no argument.

Argued for the respondents;—(1) As regarded the exclusion of Mrs Brown's family, they adopted the argument of the appellant Mrs Whitworth; (2) as regarded the principle of division, that must be as the Sheriff-substitute had held. The important point was the gift of income to the parents, and then the gift of the fee to representatives of these parents, by means of the word "families," which had been described as "an aggregate word."⁵

At advising,—

LORD TRAYNER.—The claims now made on the fund *in medio* give rise to two questions,—(First) who are to be held as in the "families" of the two sisters, and (second) is the division of the fund among those entitled to share therein to be *per capita* or *per stirpes*?

The former of these questions arises thus:—Mrs Lawrie, one of the testator's sisters, had a daughter Eliza Lawrie or Brown, who died in 1859, that is ten years before the date of the settlement now under consideration, leaving children and grandchildren. These children and grandchildren claim the share in the fund *in medio*, as being of the "family" of Mrs Lawrie, the testator's sister,

¹ *Irvine v. Irvine*, July 9, 1873, 11 Macph. 892, 45 Scot. Jur. 546.

² *Gregory v. Smith* (1852), 9 Ha. 708; *Barnes v. Patch*, 1803, 8 Vesey, 603.

³ *McKenzie v. Holte's Legatees*, 1781, M. 6602; *Grant v. Fyffe*, May 22, 1810, F. C.; *McCourtie v. Blackie's Children*, 1812, Hume's Dec. 270; *Fyffe v. Fyffe*, July 13, 1841, 3 D. 1205, 13 Scot. Jur. 539; *Cunningham's Trustees v. Cunningham*, Jan. 13, 1891, 18 R. 380.

⁴ *Williams v. Williams*, 1 Sim. N. S. 358, Lord Cranworth at p. 371.

⁵ Per Lord Thurlow in *Alexander v. Douglas*, 1782, Romilly's notes of Ch. Ca. p. 93; *Brett v. Horton*, 1841, 4 Beav. 239.

No. 91.

Feb. 4, 1892.
Low's Trustees v. Whitworth.

maintaining that the word "family" means not children only, but descendants generally. I think these claimants cannot succeed in their claim upon this ground. The word "family" when used as a term of designation is synonymous with children, a character which these claimants do not possess. It is quite true that in the case of *Irvine*, it was said that the "family," in the circumstances of that case, would include all descendants. But in that case the destination which was being construed was one in favour of nephews and nieces, "and the families of such as may have predeceased," and the question was whether under such a destination the grandchildren of a predeceasing nephew took equally with the child of that nephew. It was held that they did, not because they were included in the destination as of the nephew's family, but because they were entitled to their deceased parent's share on the principle of implied conditional institution. In cases in which that principle is applicable it was said that the word "family" had a wider signification than "children."

Here the destination is to the family of each sister of the testator without any provision for the succession of the issue of any member of such family to the predeceasing parent's share, and it seems to me that the destination here is in favour of the family,—that is, the children of the two sisters who were alive at the date of vesting. Whether under that destination the children of any member of the family predeceasing would be entitled to succeed on the *conditio si sine liberis* need not here be considered, for in this case there is no room for the application of that principle. Mrs Brown, through whom the claimants claim, was never herself instituted, for she died ten years before the testator's settlement was executed.

The Sheriff-substitute has rejected the claims of these claimants on another ground, viz., that they are the direct beneficiaries under the testator's codicil of a special legacy. I should rather regard that fact as shewing that the testator made a special provision in favour of his grandnephews and niece, because they did not under his will take any share in the division of the residue. If I had read the provision as to the division of the residue otherwise than I have done, I should not have been disposed to hold that a special legacy in itself militated against the view that they were also to participate in the residue. But this question need not enter into the decision of the case. It is enough to say that these claimants who claim through Mrs Brown neither take directly under the destination of the settlement, nor on the ground of implied conditional institution.

The remaining question is, Is the division of the residue to be a division *per capita* or *per stirpes*? On that question I agree with the Sheriff-substitute, and with the reasons assigned by him for his judgment.

THE LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the third finding in the interlocutor of the Sheriff-substitute, *quoad ultra* adhered to the interlocutor and dismissed the appeal, and of consent of parties ranked and preferred the claimants accordingly.

DOUGLAS & MILLER, W.S.—HAGART & BURN MURDOCH, W.S.—
MACPHERSON & MACKAY, W.S.—ALEX. MORISON, S.S.C.—Agents.

SAMUEL COWAN AND OTHERS, Petitioners.—*Dickson—G. W. Burnet.*

No. 92.

JAMES GLOVER DENHAM, Co-plear.—*Dickson—G. W. Burnet.*

THE SCOTTISH PUBLISHING COMPANY, Respondents.—*Sol.-Gen. Murray—W. Campbell.*

Feb. 4, 1892.
Cowan v.
Scottish Pub-
lishing Co.

Company—General meeting—Voting—Special resolution—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 51.—By the 51st section of the Companies Act, 1862, a majority of “not less than three-fourths” of such members, “for the time being entitled to vote, as may be present in person or by proxy,” is required to pass a special resolution of a company; and it is provided that “a declaration by the chairman that the resolution has been carried shall be conclusive evidence of the fact without proof of the number or proportion of the votes.”

Where an amendment was put against a special resolution for the voluntary winding-up of a company, the minute, which was signed by the chairman, bore that, “a shew of hands being taken, there voted for the former four and for the latter eight. The resolution therefore became the decision of the meeting, and the chairman declared it carried.” *Held* that as the minute shewed that the resolution had not been passed by the requisite statutory majority, the resolution could not receive effect.

Company—Judicial winding-up—Inability to pay debt—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 79.—In a petition for the judicial winding-up of a limited company which was admittedly deemed solvent, the petitioners founded upon a judgment debt for £58 awarded to them under a decree-arbitral, the *inducere* of a charge upon the extract decree having expired without payment. The company admitted that £43 of the £58 was due, and in order to make good their objection to the remaining portion, it would have been necessary to suspend the decree and reduce the decree-arbitral. *Held* that no sufficient ground had been shewn why the prayer of the petition should not be granted.

THE SCOTTISH PUBLISHING COMPANY, LIMITED, was incorporated under 1ST DIVISION. the Companies Acts in 1885, and thereafter carried on its business of owning and publishing a magazine or magazines and other literature in Edinburgh. It had a capital of £5000 in £1 shares. 2245 of these were issued, on each of which 12s. had been paid up.

On 23d December 1891 Samuel Cowan and Cowan & Company, printers, Perth, presented a petition to the First Division craving that the Publishing Company should be wound up by the Court under the 79th and 80th sections of the Act of 1862.* The petitioners stated that they were creditors of the respondents in the sums (1) of £58, 12s. 2d., with interest from 1st February 1889; and (2) of £10, 10s., both found due under a decree-arbitral in a submission between the parties, dated 24th November 1891. The petitioners had charged the respondents upon the warrant contained in the decree, and the *inducere* had expired without payment.

The Scottish Publishing Company lodged answers, in which they stated that the company was perfectly solvent, and had no liabilities beyond the petitioners' alleged debt. They further alleged that the proceedings in the arbitration were illegal, but that they had not taken steps to challenge them, in view of the fact that, at an extraordinary general meeting of the company on 29th December 1891, a resolution had been passed to wind up the company voluntarily.†

* The Companies Act, 1862, sec. 79, provided that “a company under this Act may be wound up by the Court . . . under the following circumstances,—that is to say . . . (4) whenever the company is unable to pay its debts.”

Section 80 provided that “a company under this Act shall be deemed to be unable to pay its debts . . . (3) whenever in Scotland the *inducere* of a charge for payment in an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made.”

† The resolution proposed was,—“That the company be wound up voluntarily

No. 92.

Feb. 4, 1892.
Cowan v.
Scottish Pub-
lishing Co.

They maintained that the application was presented with no other object than to concuss the respondents into paying a disputed debt, and that, as a matter of justice and expediency, there were no grounds for interfering with the voluntary liquidation.

Mr Denham, a shareholder of the company, was allowed to compare, and lodged answers, in which he stated that he concurred in the prayer of the petition.

At the hearing, it was stated that the respondents admitted liability for £43 of the alleged debt.

Argued for the petitioners;—1. Wherever as here the *induciae* upon a charge on a decree of Court had expired without payment, a company was deemed to be unable to pay its debts, irrespective of its actual solvency or insolvency,¹ and the debt being established, it was the duty of the Court to order a winding-up. The validity of this decree was never questioned until the answers were lodged. It differed from the debt in *Bowes*' case, as the decree here proceeded upon an award pronounced under a reference to an arbiter. The company was really quite solvent, and no indulgence should be shewn to it. The *Walkinshaw Oil Company* case² was not in point, as in answer to the petition for winding-up in that case it was stated that the company was desirous of going on with its business, and consigned the amount of the debt in bank. 2. The company's resolution for a voluntary winding-up was clearly incompetent, as the minute stated that it had not been passed by the requisite majority of three-fourths, and was thus not in compliance with the 51st section of the statute.*³

Argued for the respondents;—1. It had never been held *ex debito justitiae* that a creditor might come forward in any case where his debt was not paid and get a compulsory winding-up. The matter was one for the discretion of the Court, and the Court would discourage a practice of compelling payment of a debt by the threat of a winding-up.⁴ The reason why the respondents had not suspended the charge was because they thought the voluntary winding-up would proceed, and they had no reason to doubt its validity. They now offered to consign the amount of the alleged debt, and to bring a suspension of the charge. 2. The minute of meeting to which exception was taken ought to be treated as if it had

under the provisions of the Companies Acts, 1862 to 1890, and that Mr Robert A. Marr . . . be and is hereby appointed liquidator for the purposes of such winding-up." And the minute of meeting bore,—“Mr Forbes' amendment being then put against the proposed resolution, and a shew of hands being taken, there voted for the former four, and for the latter eight. The resolution therefore became the decision of the meeting, and the chairman declared it carried. No poll was demanded in either case.” The minute was signed by the chairman.

¹ *Bowes v. Hope Life Insurance Co.*, 1865, 11 Clark's H. L. Reps. 389.

² *Cuninghame v. Walkinshaw Oil Co.*, Nov. 17, 1886, 14 R. 87.

* The Companies Act, 1862, sec. 51, provided that “a resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present in person or by proxy . . . and [unless a poll is demanded] a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same.”

³ *In re Horbury Bridge Coal and Waggon Co.*, 1879, L. R., 11 Chanc. Div. 109; *in re Caloric Engine Co., Limited*, April 18, 1885, 52 L. T. 846.

⁴ *Cuninghame v. Walkinshaw Oil Co.*, *supra*.

simply read "the motion was carried." There could now be no inquiry into the numbers voting, the chairman's declaration being final. No. 92.

Feb. 4, 1892.

Cowan v.

Scottish Pub-

lishing Co.

LORD PRESIDENT.—Upon the first question in this case, viz., whether there is here a voluntary liquidation or not, I cannot say that I have any doubt. We have to judge of it upon the minute of meeting of 29th December last, and having regard to the fact that, by the 51st section of the Companies Act of 1862, a majority of three-fourths is necessary to carry a special resolution, the question is whether there is such a majority here. I think the contrary is shewn, because the minute bears that the figures for the resolution and amendment are eight and four respectively. These figures do not shew a majority of three-fourths; but upon the footing that these are the *media*, as I think they purport to be, by which the conclusion is reached, the minute goes on to state,—"The resolution therefore became the decision of the meeting, and the chairman declared it carried." It is true that the section I have referred to bears that "a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same." But in the present case we find a minute under the hand of the chairman which is evidence not corroborative but contradictory of the validity of the resolution. Now, the section merely dispenses with the need of proving the numbers, but it does not suggest that, when they are proved, under the hand of the chairman and in the very minute founded on, the chairman's declaration is to overrule and nullify them. Accordingly, without entering upon a consideration of the questions which have been argued in regard to the manner of voting or the construction of the provisions relating to voting by proxy, I think the case must be treated as one where there is no voluntary liquidation.

The other question which follows is whether the Court is to grant or refuse a compulsory winding-up. The petitioners hold a decree for £58, 12s. 2d., and the respondents' case was opened upon the footing that that entire sum was still in dispute. But it now appears that the question, as we have to decide it, relates only to a balance of that sum amounting to £15. Further, when the nature of the debt and of the objections to it are examined, it appears that there is a decree-arbitral under which the petitioners were awarded the sum of £58, 12s. 2d., and that the objections are of a somewhat shadowy character. Applying the kind of consideration which the Court is in the habit of giving, where they are scrutinising the answer to a judgment debt, I cannot say that the objections pleaded are either very sharply stated or are such as are instantly refutable. They were not stated at the outset, because the correspondence shews that £58 was for some time treated as an extant debt of the company. It now appears that the debt is not admitted, but that the position is that, if anything is to be made of the objection, there must be a suspension of the decree and then a reduction of the decree-arbitral. I cannot see that it is at all demonstrated that decree of reduction would be matter of high or immediate probability.

Accordingly, we have now to decide whether we are to refuse liquidation upon the footing that the objections stated to the debt in question involve a suspension and a reduction of a decree-arbitral, the sum in dispute being now only £15 of the original £58. If we were to give effect to these objections, I think we should create a very dangerous precedent, for we should encourage all

No. 92.

Feb. 4, 1892.
Cowan v.
Scottish Pub-
lishing Co.

sorts of cavils against judgment debts every time an order for liquidation is sought. I am not prepared to accept that responsibility, and accordingly I am for granting the prayer of the petition.

LORD ADAM.—The first question for consideration is whether there is a good voluntary liquidation or not. By the 51st section of the Companies Act of 1862, a majority of not less than three-fourths of the members of the company voting either in person or by proxy is required to pass such a special resolution as we have here, and the question is whether it is the fact that the resolution was carried in conformity with the requirements of that section. I do not mean to pronounce any opinion as to what view I should have taken if there had been no statement as to the numbers voting, and if the minute had merely stated that the resolution was declared by the chairman to be carried. Even although it had not been so carried in point of fact, I am not sure that we should have been entitled to make any inquiry into that, or that any proof in contradiction of its terms would have been admissible.

But in the present case we have it under the hand of the chairman, and upon the face of the minute, that the resolution was carried by a majority of two to one, and accordingly we see that, in point of fact, the resolution was not carried by the requisite majority of three-fourths. Accordingly, I agree that there is no voluntary liquidation.

That being so, the next question is whether we ought to grant a judicial winding-up. I do not think it is necessary to decide what amount of debt in dispute would justify the Court in ordering a winding-up. But where we have a decree for £58 in favour of the petitioning creditor, which is admittedly well founded to the extent of £43, and where we find that, in order to set it aside, there must be a suspension and a reduction of a decree-arbitral, I think it is very clear that the dispute is not such as we ought to recognise. I therefore think we ought to allow the winding-up.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

COUNSEL for the company tendered payment of the debt and the petitioners' expenses, and the Lord President stated that on a minute being put in to the effect that payment had been made, the petition would be dismissed.

SIMPSON & MARWICK, W.S.—LINDSAY MACKERSY, W.S.—Agents.

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

JAMES M'DUFF, Pursuer (Respondent).—*Shaw*—A. S. D. Thomson.
JOHN BALFOUR, Defender (Reclaiming).—*Comrie Thomson*—C. N. Johnston.

Lease—Management—Consumption and application of straw and dung—Rights of landlord and tenant at expiry.—An agricultural tenant under a lease for a term of years, with entry at Martinmas, was bound by the lease to leave to the proprietor or incoming tenant at its expiry at Martinmas the dung that might be made after the 15th June immediately before the expiry, "at a price to be fixed by arbitration," the lease requiring that all dung made previously should be applied to the lands. It was also stipulated that the tenant "shall not sell or remove from said farm any . . . straw . . . or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the same on said farm for manure, and shall apply such manure to the lands yearly."

In the district in which the farm was situated the green crop was the only

crop to which manure was applied. According to the custom which prevailed when the lease was entered into, the straw crop, with the exception of a small portion reserved for the minor uses of the farm, was consumed in winter by cattle kept in courts (few cattle being kept in summer, and those on pasture), and the manure so made was applied to the next year's crop. No. 93.
Feb. 5, 1892.
M'Duff v.
Balfour.

The tenant afterwards fed cattle in courts in summer, and to provide litter reserved half of the straw crop of the previous year, so that when he left the farm at Martinmas 1890 there was upon it a large amount of manure made after the immediately preceding 15th of June.

In an action by the tenant for payment of the value of this manure under the first clause of the lease, the landlord pleaded that, in terms of the clause providing for the annual consumption and application of the straw, the tenant ought to have applied before 15th June 1890 the portion of the straw crop of 1889 which he had reserved for litter, that he had accumulated it in violation of the lease, and was therefore not entitled to be paid for the manure made therefrom.

Held (1) that on a reasonable construction of the lease the tenant had a period of twelve months for the consumption of the straw and a separate period for the application to the lands of the manure therefrom; (2) that the period of consumption of straw ran from harvest to harvest, and that though the tenant was bound to apply to the land by 15th June all the manure then available, he was not precluded by the lease from retaining a large part of the straw for consumption by stall-fed cattle during the summer and autumn months, the manure produced being applicable to the land in the following spring; (3) that in this view he had not accumulated the straw in violation of the lease, and was entitled to receive payment for the manure made from it. *Diss.* Lord Adam, who held that the tenant was bound under the lease to consume the whole straw crop of a year during the succeeding winter and to apply the manure to the green crop of the next year; and that the clause binding the tenant to leave to the proprietor or incoming tenant at the end of the lease the dung made after the 15th June in the last year of the lease was intended to apply to dung made from the straw of the last crop under the lease consumed by cattle in courts between harvest and Martinmas.

FROM 1866 to 1885 James M'Duff was tenant of the farm of Kingsdale on the estate of Balbirnie in Fife. At the expiry of the nineteen years lease he obtained a new one from the proprietor, Mr John Balfour, for other nineteen years from Martinmas 1885, with an option to either party to terminate the lease at the expiry of five years. The farm extended to 349 acres, and the rent fixed was £460. 1st Division.
Lord Kin-
cairney.

The lease contained, *inter alia*, the following stipulations:—"And further" (the tenant) "to manage, cultivate, and improve the lands hereby let, according to the rules of good husbandry, adopting a rotation of not less than five years, whereof two years at least shall be pasture, and shall not hurt or run out the same by taking scourging crops or otherwise, and particular, without prejudice to the foresaid generality, the following stipulations are specially agreed to, namely, . . ." that "the tenant shall leave to the proprietor or incoming tenant at the expiry of the lease the dung that may be made after the 15th day of June immediately before the expiry; that all dung made previously must be applied to the lands hereby let for the benefit thereof, said dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by two arbiters to be mutually chosen, it being understood that where compensation is claimed for feeding stuffs consumed on the holding, the value of the dung must be estimated as if it had been made by the consumption of the natural produce of the farm only . . ."; that "the tenant shall be entitled to sell turnips and hay, provided he shall produce evidence to the satisfaction of the proprietor that he has brought and applied to the lands hereby let vegetable matter, bones, or dung to at least the same manurial value during previous years; that, with the exceptions above-mentioned,

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

the tenant shall not sell or remove from said farm any turnips or green crop (except potatoes), hay, grass, straw, fodder, chaff, or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the same on said farm for manure, and shall apply such manure to the lands yearly."

M'Duff availed himself of the option to break the lease at the end of the first five years, and the lease accordingly came to an end at Martinmas 1890. At that date there was upon the farm 1372 cubic yards of manure, which M'Duff averred had been made since 15th June 1890, and the value of which he claimed from his landlord at a price to be fixed by arbiters in terms of his lease.

The landlord denied that he was bound to take over so large a quantity of manure, and accordingly M'Duff, upon 9th December 1890, raised an action to enforce payment.

In his statement of facts the defender, *inter alia*, averred,—(Stat. 2. "During the last three years of the lease the pursuer, instead of annually consuming the straw upon the farm, has kept it up, and used instead purchased material, such as mill dust. Accordingly, at 15th June last, the pursuer had on the farm a quantity of straw amounting to about a whole year's crop, and out of all proportion in excess of the quantity which would have been on the farm at that date in the ordinary course of prudent management, or if he had complied with the provisions of the lease. About that time he brought upon the farm a large stock of cattle, which consumed the straw, and converted it into manure between 15th June and Martinmas. Under the lease as aforesaid, the tenant's claim for payment for manure is limited to the manure made subsequent to 15th June in the last year of the lease. The object of the pursuer in adopting the course of management detailed was to make an abnormal quantity of manure within the foresaid period, and claim payment for it."

The defender pleaded ;—(3) The defender is not bound to pay for more manure than would have been made in the ordinary course of prudent management and in accordance with the system of cultivation prescribed by the lease within the period specified in the lease, and the pursuer is bound to leave the remainder free of charge to the defender.

The value of the manure at Martinmas 1890 was ascertained to be £291, 11s.

A proof having been allowed, the following were the material facts:—

The amount of manure left on the farm at the close of the lease was exceptionally large compared with previous experience in the matter in other farms of the size in the neighbourhood. Intending offerers for the farm were deterred by the fact from coming forward, and in the end the landlord was compelled to accept from the incoming tenant a sum much less than its value. It was, however, proved that the manure had all been made after 15th June 1890, and it was not disputed that it was made from the straw of the crop which was reaped in September 1889. The exceptional amount of the manure was accounted for by the fact that during his second lease the pursuer had introduced a different system of management from that practised generally in the district, with the result of making a greater quantity of manure during the summer months. The general custom in the neighbourhood had been followed by the pursuer during the whole of the previous lease. Under it the bulk of the year's crop of straw was made into manure in the course of the following winter and applied to the next season's green crop, only a small proportion of the straw, a fourth to a sixth, being kept after the month of June for litter during the summer, for happing the potatoes, and for thatching the stacks of the next crop. During the winter a large

stock of cattle were kept and fattened in courts. In summer comparatively few cattle were kept, and these were pastured in the fields, so that little manure was thus made in summer. The district was not a wheat-growing one, no wheat was grown on Kingsdale farm, and the green crop was the only crop to which the manure was applied.

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

Under his new system of management the pursuer kept as many cattle in summer as in winter, and he fattened them in courts, buying such feeding stuff as the dregs and draff from a neighbouring distillery. For the purpose of providing litter he bought pob or dust from flax mills. In 1890 he found it necessary for this purpose to reserve one-half of the straw of 1889, and it was proved that it was from this straw only that the manure left on the farm after June 1890 had been made. It was proved that the straw crops of 1888 and 1889 were unusually bulky, and further, that the green crop of 1890 was liberally manured. Reference is further made to the opinion of the Lord Ordinary for the import of the proof.

On 18th August 1891, the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds . . . (2) that the lease current at Martinmas 1890 provides that the tenant shall annually consume the straw made on the farm for manure, and shall apply such manure to the lands yearly, and that all dung made prior to the 15th June immediately preceding the termination of the lease shall be applied to the lands for the benefit thereof, and that all dung made after the said 15th June shall be left to the proprietor or incoming tenant at a price to be fixed by arbiters; (3) that at the expiry of the lease at Martinmas 1890 there was on the farm dung to the extent of 1372 cubic yards, which had all been made after the 15th June 1890; (4) that it has not been proved that the pursuer's course of management by which the said manure was produced was unfair or in contravention of his lease or of the rules of good husbandry; (5) that the value of the said manure at Martinmas 1890 was £291, 11s.: Therefore finds the pursuer entitled to be paid the value of the said manure, and decerns against the defender for payment to the pursuer of the said sum of £291, 11s., with interest," &c. *

* "OPINION.— . . . The pursuer's claim is founded on a clause in his lease to the effect that he should leave to the proprietor or incoming tenant the dung made on the farm after the 15th day of June immediately before the expiry of the lease, at a price to be fixed by arbiters; but should apply to the land all the dung made before that date. Provision is thus made for disposal of all the dung on the farm at the end of the lease—that made before 15th June is allotted to the land, that made after is to be sold to the landlord.

"It is clear that 15th June was fixed on as a date at or before which the mowing of the green crop might be assumed to be completed; and what the clause really provides is, that all the manure on the farm when the green crop was sown in the last year of the lease should be applied to that crop.

"It has been amply proved that all the dung left was made after 15th June 1890.

"The pursuer is, therefore, *prima facie* within the clause on which he founds, and *prima facie* is, in virtue of that clause, entitled to be paid for the manure he has left.

"The amount of manure left, however, is very exceptionally large, so much so that it is in evidence that intending offerers for the farm were deterred by it, and that the landlord found himself obliged in the end to accept from his new tenant a sum much less than its value, and the landlord now maintains that it could not have been made, and in fact was not made by a course of management in compliance with the lease, with the custom of the district, or with the rules of good husbandry. His plea is that,—The defender is not bound to pay for more manure than would have been made in the ordinary course of prudent management, and in accordance with the system of cultivation

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

The defender reclaimed, and argued;—The pursuer had violated the provisions of his lease, and the large quantity of manure, which was ad-

prescribed by the lease within the period specified in the lease, and the pursuer is bound to leave the remainder free of charge to the defender or incoming tenant.

"I think that plea sound in law, and consider that when the lease provides that the tenant must apply all the manure made on the farm before June, what is meant is, all the manure that ought to have been made in a fair course of management; and when it provides that the landlord shall pay for all the manure made after 15th June, what is meant is, that he shall pay for all the manure which should have been made in a fair course of management after the sowing of the green crop.

"The defender founds on a provision in the lease to the effect, so far as it bears on this question, that the tenant shall not sell the straw, but shall annually consume it on the farm for manure, and shall annually apply such manure to the lands.

"These are the only provisions of the lease to which it is necessary to refer.

"There is no wheat grown on Kingsdale farm, and it has been the pursuer's practice to apply his farm-yard manure to the turnip break at seed time, that is in April, May, or June, and to no other crop, and at no other time. That has also been the custom on most of the farms in the district on which wheat is not grown.

"This may or may not be enlightened farming, but there is no doubt that the clauses of the lease have reference to that custom.

"It has apparently been the general custom in the neighbourhood to apply much the larger part of the straw of one year to the green crop of the following year, and to reserve only a fraction, from a fourth to a sixth, of the straw of the year for use during summer and autumn. It has also apparently been the custom to keep comparatively few cattle in summer, and to keep them in pasture, and thus to make very little manure after June.

"In June 1890 the pursuer did not follow this ordinary course pursued by his neighbours, but he had a large quantity of the straw of the crop of 1889 converted into manure, after the green crop was sown and manured. I do not think the exact amount is stated in the proof, but, as it was the straw out of which the 1372 cubic yards of manure were made, it must have been more than 100 tons.

"Now, the lease contains no restriction whatever as to the amount of manure which the tenant might make after 15th June, and therefore the tenant committed no breach of the express provisions of the lease in converting all the straw into manure; and it is hard to see how the conversion of it into manure could possibly be against the rules of good husbandry, and no witness says that it was. Therefore it would seem to follow that no exception can be taken to the conversion of the straw which was on the farm on 15th June 1890 when it was converted into manure, and that the pursuer's management after 15th June 1890 cannot be successfully challenged.

"The true question must therefore regard the straw which was left after turnip sowing, rather than the manure made from it, and the question is, has it been shewn that that straw was accumulated by a course of management in variance with the provisions of the lease and of good husbandry?

"The question whether the straw has been fairly accumulated is the question to which the proof has been directed, and I have found it very difficult, all the more difficult I must take leave to say, on account of the very unsatisfactory character of the proof, which is desultory, loose, and speculative, and much of it little to the point. Long as it is, it is remarkable how little of definite and tangible fact can be extracted from it.

"The first question is, whether it has been proved that the straw remaining on the farm at June 1890 was accumulated by a violation of the provisions of the lease. It falls on the defender to establish that it was, and I have come, though without hesitation, to think that he has not done so.

"The precise meaning of the provision that the straw shall be consumed

mittedly made after June 1890, and for which he claimed payment, was the result of his violation. The obvious meaning of the clauses of the

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

annually for manure, and that the manure shall be applied to the land annually, is not obvious. The time of the year when it is to be applied is not mentioned. But there is no time when it could be applied, according to the custom of the district and the pursuer's system of cultivation, except the potato and turnip seed time. But it cannot be meant that all the straw of one harvest shall be applied to the next green crop. That would be impossible, because it is admitted that it is necessary to hold some part of it over for use during summer and autumn. It is said, indeed, to be the custom to apply a very large proportion of the crop of one year to the green crop of the next, but there is no provision in the lease to that effect. The mode in which, according to the defender, the requirement of the lease ought to be complied with is by the application of five-sixths of the crop to the next green crop and one-sixth to the green crop following. But the words of the lease would be equally complied with by the application of the manure to the two green crops in any other proportion, as for example, if half of the crop were to be applied at the first turnip sowing and the other half at the next turnip sowing. In either case the manure would be applied annually—that is, between June and June.

"Now, is it proved that the pursuer failed to comply with this requirement? . . .

"The defender maintains that the pursuer must needs have withheld some part of his straw, in violation of the lease, otherwise his manure heap could not have so much exceeded the manure which he purchased when he came to the farm. I am not satisfied on this point, having in view the pursuer's evidence that he was in the habit of purchasing manure, and also mill dust and dreg and draff from the Methil Distillery, which is in the neighbourhood of his farm, but, at all events, I have no means of knowing at what period of the pursuer's occupation it occurred, if it happened at all.

"I therefore do not think it proved that the pursuer has violated the express conditions of his lease in relation to the annual consumption of the straw and application of the manure.

"But the defender further maintains that the pursuer's accumulation of straw was the result of a violation of the rules of good husbandry.

"If it were proved that the straw remaining in June 1890 was unduly withheld from the turnip break of June, I should have held the defence established, and should not have allowed the pursuer the value of manure made from straw which should, in fair management, have been converted and applied to the green crop. But I do not think this proved—(His Lordship here referred to the evidence on the point).

"250 tons of straw was the pursuer's estimate of the crop of 1889.

"According to the pursuer, this result was attained mainly in consequence of the bulky crops of 1888 and 1889, and also because of the somewhat increased acreage under white crop in 1889, and because of the hay, aftermath, and feeding stuffs with which he supplied his cattle. He also regards his proximity to the Methil Distillery, where he could be cheaply supplied with draff and dreg, as a circumstance which enabled him to produce more manure than his neighbours. The pursuer has adduced a number of witnesses of great experience, who are of opinion that these circumstances adequately account for the amount of the pursuer's straw. . . .

"The defender argued that it was the pursuer's duty to give the green crop the benefit of a crop of extra bulk. Of course, the larger the straw crop the more will be the manure, but whether it be the tenant's obligation to make more manure by the immediately following June must depend on his system of management otherwise.

"The defender maintains that the pursuer's system was wrong and unfair altogether, because he says he understocked his farm in winter and overstocked it in summer, at least during the last year of his lease, and this for the unfair purpose of accumulating a large stock of manure at the landlord's expense. But

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

lease was that he was bound to consume the straw and apply it to the lands in the form of manure between the reaping of the crop and the sowing of the green crop of the next year. He was only entitled to retain a small portion of the straw for purposes of litter, thatching the next year's stacks, and happing the potatoes. That was really the only way in which he could consume the straw crop of one year and apply it to the land before the time for using the crop of the succeeding year arrived. In the present

I prefer the evidence of the pursuer's witnesses on this point to those for the defender, who took but an occasional glance at the farm; whereas the pursuer has adduced his neighbour (Fische), a cattle-dealer to whom he was accustomed to sell his cattle (Birrell), and his farm-servants, and the purport of their evidence is that throughout the year, and generally during the course of his lease, the pursuer had a large stock of cattle on his farm, which he sold from time to time to cattle-dealers and butchers.

"Further, the defender maintained that the pursuer had changed his system of management at the end of his lease. The only witness for that is the factor Neil Ballingal, and his evidence is certainly very indefinite. The pursuer denied it, and while it may fairly be said that more satisfactory evidence on the point might have been expected from him, I cannot hold it proved.

"It is true that the system pursued by the pursuer was different from that pursued by most of his neighbours, in this, that it was his custom and a part of his system of management to fatten cattle in courts in summer. I understand the pursuer to say that he began to pursue this system, or at least extended it, when he got additional accommodation for cattle at the beginning of his second lease. If that be so, and there is nothing in the evidence which leads me to discredit it, it is obvious that this system of farming made it necessary to reserve a considerable amount of straw at June. And I am unable to see that it can be stigmatised as bad or unfair farming, merely because it was not in accordance with the custom of the district. It has received the approval of farmers of well-known skill and experience—his witnesses no doubt, and not farmers from Fife—but not, I think, the less qualified on that account to form an opinion on such a point. It is besides in evidence that, although cattle-feeding in the courts in summer may not have been practised generally, there were others in the district, the witnesses Fische and Birrell for example, who followed the course.

"There is a body of important evidence to the effect that the pursuer's cultivation of his farm was considerably above the average.

"The landlord complains that he suffered great disadvantage and loss by the accumulation of unapplied manure. He did so suffer, if he can shew that the tenant was under obligation to apply it to the green crop of 1890, but not, I think, otherwise. If the green crop was fairly treated, I do not see any disadvantage to which the landlord has been illegally subjected. He or the incoming tenant required at least part of the manure if not the whole of it, and if he had not found it on the farm, would have required to purchase it elsewhere: but it is sufficient to say that it was manure actually made, and not unfairly made after 15th June 1890, and after the green crop was adequately manured.

"On the whole, I have, after repeated perusal of the proof, come to the conclusion that the defender's defence, although good in law, has not been made out in point of fact, and that the pursuer is entitled to be paid for the manure left on the farm.

"The view which I have taken of the case depends on the provisions of the lease and the evidence, and not on any question of common law. I may, however, quote the following cases which bear on the point, most of which were referred to:—*Berry v. Allan*, 1827, 5 S. 212, aff. 10th June 1829, 3 W. and A. 429; *Greig v. Mackay*, 20th July 1869, 7 Macph. 1109; *Murray's Trustees v. Murray*, 19th July 1889, 26 S. L. R. 762; *Reid's Executors v. Reid*, 28th February 1890, 17 R. 519; *Penman's Executors v. Jamieson*, 20th January 1891, per Lord Fraser; and *Easson v. Morrison*, 21st January 1891, Second Division. Neither of the last two cases is reported."

case the straw ought to have been made into dung, and applied to the farm between September 1889 and June 1890. It was said that the lease meant that part of the straw was to be applied on or before June 1890, as for the crop of the year, and part left to be applied in the spring of 1891. But that would not be a "yearly" application of dung to the lands. Again, it was said that the defender's construction of the lease was inconsistent with the clause as to the pursuer's getting payment for dung left on the farm after 15th June 1890. But that clause was adapted to the system universally practised in the district; according to which a small portion of the straw was reserved for litter and the minor uses of the farm. But, further, assuming that the defender had not contravened the stipulations in the lease, and that he was entitled to alter his system of management, he was not entitled, after making this change, to take advantage of a clause in the lease framed with special reference to the previous system, with the result of throwing a new burden upon his landlord.¹

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

The respondent's argument sufficiently appears from the opinions of the Judges.

At advising,—

LORD PRESIDENT.—The claim of the pursuer of this action is that the defender, whose tenant he was in the farm of Kingsdale, in Fife, shall pay him the value of 1321 cubic yards of dung left on the farm at his removal at Martinmas 1890. This claim is rested on the following stipulation,—“The tenant shall leave to the proprietor or incoming tenant, at the expiry of this lease, all dung that may be made after the 15th of June immediately before the expiry; all dung made previously must be applied to the lands hereby let for the benefit thereof, said dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by two arbiters.”

This stipulation, however, is only one part of a clause dealing with the mode of cultivation, and including the subject of manure, and its scope and application must be ascertained with reference to certain other stipulations which form parts of the same clause. These are, that (with certain exceptions which do not directly bear on the question) “the tenant shall not sell or remove any . . . straw . . . or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the straw on the farm for manure, and shall apply such manure to the lands yearly.” Now, the defender says that the amount of dung which he is asked to pay for is enormously in excess of what the pursuer would have had extant at Martinmas if he had fulfilled the obligations which I have last mentioned, and he says that the excess has been produced with straw which ought to have been already applied to the land in manure prior to 15th June 1890. The defender maintains that he is not bound to pay for more manure than would have been left if the mode of dealing with the straw prescribed by the lease had been followed. The pursuer does not dispute that if this last proposition be applicable to the facts of the case it affords a good legal defence to the action, but he denies that he has contravened the lease.

The question therefore between the parties is, whether the pursuer has contravened the lease in the matter of straw or dung? Other controversies as to the general effect of the pursuer's management have added complexity to the case, but it really turns on the more limited question which I have stated. If

¹ Greig v. Mackay, July 20, 1869, 7 Macph. 1109, per Lord Justice-Clerk, p. 1113, 41 Scot. Jur. 619.

No. 93.
 Feb. 5, 1892.
 M'Duff v.
 Balfour.

the pursuer has not contravened the lease, then it is nothing to the purpose that his methods are unusual, or that they land the defender with an exceptional and inconvenient amount of manure. If, on the other hand, the pursuer, instead of giving the land the benefit of the straw which he had undertaken to put into it, has held it back, with the effect, if not the intention, of making the landlord pay for what he was entitled to get as part of the return for the use of the land, then the defender is perfectly justified in resisting a claim that the same thing should be counted twice.

For greater clearness it may be well here to say that I take the controversy to relate to the straw of the crop 1889. It is true that there is some evidence that the pursuer had on the farm in May 1890 some straw of crop 1888, but the pursuer denies this, and I do not think it is proved.

Now, the defender's theory of the lease is that the clause requiring the tenant annually to consume the straw for manure, and to apply such manure to the lands yearly, means in terms that the straw of crop 1889 must all be put into the ground in manure before the reaping of crop 1890. In other words, it means that the two processes of turning the straw into manure and applying the manure so made to the land are both to be completed within the same year, viz., between Martinmas 1889 and Martinmas 1890.

This theory is exposed to one grave difficulty. To whatever period or periods the clause immediately in question relates, it is expressed absolutely, and does not purport to recognise any exception (for the words "with the exceptions above mentioned" relate to turnips and hay only). But the clause founded on by the tenant, and providing for the landlord taking over at Martinmas of the last year dung made after 15th June, proceeds on the assumption that there will be dung extant unapplied to the land at the end of the period, which, on the theory I am now discussing, ought to see it all applied to the land.

It has been suggested, indeed, that this clause may be accounted for by supposing it to apply to straw or dung bought outside, and brought on the land, but I cannot think this a fair explanation, for (1) the clause speaks of the dung in question as if it were distinguished only by date and not by origin from that which by express provision must be put into the land, and this can only be home-made manure; and (2) the purchase and importation of manure or straw on to a farm in the last year of the lease is not so customary an event as to form a natural subject of stipulation.

It has also been suggested that the clause may be accounted for by holding it to apply to dung made with straw of crop 1890, thrashed and made into dung between harvest and Martinmas. I cannot think this a natural construction and it had not occurred to the defender. No one reading the clause would be apt to suppose that when the lease speaks of "the dung that may be made after the 15th day of June immediately before the expiry," and promises the tenant payment for "said dung," it really meant dung made after harvest, and that the tenant was not to get paid for any more.

The defender did not submit any such contention; he admits that the clause providing for payment of dung made after 15th June applies to dung made with straw of crop 1889, and his argument is that the two clauses are to be reconciled by treating the one as applying to an unexpressed but implied exception from the other; or, in other words, that while the tenant is in words told that he must have all his straw underground in manure by 15th June, this really means all except what he requires for what are described in argument as his

and the minor uses of the farm. This, however, gives rise to a very awkward difficulty. Not only does it assume an unexpressed exception to what purports to be an absolute rule, but it turns out that there are no *media* for determining the extent of the exception. Take the present case—this pursuer, for better or worse, took to keeping a large head of cattle in summer and stall-feeding them. For this he required a much larger amount of litter than his neighbours or predecessors. Now, there is admittedly nothing in the lease to prevent his doing all this, and yet in the case before us he avows that he kept and required to keep the half of his straw of 1889 to litter these cattle, and it is of the result of this that the defender complains. It turns out therefore that the defender's theory of the case requires us to read into the absolute obligation about the straw an exception of straw required for litter and the minor uses of the farm during summer, but that this exception is again to be limited to one only of the modes of stock farming permissible under the other clauses of the lease.

No. 93.
Feb. 5, 1892.
M'Duff v.
Balfour.

I confess my inability to keep up with such elaborate interpolation in a contract if any other construction is available which can live with the words of the contract without addition or subtraction.

Now, I think there is such a construction. The whole difficulty of the theory from which I have turned arises from its assuming that one and the same year is running for the making the straw into manure and also for the putting that manure in the ground.

Is this necessary, either from the structure of the clause or from the relation of the two operations? I think it is not. As regards the phraseology of the clause, my own experience is that the attention of the reader is arrested by the fact that, looking to the description of the one process and the description of the other, each has a separate word to express the time prescribed, "annually" and "yearly," and the fact that the words may be or are synonymous makes it not the less noteworthy. Without making too much of this, I think it rather favours, and it certainly permits, the idea of a separate period being assigned to each. When we turn to the reason of the thing, the matter stands thus: The process of turning the straw into dung necessarily goes on all the year round, to a greater or less extent, and it necessarily has its beginning from the harvest when the crop of straw is ingathered. Towards the middle of this period comes what *de facto* is the time for applying the manure to the land at or before seed time. No one, suppose he were ever so anxious to comply with a lease, can either have put into the land by seed time 1890 manure made the summer and autumn after it is over, or can, except unwisely, put it into the ground in harvest or by Martinmas. The meaning of applying manure to the lands annually is, according to plain good sense, applying each season the manure then available. Thus, if we take each of the two clauses describing the two operations separately, it is complete in itself; we effect a separation which the good sense of the subject-matter justifies, and the two work harmoniously.

That the lease contemplates a yearly season for the putting manure into the land is, I think, shewn by the date named in the clause founded on by the tenant. All dung made to 15th June in the last year of the lease must be put into the land, this date representing the close of the time for sowing turnips, and therefore for manuring; what is made after 15th June is held to be legitimately waiting for next season, and therefore is to be taken over and paid for.

Accordingly, I think that the "yearly" application of manure contemplated

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

in the lease is an application at and before seed time, that being necessarily the period when the manure is applied to the land, and that period of the year being recognised by the lease. I may add that I am not at all surprised that this last point is not made more definite in expression, because the landlord's interests are completely protected whatever latitude this particular clause may permit to the tenant for the second of the two stages of the process, even if the word "yearly" were held to imply a period of a whole year.

The joint operation of the clauses which (1) compel the tenant annually to turn his straw into dung, (2) forbid him to sell or remove any dung, and (3) only pay him for dung made after 15th June in the year he leaves, makes it a matter of indifference to the landlord whether the tenant does or does not act like a man of sense as to the time of year when he manures the land, and makes it correspondingly indifferent to him whether the tenant have or have not a whole year from any given time to put the dung on the land. In other words, the key of the situation is the clause about the straw—so soon as the tenant is forced each year to turn the straw crop into dung, and knows he can make nothing of that dung except by putting it into the farm, he is sure to do so, and sooner rather than later, in order to reap the results.

In my opinion, therefore, this theory, that there is one period allowed for making the dung and another for using it, holds water; while the competing theory, that the periods are concurrent, does not. The result is that, in my judgment, the pursuer has not contravened the lease, and is entitled to the decree which he has obtained. It may quite well be that the number of cattle kept in summer during the latter years of the lease was greater than either he himself or the defender thought of when the lease was executed. But if the pursuer has not contravened the rules prescribed by the lease, the legal condition indicated in the defender's third plea has not arisen.

My judgment rests upon the terms of the lease, while the Lord Ordinary seems to have proceeded upon a more elaborate and comprehensive view of all the material submitted to his Lordship; but I have only one alteration to suggest in the interlocutor before us—I think we ought to affirm the interlocutor with this variance, that there be omitted from the fourth finding the following words, "unfair or," and "or of the rules of good husbandry."

LORD ADAM.—The Lord Ordinary has given the pursuer, who is the waygoing tenant of the farm of Kingsdale, decree for the sum of £291, 11s, being the value of the dung left by him on that farm at the expiry of his lease at Matinmas 1890.

The lease, which is dated in February 1885, contains a clause to the effect that the tenant shall leave to the proprietor or incoming tenant at the expiry of the lease the dung that may be made after the 15th of June immediately before the expiry, said dung so to be left to be paid for at a price to be fixed as the specified. It is upon this clause that the pursuer founds his claim.

It is not disputed that the dung in question was made after the 15th June immediately before the expiry of the lease—that is, after 15th June 1890—and it is not disputed that the sum decreed for is its value.

The answer of the defender, the proprietor, is that the tenant was bound by the terms of a clause in his lease to have converted the straw from which this dung was made into dung and to have applied it to the lands yearly—that is, practically in this case before the 15th June 1890—that the tenant is prohibited

from selling dung made from the straw in question, and that consequently he is not entitled to payment for this dung. No. 93.

The tenant in this case entered to the lands at Martinmas 1885. His first crop would therefore be reaped in September 1886, and according to my construction of the lease, the straw ought to have been made into dung and applied to the lands between that date and June 1887, and so on as regards each succeeding year's crop. The fourth crop, with reference to the straw of which the present question has arisen, would be reaped in September 1889, and in my view ought to have been made into dung and applied to the lands on or before June 1890. In this way the straw is annually consumed, and the dung applied yearly to the lands, as provided for by the lease. Feb. 5, 1892.
M'Duff v.
Balfour.

It is suggested, however, that part of the straw or dung of one year's crop may be applied as the manure of the succeeding year's crop, and part carried forward so as to manure the next succeeding crop—that is (to take, for example, the first year's crop under the lease), that the dung made from the straw of the crop reaped in September 1886 might have been in part applied on or before June 1887 as manure for that year's crop, and in part applied on or before June 1888 as manure for that year's crop. The answer is that that would not be applying such manure to the lands yearly in terms of the lease, but in two separate years. And so, to come to the crop in question—that reaped in September 1889—it is contended that part of the dung made from it might be applied to the lands on or before June 1890 as manure for the crop of that year, and part left to be carried forward and applied on or before June 1891 as manure for the crop of that year. But I say as before that that would not be applying the dung to the lands yearly, but partly in one year and partly in another. Moreover, I fail to see how the tenant, on whom the obligation lies to apply the dung to the lands, could be in a position so to apply it on or before June 1891, because he has ceased to be tenant of the farm at the preceding Martinmas, and has nothing to do with the lands thereafter. The tenant accordingly does not propose to apply the dung to the farm. He claims and has got decree for the price of the dung so carried forward in direct contravention, as it appears to me, of the provision in the lease that he shall not remove or sell any straw or dung grown or made on the lands let.

It is said, however, that this construction of the lease is inconsistent with the clause founded on by the tenant, which provides that the tenant shall leave to the proprietor or incoming tenant at the expiry of the lease the dung that may be made after the 15th day of June immediately before the expiry, the dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by arbiters.

The facts which raise this plea are not in dispute. It is not disputed that the dung was made from the straw of the second last crop, which was reaped in September 1889, and it is not disputed that the clause in question, whatever its proper construction may be, applies to the straw of that crop.

The clause in the lease founded on by the landlord provides that the tenant shall not sell or remove any turnips, . . . straw, . . . or dung grown or made on the lands, but shall annually consume the same on the farm for manure, and shall apply such manure to the lands yearly.

It is to be observed that this clause does not apply to the waygoing crop—that of 1890—which the tenant is entitled to sell or remove, but that it does apply to all previous crops.

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

It appears to me that the clause clearly provides for three things: one which the tenant is prohibited from doing, viz., selling or removing any straw grown or dung made on the lands; and two things which he comes under an obligation to do, (1) annually to consume the straw on the ground for manure, and (2) to apply such manure to the lands yearly.

I agree that the time which the tenant practically has to do this is between the reaping of the crop, presumably in September, and the June following, because between the latter date and Martinmas no manure is ever applied to the lands.

I think that the object and effect of the provision in question is to secure that the straw and dung of one year's crop shall be applied to the lands as the manure of the succeeding year's crop. The lease says that the tenant is annually to consume the straw for manure, and to apply such manure to the lands yearly.

In my view there is no inconsistency between the two clauses, because this clause assumes—and I think rightly assumes—that the straw of the previous crop shall have been made into dung and applied to the lands previous to the 15th June. But the inconsistency is said to lie in this, that if all the straw of the crop of 1889 had been made into dung before the 15th June 1890 there would be no straw left to make into dung to which this clause could apply. But I think that is a fallacy. The clause is adapted to a system of farming by which the stock is pastured in the fields in summer, but brought into the courts after harvest and fed there—a system which prevailed on the farm till the tenant changed it in the last year of the lease.

Obviously under this system very little straw would be required in summer when the stock was in the fields, but a good deal would be required for litter and food after the stock was brought into the courts until the succeeding Martinmas. For this the tenant had recourse to the straw of the new crop, and it is to the dung made from this straw that the clause in the lease founded on by the tenant applies, and the clause founded on by the landlord does not apply. And rightly so, because as the tenant on entry had paid for the straw and dung which produced the first crop, so it was right and proper that no part of the straw or dung of the last crop should be applied at his cost to produce a crop from which he was to derive no benefit. The clause in truth is not a clause introduced for the benefit of the tenant, but for the benefit of the landlord. It is a restriction of the tenant's right to remove the whole of the waygoing crop.

I demur therefore to the conclusion that, in order to reconcile the two clauses in question, it is necessary to imply any exception to the universality of the landlord's right to have the whole of the straw consumed on or before June in each year.

It is said, however, and quite truly, that straw is needed in summer for certain minor purposes about the farm, such as thatching, &c., and that if the tenant were bound to consume the whole straw of his crop before the 15th June, he would have none left for such purposes, but would have to buy. No doubt that would be so, and it is said that no tenant would become a party to a lease containing such a stipulation, and that a construction of the lease which leads to such a result would not be a reasonable construction. Probably, however, the tenant would be well aware that the landlord, except during the last year of the lease, had no interest to insist on the strict fulfilment of the stipulation, seeing that all dung made from straw

reserved for such purposes would ultimately be applied to the lands, and if the landlord chose to insist on it during the last year of the lease, and the tenant had to buy straw, he would suffer little prejudice, because he would get the value back in the shape of the dung into which it had been converted. But however that may be, I am of opinion that the tenant has bound himself to apply the straw grown and dung made of each year's crop as the manure of the succeeding year's crop, and that the dung for which he seeks payment has been made in contravention of his lease.

No. 93.

Feb. 5, 1892.

M'Duff v. Balfour.

If the tenant in this case had been content to carry on the farm on the system on which it had been previously carried on, and reserved as usual only a small portion of the straw for the minor purposes about the farm, probably nothing would have been heard about the landlord's right to have had the dung made from that straw applied to the lands, and he would no doubt have paid for all the dung left by the tenant without objection, although a small part of it might have been the produce of that straw.

But when the tenant for his own benefit introduced during the last year of the lease a new system of management, and reserved, in order to carry out his system, at least one-half of the straw of the previous year's crop, with the result of producing from that straw a most unusual quantity of dung, which, as the evidence shews, no incoming tenant would buy, then I am not surprised that the landlord should insist on what he considers his rights under the lease, and should decline to pay for such dung.

In my view the landlord is right in his contention, and I cannot find the tenant entitled to payment of dung which by the lease he is, in my opinion, prohibited from selling, and was bound to have applied to the lands as manure for the previous year's crop.

LORD M'LAREN.—I have had an opportunity of considering your Lordship's opinion and also that of Lord Adam, and I concur in the opinion of your Lordship, and have very little to add. I should just like to say that in construing the obligation in the lease it must be kept in view that all leases deal with a number of annual operations, but as the operations of agriculture are dependent on the seasons, it would be difficult, and indeed impossible, to hold that all obligations have the same period of commencement and termination. The period from and to which annual operations run must be affected by the nature of the annual operations. Especially is this the case where one operation is dependent on the other.

In the present case the lease deals with two distinct operations in the same clause, namely, the consumption of the straw grown on the farm, and the application of the manure to the ground. The consumption of the straw, as I understand, includes both what is consumed as food and what is consumed as bedding, both contributing to the manurial product, and the two operations, according to the lease, are to be performed annually. There is a slight variation of phrase in the case of the two obligations, but nothing is said as to the commencement of the annual period in either case. I think, consequently, that the sound construction in the case of the obligation to consume the straw is, that the term of the commencement is the earliest period in each year at which it is possible for the straw to be consumed. That being assigned as the term of commencement, I think the period for the consumption of the straw continues during the whole following year, and the tenant has a period of twelve months—say from

No. 93.
Feb. 5, 1892.
M'Duff v.
Balfour.

October to October—within which to complete the operation, because the feeding of cattle is not like the operations of ploughing or manuring, which can only be done at one time of the year; but as the animals must be fed every day, and there is no obligation in the lease to turn them to grass at any particular time of the year, the consumption of the straw may be spread over the whole year.

There is also an annual period for the fulfilment of the obligation to apply the manure made on the farm to the ground, but it cannot well begin at the same time as the obligation to consume the straw, because in the proper course of husbandry the preparation of the ground for the green crop commences in March and is completed in June. According to my reading of the obligation in the lease relating to the consumption of the straw, it is a physical impossibility that the whole manure derived from the straw of the crop of one year can be put into the ground between March and June of the next, and I will not suppose that two sensible persons entered into a contract binding one to perform an impossibility. Accordingly it seems to me that if the tenant has a year to perform each of the stipulated obligations, the annual periods must be different in each case, and the tenant has from spring to spring to fulfil the obligation to apply the manure to the land. This view is confirmed by the fact that there is a provision in the lease for the taking over by the landlord of the manure remaining unapplied at the term of Martinmas in the last year of the lease. If the true construction of this lease is that the whole manure must be put into the ground before Martinmas, there would be nothing left to be taken over, and it would be quite unnecessary to provide for any manure being taken over at a valuation.

Once the above construction of the obligation in the lease is reached, it becomes very difficult for the landlord to maintain that the tenant is in breach of it on the ground that a larger quantity of manure has been left than was anticipated. I quite admit that it was possible for the tenant, by violating some of the other provisions of the lease, to have had an excessive quantity of manure remaining over at the end of the lease, but no such violation is established to have been committed here. The whole quantity of land which the tenant was bound to put into green crop was so used, and it is clearly proved that the land was adequately manured. Accordingly we must hold the quantity left over to be nothing more than the result of the application of the conditions of the lease to a somewhat different course of management than was contemplated by the parties at the date the contract was entered into, but still a course of management quite within the tenant's power to adopt.

LORD KINNEAR.—The question is one of considerable difficulty, and I agree with the Lord Ordinary that the difficulty is not diminished by the proof. The real difficulty arises in the construction of the contract, from the necessity for applying its conditions to a state of facts which was not contemplated at the date of the bargain. But whether it was contemplated or not we must inquire whether it falls within the scope of the contract, and if it does, the contract must receive effect.

There can be no question that the amount of manure which the pursuer requires his landlord to pay for is not only exceptionally large, but that it exceeds the normal amount to so great an extent that the landlord could not hope to obtain any benefit from the purchase at all corresponding to the price

that he has to pay. But that is not a consideration which we can take into account, if the contract obliges him to purchase and pay for it. Now, in order to determine whether it does so or not, I agree, as I understand, with all your Lordships, in thinking that we are not called upon to consider any question of good or bad husbandry, or to compare the tenant's management with any system of cultivation generally adopted in that part of the country. The only question is, whether the manure which the pursuer requires the landlord to take over at a price ought, under the conditions prescribed by the lease, to have been put into the land before the 15th of June 1890, because I think the one ground of defence which requires consideration is that the tenant is proved to have had on his hands on the 15th of June 1890 a large quantity of unconsumed straw which the lease required him to convert into manure and apply to the land before the 15th of June; and therefore that when he proceeded to convert it into manure after the 15th of June he was already in breach of contract, so that he came to demand payment as at the end of the year, when he was leaving the farm, for what must have been put into the land in spring, if the conditions of the lease had been performed.

Now, it is clear enough that the clause on which the pursuer relies does not in itself impose expressly or by implication any restriction whatever upon the quantity of straw which the tenant may convert into manure after the 15th of June, because the clause is that "the tenant shall leave to the proprietor or incoming tenant, at the expiry of his lease, the dung that may be made after the 15th day of June immediately before the expiry; all dung made previously must be applied to the lands hereby let for the benefit thereof, said dung so to be left to be paid for by the proprietor or incoming tenant at a price to be fixed by two arbiters. . . ." So far as that goes the tenant might begin making dung on the 16th of June, and go on making it till the expiry of the lease, and the proprietor or incoming tenant would be bound to take it all. But then it is said that there are other conditions which impose a restriction not found in the clause itself, and that, when all the clauses applicable to this matter are read together, they not only require the tenant to put into the land all the dung which he has actually made before the 15th of June, but further require him to convert into manure for that purpose all the straw, or at least the great bulk of straw of the last year's crop, so that it may be ready to be applied before the 15th of June. I am unable to find any such condition in the lease.

I agree that if the tenant had unduly withheld the straw which remained unconverted in June 1890 from the turnip-break of that year, so as to leave the green crop unmanured, there might have been very good ground for maintaining that he was acting in fraud of the contract, and endeavouring to get money for manure which he was bound to put into the land without payment. There is some evidence for the defender to shew that this is what he did, but I agree with the Lord Ordinary that the defender's case on this point is not proved. Taking it, therefore, that the manure made before June was all put into the land, and that the land was thereby well manured, the question is whether the lease still prohibited the tenant from having any considerable quantity of unconverted straw after the 15th of June. Now, the clause founded on by the defender seems to me to contain two distinct and separate stipulations, and I agree that if the tenant has failed to perform either of them he is in breach of the contract, and cannot recover. The first is that the tenant who is prohibited, except under certain specified circumstances, from selling any . . . straw,

No. 93.

Feb. 5, 1892.

M'Duff v.
Balfour.

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

. . . or dung of any kind that may be grown or made on the lands, shall annually consume the same on said farm for manure"; and the second is, that the tenant "shall apply such manure to the lands yearly." There are thus two entirely distinct operations enjoined on the tenant—first, the consumption on the farm of the straw, &c., grown there, and second, the application of the resulting manure to the lands. Now, I cannot see any ground for alleging that the tenant has failed to perform the first of these operations. Straw may be consumed in various ways, but it is not questioned that straw which has been used for litter during the year, and so converted into manure, has been consumed in terms of the lease. If the tenant had failed to consume the whole straw produced on the farm between the reaping of one crop and the reaping of the next, and so had left unconsumed straw on the farm, he would have been in breach of the lease, but there is no evidence that he has not fully performed the obligation to consume the straw. It is for straw converted into manure in terms of the lease that he now demands payment. I agree with your Lordships and the Lord Ordinary that there is no evidence that any material quantity of the straw of crop 1888 was used in making that manure.

But then it is said that the dung is also to be applied yearly, and that if the tenant has unconverted straw in June he cannot comply with that condition, because manure made from that part of the straw cannot be put into the land in the same year as that made from the other portion of the straw crop, which has been already consumed. To this there are two answers. If the condition that the manure shall be applied yearly means that the tenant is to have twelve months within which he is to complete his application of the manure made from any particular crop, it is obvious that that period cannot begin to run from exactly the same date as the twelve months during which the crop is to be consumed. The two operations cannot be simultaneous, because the manure must be made in the first place, and then applied after it is made. The defender's own case is that at least five-sixths of the whole is properly applied at the potato and turnip seed time, and if that be so, it seems to follow that the other process must have begun at a considerably earlier period. But if the tenant begins to apply in June, puts in all he has already made, and then goes on to make more and puts that into the land at the next turnip and potato seed time, he will have satisfied the condition that the manure shall be applied yearly by putting it in between June and June.

But then, in the second place, the lease does not prescribe the time of year at which the manure is to be applied. It is true that according to the evidence the usual time for tenants on this estate to manure their land seems to have been immediately before the sowing of the green crop, but that is not required by the lease. All that is required is the annual consumption of the straw crop on the farm. The lease prohibits the tenant from selling that crop, and requires him to convert it into dung and apply it to the land yearly; but that may be satisfied by his putting it into the land at the most convenient time for himself. I think, therefore, that the second answer to the defender's contention is, that the lease does not prescribe any particular time for the application of the manure to the land, but only requires that it shall be applied yearly. It seems from the evidence that, having regard to the system of agriculture practised in the district, the most advantageous time for applying the manure to the land was at or about the sowing of the green crop, and that no doubt was the time at which the parties, when they entered into the lease, contemplated

that it would be applied, not because the lease prescribed it, but because they assumed that the tenant in the exercise of his judgment would put the manure into the ground at this useful and convenient time. That result was not provided for by any regulations in the lease, but was left to be attained by the operation of the ordinary motives which guide a man in carrying on his business. If, however, the tenant changes the system of management and adopts a new one, which disturbs the ordinary recurrence of the convenient times for making manure, the motives which were previously supposed to operate, so as to lead the tenant to apply the manure to his land in June, cease to operate, and the question arises whether there is in the lease anything to prevent the tenant making such a change and applying the manure to the land at a different time. Some agriculturists think it better to put in manure in autumn or winter. Others think it better to put it in at seed time. Which is the better course in any particular case may depend upon circumstances peculiar to the farm or to the district. There is nothing in the lease to bind the tenant to take the one course rather than the other. It is said that the lease must be read with reference to the system and management in practice at its date, and that according to that system the manure must all be applied before the 15th of June. But the tenant was not bound to follow that system throughout the lease, but was quite entitled to depart from it, provided he did not violate the rules of good husbandry. And if, during the currency of the lease, he had changed his system of management, and begun feeding cattle in stalls in summer to a great extent, and if, as some of the witnesses say, the only useful time for manuring the land were in June, the practical question would then have arisen, whether the disadvantage of making a great quantity of manure after the 15th of June was a sufficient reason for abiding by the old system. The tenant would have had to choose between alternative courses, and I think he would have been entitled to take that which seemed to him to be the most advantageous, irrespective of the opinion of his landlord. It seems to me that if such a question had occurred during the course of the lease it would have been quite out of the power of the landlord to interfere and say that the tenant was not to apply the manure except in the manner contemplated when the lease was entered into. If the tenant had a great quantity of manure in hand after the middle of June, the landlord might prohibit him from selling it, and it would be a question for the tenant whether he would make manure which he could not sell nor dispose of in any way except by putting it into the ground in winter.

In the case which has happened, the tenant made a great quantity of manure after the month of June in the last year of his lease, and so threw on his landlord the result of his change of system. The question is, whether there is anything in the contract to prevent him doing so? and I think there is nothing. We are all agreed that there is nothing in the lease to prevent the tenant changing his system of management; is there anything to enable the landlord to take the manure which the tenant has in hand in consequence of the change without paying for it? I think there is not, because the clause in the lease treats of manure made after June in the last year of the tenant's occupancy, and provides that the tenant shall leave it on the farm, and that he shall be entitled to payment for it from the proprietor or incoming tenant. There is nothing to limit the proportion of manure to be left in this position. It is said that the lease contemplates that only a small proportion of the straw crop should be left

No. 93.

Feb. 5, 1892.

M'Duff v.

Balfour.

No. 93.

Feb. 5, 1892.
M'Duff v.
Balfour.

over after the land has been manured, and it is accordingly suggested that the tenant's possession of such straw is really accounted for by a relaxation of the conditions of the lease which it was understood between the parties would be made. I can find no ground for such a conclusion, but the tenant is—it seems to me in accordance with his contract—in possession of manure at the end of his occupancy, and is entitled to payment for it. No doubt the extent of his claim presses somewhat hardly upon the landlord, because the operation of the lease is to throw on the landlord a burden which neither party contemplated at the time when the contract was entered into, and to confer on the tenant a corresponding advantage. The result may not be altogether equitable. But when people make a contract of this kind, containing very specific and stringent stipulations for the regulation of their future rights and interests in circumstances which they do not very clearly foresee, the consequences are very apt to be prejudicial to one or other of the parties. Where this happens, as it frequently does, it is impossible for the Court to make a new contract for them different from that which they have made for themselves, or to readjust their interests as they might have done if they had not been already bound. We must construe the contract they have made according to its terms.

THE COURT pronounced this interlocutor:—"Vary said interlocutor by omitting from lines 14-15 thereof the words 'unfair or,' and the words 'or the rules of good husbandry': *Quoad ultra* adhere to said interlocutor, and decern."

T. TEMPLE MUIR, S.S.C.—STRATHERN & BLAIR, W.S.—Agents.

No. 94.

Feb. 5, 1892.
Irvine v.
M'Hardy.

GEORGE IRVINE, Pursuer (Respondent).—*A. J. M. Morison.*
GEORGE M'HARDY, Defender (Appellant).—*A. J. Young—T. B. Morison.*

Writ—Assignment of lease—Docquet—Holograph of Justice of Peace—Conveyancing Act, 1874 (37 and 38 Vict. c. 94), sec. 41.—Held that the necessity for a notarial docquet being holograph was not removed by the provisions of the 41st section of the Conveyancing Act, 1874, and that a deed bearing to be signed for the granter by a Justice of the Peace was invalid in respect that the docquet signed by the latter was not holograph.*

1st DIVISION.
Sheriff of
Banffshire.

CHARLES M'INTOSH was tenant of certain subjects in the village of Tomintoul, Banffshire, under long lease from the Duke of Richmond.

On 19th March 1891 he granted an assignment of his lease to George M'Hardy, who afterwards occupied the subjects in question.

George Irvine, assignee of the lease under a subsequent assignment by M'Intosh, dated 14th April 1891, presented a petition in the Sheriff Court of Banffshire against M'Intosh and M'Hardy, praying that they should be ejected from the subjects and interdicted from interfering with the pursuer's occupation of them.

* The Conveyancing Act, 1874, sec. 41, provided,—“Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter who . . . is unable to write, by one notary-public or Justice of the Peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses. . . .”

He averred that M'Hardy's "pretended assignation does not convey the said lease or anything thereunder; besides the said pretended assignation is not executed in terms of law, is not signed or executed by the pretended granter thereof, and, in particular, the pretended docquet by the Justice of the Peace is not in the handwriting of the said Justice of Peace therein named, but is in the handwriting of John Macdonald, auctioneer, Tomintoul" * No. 94.
Feb. 5, 1892.
Irvine v.
M'Hardy.

The defender M'Hardy, who alone appeared, admitted that the docquet was not holograph of the Justice of the Peace who subscribed the deed.

The pursuer pleaded, *inter alia*;—(1) The pursuer being in the right of said lease is entitled to the declaration prayed for. (2) The defender George M'Hardy having groundlessly and unwarrantably claimed right to enter upon the said subjects, and the defender Charles M'Intosh having refused to quit the same, the pursuer is entitled to decree of ejection and interdict as craved. (6) The said pretended assignation not being probative, and not having been signed or executed by the pretended granter thereof, the same can receive no force or effect in law, and the said objections being pleadable by way of exception, the defences ought to be repelled, and the prayer of the petition granted.

The defender pleaded, *inter alia*;—(3) The assignation in favour of the defender George M'Hardy, though informally executed, may be set up in terms of section 39 of the Conveyancing Act, 37 and 38 Vict. c. 94, and the defender George M'Hardy is entitled to have it set up accordingly.†

The Sheriff-substitute (Grant), on 23d July 1891, pronounced this interlocutor:—"Finds in fact that the docquet appended to" the assignation dated 19th March 1891 "is not holograph of John Grant, the Justice of the Peace executing the same, and in law that the said writ is not executed in terms of law, and of no force or effect: Therefore repels the third plea in law for the said defender, and sustains the first and second pleas in law for the pursuer, and therefore finds and declares, decerns ejection against the defenders as prayed for, and declares the interim interdict already granted perpetual, and decerns," &c.‡

* The docquet was in these terms:—"By authority of the within named and designed Charles M'Intosh, who declares that he cannot write on account of bodily weakness, I, John Grant, Justice of Peace for the county of Banff, subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard authority given to me as aforesaid, and heard these presents read over to the said Charles M'Intosh." Charles M'Intosh appended his mark, and the two witnesses attested the signature.

† The Conveyancing Act, 1874, sec. 39, enacted,—“No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall be upon the party using or upholding the same”

‡ “NOTE.— After full consideration, I give effect to the pursuer's objection for these reasons. The point settled in *Henry's* case, where all the authorities are reviewed, is clear, and the ground on which that judgment, following on these authorities, proceeds is also clear. It is the exceptional position of a notary's docquet in these cases, as is fully set forth in the opinions of the learned Judges, and, as far as I can see, that ground is as cogent now as it was then. The docquet is a solemn record by a public officer (now he may be a Justice of the Peace, formerly he could only be a notary, but that does not affect

No. 94. On appeal the Sheriff (Guthrie Smith) affirmed his Substitute's interlocutor.

Feb. 5, 1892.
Irvine v.
M'Hardy.

M'Hardy appealed to the Court of Session, and argued;—The 41st section of the Conveyancing Act, 1874, set forth in detail what was required in such a docquet as the present, and for the first time allowed a Justice of the Peace to subscribe where the granter was unable to do so. If it had been intended that the docquet should be holograph of the Justice, that would have been stated there. The case of *Henry*,¹ relied upon by the Sheriff-substitute, was decided prior to 1874 when the change in the law took place. 2. In any view, the docquet could be set up by proof under the 39th section of the Act of 1874. The omission as to its not being holograph was an "informality of execution" such as that section was designed to meet.² What it was desired to prove was that the Justice signed the docquet in the presence of the witnesses.

Argued for the respondent;—The Sheriffs had decided the case upon the terms of the 39th section of the Conveyancing Act, 1874. But the 41st section was also very important. The requirements to the validity of a docquet prior to the Act of 1874 were still necessary, except in so far as they had been expressly dispensed with.³ Accordingly, the docquet must be holograph of the Justice.⁴ Further, section 39 did not apply to notarial documents. In terms it only applied to such writings as were "subscribed by the granter or maker thereof," and the notary was not the granter of the deed here.

LORD PRESIDENT.—I think the Sheriffs are right in this case. The first question is, what was the law prior to 1874, and as to that the case of *Henry* leaves no doubt. The law required the docquet to be holograph, otherwise the deed was not well executed. The reasons which lead to that result are so fully discussed in the Sheriff-substitute's note that it is unnecessary for me to enter into the grounds of the highly authoritative judgment in the case to which I have referred.

In the second place, we have to consider whether the Act of 1874 has made any change, and two sections of that Act have been founded on by the appellant in his argument. As regards the 41st section, it is said to do away with the necessity of the docquet being holograph. It introduced two changes—in the first place, it enabled one notary-public or Justice of the Peace to take the place of two notaries, and, in the second place, it also altered to some extent the form

the argument) of certain concurring facts and circumstances; and the witnesses to the docquet are not merely witnesses to that officer's signature, but also to the truth of his record. Then, what is it that the defender asks to be allowed to prove in this case? I can only take it that he wants to prove what is necessary to make the docquet a good docquet—the truth of what it bears record of; but the 39th section of the Conveyancing (Scotland) Act, 1874, on which he founds, contemplates no more than the proof that the writing in question was subscribed by the maker and witnesses, which, if proved in this case, would still leave him short of what is necessary to maintain his position. There are strong considerations of public policy against weakening any of the safeguards provided against an abuse of the power of notarial subscription on behalf of another party. I cannot find warrant for the course the defender proposes to take, which tends in this direction, under the section of the statute on which he founds; for from its language I do not take it to be applicable to the present case. . . ."

¹ *Henry v. Reid*, Feb. 10, 1871, 9 Macph. 503, 43 Scot. Jur. 237.

² *Gardner v. Lucas*, Feb. 8, 1878, 5 R. 638, Lord President Inglis, p. 646.

³ *Atchison's Trustees v. Atchison*, Jan. 21, 1876, 3 R. 388, Lord Deas, p. 393.

⁴ *Henry v. Reid*, *ut supra*.

of the docquet itself. The question is, whether there is implied in the section the further change that the docquet is not to be holograph. In the opinions in the case of *Henry* to which I have referred the Judges point out the high importance of the docquet, and that it is itself really a part of the instrument. As the late Lord President said in the case of *Henry* (9 Macph. 507),—"The legal equivalent for the subscription of a person physically incapable of signing his own name is not merely the notary's signature, which would be a very imperfect security for compliance with the requirements of the law, but the notary's docquet signed by him and the witnesses, in attestation of the special mandate conferred by the granter of the deed." I put the question thus: Do these words apply to a docquet under the Act of 1874? I think they do; and I think further that the whole reasons remain for the docquet being holograph of the official who signs it. No further relaxation of the law in this respect is implied in the two sections to which I have referred—indeed, it appears to me to be quite the other way, and Mr Morison, for the respondent, said with some plausibility that the opening words of the 41st section favoured his contention.

Turning to the 39th section, I think it puts the appellant into somewhat of a dilemma. If he says that the deed, instrument, or writing which he seeks shall be held to have been subscribed is the docquet, a decerniture to that effect would not advance his case. The Court would pronounce a finding to the effect that although the docquet was not holograph it had nevertheless been proved to have been subscribed by the maker. But that would not do him any good. If, again, he says that it is the assignation itself which he asks the Court to hold has been subscribed, he will thereby put himself out of Court, for it has not been subscribed by the maker of the deed, but by the Justice of the Peace himself.

It seems to me to be unnecessary to discuss whether there has been an informality of execution in the terms of the 39th section. I think the case stands higher than mere formality; but because of the other reasons on which the Sheriffs' judgment may be supported it is, in my view, needless to enter into that question.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT dismissed the appeal.

ALEXANDER MORISON, S.S.C.—D. HOWARD SMITH, S.S.C.—Agents.

THE LORD ADVOCATE, Pursuer (Respondent).—*Lord-Adv. Pearson—Sol.-Gen. Murray—A. J. Young.*

No. 95.

GRAHAM MACFARLANE AND OTHERS (Dunlop's Trustees), Defenders (Reclaimers).—*D.-F. Balfour—Johnston—Pitman.*

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

Revenue—Legacy-duty—Moveable estate directed to be invested in purchase of land—Entail—Act 36 Geo. III. c. 52, secs. 12 and 19.—Section 19 of the Act 36 Geo. III. c. 52, enacts,—“That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty,” the duty being payable under sec. 12, “as if the annual produce thereof had been given by way of annuity.”

Then follows this proviso,—“Provided, nevertheless, that in case before the

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

Testamentary trustees were directed, during the period of six years next after the testator's death, to realise the residue of the trust-estate, consisting of moveables to the extent of about £350,000, and therewith to purchase land to be entailed on A and a series of heirs. The trustees expended £21,000 on the purchase of land. At the end of the six years A presented a petition for disentail, and having by private arrangement obtained the consents of the next three heirs on payment of compensation for their respective interests, as ascertained by an extrajudicial valuation, he obtained a decree ordaining the trustees to convey to him in fee-simple the lands and the moneys held by them for investment in land.

The Crown thereupon claimed from the trustees legacy-duty upon the capital of the whole residue of the moveable estate, under the 19th section of the Act 36 Geo. III. c. 52, on the ground that A had right to the whole thereof, and had, in the sense of that section, "become entitled to an estate of inheritance in possession in the real estate to be purchased therewith." The trustees maintained (1) that the duty fell to be charged only on the succession which had opened to A under the will, and that as he was merely the first of a series of beneficiaries in succession, the duty should be charged on his interest as an annuity, the proceedings by which he had acquired a right in fee-simple being transactions *inter vivos* which did not affect his succession; and (2) alternatively, that he was entitled to deduct from the amount of residue to which he had right the compensation paid by him to the three next substitute heirs for their consents to the disentail.

The Court sustained the claim of the Crown without deduction, holding (1) (following the interpretation of the English Judges in *De Lancey*, L. R. 4 Exch. 345, 5 Exch. 102, 6 Exch. 286, 7 Exch. 140) that the words in the proviso in section 19 of the Act 36 Geo. III. c. 52, "shall become entitled to an inheritance in possession in the real estate to be purchased therewith," mean shall become entitled to an absolute interest in the money bequeathed to be laid out in the purchase of land; and (2) that the fact that A had not "become entitled" to such an absolute interest by the will, but by the voluntary arrangement in the disentail proceedings, did not prevent the proviso applying to his case; and (3) that the sums paid to the next heirs of entail for their consent did not fall to be deducted from the amount liable to duty.

1ST DIVISION. ALEXANDER DUNLOP, of Carnduff and Doonside, died on 30th September 1883, leaving a trust-disposition and settlement dated 28th July 1875, and two holograph testamentary writings.

By the fifth purpose of the trust-disposition the trustees were directed to retain and accumulate for six years after the truster's decease the whole rents, interests, profits, and proceeds of the residue of the estate, and to apply them in the way therein specified.

The sixth purpose was as follows:—"During the said period of six years my said trustees shall sell and realise the whole of the residue and reversion of my moveable estate of every kind, and of the whole of my heritable bonds, feu-duties, and ground-annuals, and my house and other heritable property in Glasgow and out of the United Kingdom," [with certain specified exceptions]; "and my said trustees shall look out for and purchase with the proceeds of said residue and reversion, such lands or landed estate or estates in Scotland as they may consider proper, and shall entail the same and my other landed estates as after mentioned: . . . Declaring, however, that although it is my wish and desire that my said trustees should realise the residue and reversion of my said

estates, and purchase the said lands or estates during the said period of six years, I hereby declare that they shall be entitled to use their own discretion as to this, and if they consider it necessary, they shall be entitled, and are hereby empowered to delay the said realisation, and also the said purchase or purchases till such time or times as may seem to them most convenient and suitable for such realisation and purchases: Declaring, however, that after the said period of six years have expired, the institute or the heir of entail in possession or entitled at the time to possess the lands and estates to be purchased as aforesaid, under the destination hereinafter written, shall be entitled to demand and receive the interest and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always of such expenses and charges as may be incurred by my said trustees in the management and execution of the trust, until the said lands or estates are purchased and entailed, and the whole purposes of the trust fulfilled."

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dun-
lop's Trustees.

By the seventh purpose the trustees were directed, as soon as convenient after the said period, to execute a deed or deeds of strict entail of the lands and estates to be purchased in terms of the sixth purpose, and also of certain lands and estates which were named, and of any other properties which might belong to the truster at his death, to and in favour of William Hamilton Dunlop, solicitor, Ayr, and the heirs-male of his body, according to their seniority, and the heirs-male of their bodies, according to their seniority, whom failing, to other substitutes in succession.

At the truster's death he was possessed of heritable property in Scotland and abroad, and also of personal property of the value of about £350,000.

The trustees accepted office, and out of the residue vested in them they purchased certain lands in Ayrshire at the price of £21,000, but made no further purchases.

The period of six years expired on 30th September 1889.

On 11th January 1890 William Hamilton Dunlop, who would have been the heir of entail in possession had the truster's directions as to the investment of the residue been carried into effect, presented a petition to the Court under the Entail Acts, 1848 to 1882, for authority to acquire in fee-simple the whole heritable and personal property vested in the trustees, with the exception of a sum of £20,000, which was set apart to meet annuities, and the sums required for Government duties, expenses, and other liabilities of the trust.

In order to obtain the authority craved, the consents of the three next heirs, who were three of Mr Dunlop's sons, all in pupillarity, were required. A curator *ad litem* was appointed to each, and by extrajudicial arrangement, as set forth in the defender's answers, quoted below, the values of their expectancies were fixed to be respectively £89,145, £10,000, and £1350. On 22d November 1890 the Lord Ordinary interposed his authority to the proposed transaction, and authorised and decreed the trustees to pay and convey to William Hamilton Dunlop in fee-simple the lands and estates mentioned in the petition and the whole of the personal property and estate therein also specified, and any other property and estate vested in the trustees, with the exception of (1) a sum of £20,000 to meet annuities; and (2) a further sum of £20,000 to pay or provide for the duties payable to Government, and the expenses of executing the trust.

The Lord Advocate, as representing the Crown, now brought an action against the trustees for payment of legacy-duty upon the sum of £350,000, being the capital of the personal estate held by the trustees, and falling

No. 95.

Feb. 6, 1892.
 Lord Advocate v. Dunlop's Trustees.

to be paid over by them to Mr Dunlop. Mr Dunlop being a descendant of a brother of the trustor's father, the duty calculated at 5 per cent amounted to £17,500, the sum sued for, with interest chargeable at 4 per cent from 22d November 1890.

The pursuer founded upon the Act 55 Geo. III. c. 184, schedule part iii., under which provision is made for the payment of duty on legacies, and on the residue of the personal estate of a deceased, and in particular upon the terms of the 19th section of the Act 36 Geo. III. cap. 52.*

The defenders stated :—"At the time the petition for disentail was presented the amount of personal property held by the trustees was in value about £340,000, of which sum the trustees were directed by said interlocutor to retain £20,000 for the payment and security of certain annuities, and £20,000 to meet Government duties, the expenses of the trust, and any other liabilities payable out of the trust-estate. Before the said William Hamilton Dunlop could obtain the authority of the Court contained in said interlocutor, it was necessary for him to obtain the consents of the three next heirs, his three eldest sons, and to pay or secure the value of their interests or expectancies in the trust-estate to be acquired by him in fee-simple. The three next heirs above named were in pupilarity, and a separate curator ad litem was appointed by the Court to each of them. The values of the expectancies or interests of the three heirs in the whole trust property to be acquired in fee-simple, including the heritable properties, were ascertained and fixed to be respectively £89,145, £10,000, and £1350. The proportions of these sums, representing the value of the expectancies and interests of the three heirs in the personal property alone, were £72,700, £8160, and £1100 or thereby. A special arrangement was come to with the curator ad litem to Alexander Hamilton Dunlop, the first heir, whereby, instead of making payment of the said sum of £89,145, William Hamilton Dunlop vested a sum of £153,073 in trustees, part of which sum is to be paid to Alexander Hamilton Dunlop at certain dates, and the remainder is to be liferented by William Hamilton Dunlop, the father, and on his death is to be paid over to Alexander Hamilton Dunlop. The sums of £10,000 and £1350, representing the compensation to the second and third heirs, were vested in trustees for their behoof, to be held until they respectively attain majority, when said sums are to be paid over to them." They further stated that, taking the value of the personal estate to be acquired in fee-simple at £300,000, the legacy-duty upon which, calculated by way of annuity in terms of section 12 of the

* The Act 36 Geo. III. cap. 52, sec. 19, enacts "that any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate: unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons and raised and paid out of the fund remaining to be applied in such purchase."

Act 36 Geo. III. cap. 52,* for which they admitted liability, would amount to about £8700. "The said proceedings and arrangement come to between William Hamilton Dunlop and the three next heirs in no way alter the position of the personal estate which was vested in the defenders as trustees foresaid as regards liability in legacy-duty. These proceedings and arrangements formed purely *inter vivos* transactions, in terms of which William Hamilton Dunlop purchased the consents of the three next heirs in exercise of a power competent to him in virtue of the Entail Acts, which were passed subsequent to said Act 36 George III., cap. 52, and none of which impose any legacy or succession-duties upon heirs of entail taking advantage of them, or enlarge the rights of the Crown. In any event, in ascertaining the amount of the so-called 'estate of inheritance in possession in the real estate' to which the said William Hamilton Dunlop is said to have become entitled, the sums paid to the three next heirs as the value of their contingent and defeasible expectancies or interests, so far as applicable to said personal estate, must be deducted. The transactions whereby the said William Hamilton Dunlop became entitled to the said personal estate in fee-simple are outside the province of the defenders as administrators of the trust-funds, and in no way affect the succession or bequests under the trust-disposition and deed of settlement of the late Alexander Dunlop; and as the present action depends upon the interpretation put upon the said transactions, the said William Hamilton Dunlop ought to be sisted as a defender along with the present defenders."

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

The pursuer pleaded;—(1) The clear residue of the testator's personal estate administered by the defenders as trustees, and held by them for the said William Hamilton Dunlop, or paid by them to him, is liable to duty under the Legacy-Duty Acts. (2) The said William Hamilton Dunlop having acquired in fee-simple a right to the said residue, and thus become entitled to an estate of inheritance in possession, legacy-duty is chargeable on the capital of the residue under section 19 of the Act 36 Geo. III., cap. 52.

The defenders pleaded;—(1) All parties not called. (3) Upon a just construction of section 19 of the Act 36 Geo. III., cap. 52, and the Legacy and Succession-Duty Statutes, duty is only chargeable calculated by way of annuity. (4) In any event, and if duty is chargeable upon the capital, the sums paid as compensation by the said William Hamilton Dunlop to the three next heirs fall to be deducted, so that the duty payable by him may be charged upon the beneficial interest actually acquired by him by the transactions before mentioned. (5) The three next heirs never having had, and never having "become entitled to, an estate of inheritance in possession in the real estate" in question, the sums paid to them for their consents to the disentail are not liable in legacy-duty.

The Lord Ordinary (Wellwood), on 4th December 1891, pronounced

* The 12th section enacts, "that the duty payable on a legacy or residue or part of residue of any personal estate given to . . . different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue or part of residue so given, as in the case of a legacy to one person, and where any legacy or residue, or part of residue, shall be given to . . . different persons in succession, some or one of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who under or in consequence of any such bequest shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity."

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

this interlocutor:—"Finds that Mr William Hamilton Dunlop having become entitled absolutely to the clear residue of the personal estate of the deceased Alexander Dunlop, duty is chargeable on the capital thereof at the rate of five per cent; therefore repels the defences, and appoints the cause to be enrolled, in order that the balance due to the pursuer on that footing may be adjusted, reserving all question of expenses, and grants leave to reclaim." *

* "OPINION.— . . . The question which I have to decide is on what footing is legacy-duty to be paid on the estate so far as personal thus acquired in fee-simple by Mr William Hamilton Dunlop? The defenders maintain that legacy-duty is only chargeable calculated by way of annuity; and alternatively that a deduction falls to be made in respect of sums paid or secured by Mr William Hamilton Dunlop in order to obtain consents to disentail the money. The Crown maintains that duty is chargeable on the capital of the whole clear residue. The solution of this question depends upon section 19 of the Act 36 Geo. III. cap. 52.

"The case is a novel one so far as regards legal decision. Counsel for the Crown stated that such a claim had been more than once made and admitted, and that it had never been made and refused. The only weight which I attach to this statement is that it is an answer to the statement on the other side that the claim is unprecedented.

"Section 19 of 36 Geo. III. cap. 52, is somewhat ambiguously expressed, and in language more intelligible to English than to Scottish lawyers; but the following is, I think, the true construction. The leading provision is that personal estate directed to be applied in the purchase of real estate shall pay duty on personal estate, that is out of capital. This is the keynote to the section, and but for one exceptional case no more need have been said.

"The clause then proceeds to say that if the bequest is given to be enjoyed by different persons in succession, each person entitled in succession shall pay duty 'in the same manner as if the same had not been directed to be applied in the purchase of real estate.' To ascertain the meaning and effect of these words, it is necessary to examine section 12 of the Act. From that section appears (1) that if the persons entitled in succession to the enjoyment of a legacy fall to be charged at the same rate, legacy-duty shall be paid out of the capital of the legacy as in the case of a legacy to one person. So far there is no exception to the leading direction of section 19; but then (2) section 12 provides—and this is the only real exception—that if the persons entitled in succession fall to be charged with different rates of duty in respect of their respective life or other temporary interests, each person so entitled shall be charged by way of annuity. The only reason for making this distinction will be seen, the impossibility of charging one rate of duty at the outset in such a case.

"I now come to the part of the clause 19 on which the present question specially depends. It runs as follows:—'Provided nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.'

"This paragraph applies, I think, to a case in which one of several persons entitled to enjoy a limited interest in the bequest in succession (different rates being applicable) has, before the money has been applied in the purchase of real estate, become entitled through some change of circumstances to 'an estate of inheritance in possession in the real estate to be purchased therewith.' The words which I have just quoted require construction. 'An estate of inheritance in possession' is not a term familiar to Scottish lawyers; but occurring

The defenders reclaimed, and argued;—1. Duty was only payable No. 95.
calculated by way of annuity in terms of the 12th section of the Act 36

Feb. 6, 1892.

Lord Advocate v. Dunlop's Trustees.

does in a statute of the United Kingdom, it must be interpreted by this Court. The term is satisfied, I think, by interpreting it as an absolute interest, or an estate in fee-simple in possession with absolute power of disposal, which would descend to the heirs of the person in possession for the time in the event of his dying intestate.

“Another matter to be explained in this passage is, what is the meaning of the statute when it speaks of a person becoming entitled to ‘an estate of inheritance in possession in the real estate to be purchased’ when in the case provided for the money has not been applied to that purpose? There is no real difficulty, because, though it is elliptically expressed, the meaning of the passage evidently is that if the person who would have been entitled to possession of the real estate if it had been purchased becomes entitled absolutely to the *corpus* of the bequest before land is purchased (which is just the case provided for in section 27 of the Rutherfurd Entail Act of 1848) duty shall be paid on the money directed to be applied in the purchase of real estate just as if it had been personal estate not so destined.

“This being in my view the interpretation of section 19, the question which I have to decide is whether Mr William Hamilton Dunlop has become ‘entitled to an estate of inheritance in possession’ within the meaning of the statute.

“There is no doubt that he has acquired under the authority of the Court the fee-simple of the whole free residue of the trust-estate. But it is maintained that the absolute right so acquired was purchased by him, and that he did not become entitled to it by operation of the will, but by his own act. The statute does not say that the legatee must become entitled under the will in order to bring the fund within the provision. It is not necessary, however, to consider whether, in order to bring a case within the statute, it must be shewn that the party became entitled under the will to ‘an estate of inheritance in possession,’ because in a legal sense Mr W. H. Dunlop did become entitled to it under the will. His right under the will was on the expiry of six years to take the real estate if purchased as institute heir of entail, and, until the purchase of real estate, to receive payment of the interest of the fund. As institute he had a potentiality of acquiring the estate in fee-simple if real estate were purchased; or if land were not purchased to acquire the money in fee-simple on taking the steps and obtaining the consents, if any, required by the Entail Acts. That power was an inherent part of his interest under the will; and therefore, when he exercised that power and acquired the money in fee-simple he may fairly be said to have become entitled to that absolute right under the will. I may refer to the cases of *De Virte v. Wilson*, 5 R. 328; *MacDonald v. MacDonald*, 6 R. 521, and 7 R. (H. L.) 41; *The Attorney-General v. Lord Lilford*, L. R., 2 Eng. and Ir. App. 63. The following passage in Lord Colonsay’s opinion in the case last named, though spoken with reference to the provisions of another statute, describes this inherent right so aptly that I venture to quote it:—‘It appears to me that the interest which Lord Lilford took was an interest, though only of a tenant in tail, which had in it a certain potentiality which ripened into a power to dispose of the estate. . . . It was part of the quality of the succession; and he having exercised that power, or being competent to exercise that power, it must be considered that he was in the predicament which the statute contemplates.’

“This being the nature of the institute’s right, I do not think that the Crown is concerned with the arrangements by which Mr Dunlop became entitled to the money in fee-simple. Suppose that Mr W. H. Dunlop had been, as he might have been, the only heir of entail in existence. In that case the entail being dated after 1848 he would have been entitled to disentail without any consents at all. Again, assuming that consents were required, they might be given without any money down, or, as in the present case, they might be given without the Court being called upon to decide as to the adequacy of the compensation given. I am unable to hold that in each case the Crown is bound to

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

Geo. III. cap. 52, the exception contained in section 19 being applicable to the fund in question which was so given "as to be enjoyed by different

inquire what the arrangement was, and whether it was justified by actuarial calculations and other considerations. The Crown is entitled in one way or another to legacy-duty on the whole of the free residue of the personal estate of Alexander Dunlop if it is not invested in the purchase of land, and if the money is acquired absolutely before it is so laid out. Now, in the present case if it is held that Mr Dunlop has himself acquired the whole free residue absolutely, it is clear that duty must be paid out of capital. If, again, he has had to pay part of it to the next heirs for their consents, the result is practically the same, because unless the whole duty is satisfied out of the £20,000 reserved by the trustees, the portion of the fund paid as compensation and taken free from the restrictions of the will would escape legacy-duty altogether. In one way or another Mr W. H. Dunlop by himself, or he and the next heirs who would have been entitled in succession to the real estate to be purchased, have become entitled absolutely to the whole personal estate directed to be laid out on the purchase of land and entailed. In my opinion the fund so acquired is chargeable with duty as if there had been no direction to purchase real estate with it. The direction of the statute as to the duties payable by different persons in succession where the rate is not the same are no longer applicable; and the event, I think, has occurred which is contemplated by the last clause of section 19. It would perhaps be hard, assuming that the institute was compelled to pay away a large part of the estate in order to obtain consents, the burden of the whole of the legacy-duty were to fall upon him. But this was a matter for arrangement, and should have formed a part of any agreement come to between Mr W. H. Dunlop and the next heirs and their curators.

"I omitted to mention the defender's argument that Mr W. H. Dunlop's right having been originally limited, duty must be charged on that footing. There is no warrant for this contention either in the statute or the decisions.

"It may be questioned whether Mr W. H. Dunlop ever was in the position of having other than an absolute right to the *corpus* of the bequest; because practically as soon as the succession opened to him, and before the trustees had purchased, or indeed were bound to purchase, lands to be entailed (because they had a wide discretion as to this), he had taken steps to acquire the fund in fee simple. But apart from this, and apart from the unqualified terms of section 19, the whole spirit of the Act is to exact the full duty as on a legacy to one person, whenever on the expiry or failure of life interest or other temporary interest the personal estate bequeathed becomes the absolute property of one or more of the beneficiaries. If sections 12 to 18 are attentively read this becomes apparent. For instance, section 12, to which I have already alluded, after dealing with temporary interests enjoyed in succession, provides,—'And all such every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, whether and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, such part thereof as shall be so received, or of which the benefit shall be enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.' A similar provision is to be found in section 14 in regard to plate and furniture; in section 16 in regard to legacies in joint tenancy where one of the joint tenants by survivorship becomes entitled to a larger interest; in section 17 as to legacies subject to contingencies; and in section 18 in regard to legacies of a limited interest subject to a general power of appointment.

"As to the defender's plea of all parties not called, section 6 of the statute affords a complete answer. I may add that the defenders have vigorously maintained all defences open to Mr W. H. Dunlop.

"I am therefore of opinion that duty must be paid on the capital of the free residue under deduction of any instalments which may have already been paid.

persons in succession." The Lord Ordinary's interpretation of the term "an estate of inheritance in possession" was not questioned. But it was disputed that Mr Dunlop had become entitled to such an estate within the meaning of the statute, so as to make him liable to pay duty upon the capital. The circumstances to which the term was intended to apply were such as (1) where the destination took the form of a series of liferents followed by a fee,—the full estate being in such a case in one person by operation of the truster's will,—or (2) where all the substitutes had died and the institute alone survived, in which case he would then be the only heir of entail in existence, and would thus under the will become entitled to an estate of inheritance in possession. Many other such illustrations might be figured, where extrinsic events might have the effect of making a person who had originally only a limited interest a full fiar, and where therefore he would under the Act be bound to pay duty upon the capital sum. But the present case was very different. Here at the expiration of the six years Mr Dunlop took as institute under the entail with a number of substitutes behind. It could not be said that before he disentailed he was in the position contemplated by the statute, and was in possession of an estate in inheritance. A change of circumstances under the will might operate that, but nothing else. That this was the contemplation of the statute was clear from the use of the words "shall become entitled," which could not apply to the present case where it was a supervening Act of Parliament which gave the disentailer his right. In the case of a private Act of disentail prior to 1848, it could not be said that a disentailer would have been in the sense of the Act of 53 Geo. III. a person who had "become entitled to an estate of inheritance in possession." Again, in the case of a disentail prior to 1875, when consents were voluntary, the same argument applied. It was not different where as now consents could be forced and an actuarial valuation was necessary. The present case therefore of a disentail under the Entail Acts could not have been in contemplation of the Legislature in 1796 when the Act, which was the subject of construction, was passed. *Lord Lilford's* case¹ did not apply, because in barring an English entail no consents were needed, and it was not necessary to apply to the Court. The quality which created the estate of inheritance in possession under the Act must be inherent from the first, and could not be superadded afterwards by statutory enactment. *De Lancey's* case² did not help the present. The heir in that case took the estate as heir in heritage, because that character was impressed upon it under the will, but it might have been sold or willed away absolutely before it reached him. 2. Assuming Mr Dunlop, the institute, to be a legatee, he was not a legatee of the beneficial interests paid to the substitute heirs. That would be to treat the price paid for their consents as a benefit to him. Taxing Acts must be strictly construed, and there was no warrant for such a view in this Act.³

Argued for the Crown;—1. Duty fell to be paid upon the capital of the whole residue of the personal estate falling to the disentailer. In form the whole residue was paid over to him, in substance it might not

As parties do not seem to be agreed as to the precise amount of the clear residue, the figures must be adjusted before I give decree."

¹ *Lord Lilford v. Attorney-Gen.*, 1867, L. R., 2 Eng. and Ir. Apps. 63.

² *In re De Lancey*, 1869, L. R., 4 Exch. 345, 5 Exch. 102, 6 Exch. 286, 7 Exch. 140; cf. also *Hanson on Succession-Duty Acts* (3d edn.), p. 70; *Attorney-Gen. v. Bacchus*, 1821, 9 Price's Reps. 30, and 11 Price, 547; *Attorney-Gen. v. Burnie*, 1830, 3 Young and Jervis, 531.

³ *Wilberforce on Statute Law*, 248; *Partington v. The Attorney-Gen.*, 1869, L. R., 4 (H. L.), 100, *Lord Chanc. Cairns*, p. 122.

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

strictly be so, in view of the transaction which had been carried through between him and the next three heirs. But that transaction did not take the case outside of the terms of the proviso of the 19th section of the Act. The disentailer held a decree of Court which put him in the position contemplated by the statutory language, "entitled to an estate of inheritance in possession in the real estate to be purchased." It was said that the operation of the Entail Statutes must be left out of view in the consideration of the present question. But the will of the truster must be subject to the laws in existence, and so far as promulgated at the date of his death.¹ In the case of *De Lancey* the heir who took the estate on the capital of which it was ultimately held he had to pay duty under this Act, did not so take it in virtue of the will which directed that the money should be invested in the purchase of land. 2. No deductions could be made in respect of the compensation payable to the three heirs. The decree of Court under which the disentailer was found to be in right of the whole fund could alone be looked to. Besides, the 6th section of the Act 36 Geo. III. cap. 52, provided that duties should be paid by executors and administrators on retaining or paying legacies or residues, and so the question of the heirs' liability did not arise.

At advising,—

LORD PRESIDENT.—By the trust-disposition and settlement of Alexander Dunlop, of Carnduff and Doonside, his trustees were directed to lay out in the purchase of land the residue of his estate which amounted to £350,000. The Crown claim legacy-duty on this money, founding primarily upon the substantive and leading sentence of section 19 of the Act 36 Geo. III. sec. 52,—“And be it further enacted that any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate.” It is obvious, and is admitted, that those words, taken by themselves, in terms apply to the money in question; and, accordingly, the trustees, in resisting the claim of the Crown, seek to draw themselves within the exception which qualifies the general rule, and immediately follows it, “unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty” “as if the annual produce thereof had been given by way of annuity” (sec. 12). This exception, however, on which the defenders found as limiting the claim of the Crown to duty on the right valued as an annuity of William Hamilton Dunlop (upon whom as institute they were directed to entail the lands to be purchased) is itself qualified by the following proviso,—“Provided nevertheless that in case before the same or some part thereof shall be actually so applied any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to have been paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.” The argument therefore stands thus:—If William Hamilton Dunlop is in the position described in the proviso, then, whether he would otherwise have come under the exception or not, he is

¹ The Queen v. De Lancey, *supra*; Hanson on Succession-Duty Acts (3d edn.), p. 91; Lord Lilford v. Attorney-Gen., 1867, L. R., 2 Eng. and Ir. Appa. 63.

excluded by the proviso from the operation of the exception and legacy-duty must be paid. Although therefore the Crown rely on the leading words of the section to which I have first referred, the debate before us has mainly been on the question whether, in the sense of the statute Mr W. H. Dunlop has "become entitled to an estate of inheritance in possession in the real estate to be purchased" with the residue of the trust-estate.

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

Now, Mr W. H. Dunlop has obtained and holds a decree of the Court of Session, under which the defenders (the trustees) were ordained to pay and make over to him, his heirs and assignees, in fee-simple, the whole personal property and estate vested in them (with the exception of a sum to meet annuities and another sum to meet the duties in dispute). It is said by the Crown that he is thus in the position described in the proviso.

The answer of the defenders is rested on the fact that the decree of Court gave effect to a right conferred on heirs of entail by the Entail Acts, 1848-1882, and brought into operation in the present instance through onerous transaction between Mr W. H. Dunlop and the three next heirs. Mr Dunlop was entitled to acquire the money in fee-simple upon his either producing the consents of the three next heirs, or upon the Court valuing their interests, seeing the values paid to them, and then dispensing with their consents. In the present case, Mr W. H. Dunlop obtained the requisite consents from the guardians of the three next heirs, and I assume that the "transaction," upon which that consent was obtained, and which is referred to in the decree in Mr Dunlop's favour, was of the nature described in the answer to condescendences 7, 8, and 9. It is, however, important to observe that the Court made no partition of the money, as would have been the case if the expectancies of the next heirs had been valued and their consents dispensed with.

The decree of the Court in Mr Dunlop's favour being thus explained, I recur to the question whether he has become entitled to "an estate of inheritance in possession" in the lands to be purchased. Now, the section employs English legal phraseology; but the parties were not in dispute that a right to lands in Scotland, in fee-simple, would fall within the words "an estate of inheritance in possession in real estate." There remain, however, the two questions (1) whether the words of the statute apply to a right of fee-simple in money directed to be applied in the purchase of real estate; and (2) whether Mr Dunlop has "become entitled," in the sense of the statute, to the ample right which he now enjoys.

In the former of these questions, I think we are greatly aided by the case of *De Lancey*; because, although the dispute there decided was not *in pari materia* with the present, it afforded an occasion of deliberate judicial consideration of the very question of statutory construction with which I am now dealing. Now, in that case (L. R., 6 Ex. 290), Baron Martin says,—“The proviso is not very intelligibly expressed, but the words ‘entitled to an estate of inheritance in the land to be purchased therewith’ must mean entitled ‘to an absolute interest in the money which was bequeathed to be laid out in the purchase of land.’” If that is sound, it applies in terms to the point now before us; the same view seems to have been adopted, although it is less explicitly stated, by the other Judges in the Court of Exchequer and Court of Exchequer Chamber; and, as the phraseology in question is that of English law, the construction assigned to it by eminent English Judges has a special authority. On that authority I am prepared to arrive on this point at the same conclusion as the Lord Ordinary has

No. 95. come to, on apparently a more independent examination of the words themselves.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

The defenders, however, have further argued that inasmuch as Mr Dunlop's right to have the money in fee-simple arises not directly from the will of the truster, but from the combined operation of the will, the Entail Acts, and certain proceedings and transactions of his own, he cannot be held to have "become entitled" in the sense of the statute. This argument was presented by the Dean of Faculty with great force and variety of illustration, and would limit the meaning of "become entitled" to cases where through some change of circumstances, as by the occurrence of deaths, the right yielded by the operation of the will itself has become amplified into an estate of inheritance in possession. But while such instances are in their nature separated by a perceptible difference from the case before us, I do not find that any such distinction is drawn by the enactment in question, the words of which seem completely applicable to the one as well as to the other class of cases. It is of course true that the statutory rights conferred on heirs of entail by the Scotch Entail Acts, 1848-1882, cannot have been in contemplation in 1796; but that is not to the purpose if, by good fortune for the Crown, the words used at the earlier date turn out to be sufficiently comprehensive to cover these modern rights. Nor does the Act of George III. contain any warrant for the suggestion that the right of the heir who "becomes entitled" must arise by virtue of the will alone applied to external circumstances. When Mr Dunlop got his decree, giving him the money in fee simple, he did so, it is true, because he had taken steps made competent to him by statute. This, however, is only another way of saying that one of the legal qualities of the bequest in his favour was that he could take it, if he pleased, in this form, and the fact that this right does not appear on the face of the will does not seem to me to make a substantial difference in the present argument. Accordingly, my opinion is that, in the sense of the Act of 1796, Mr Dunlop has "become entitled" to the right of fee-simple expressed in the decree, and that it is, in the sense of that Act, an estate of inheritance in possession in the real estate to be purchased with the residue of the trust-estate.

The defenders claim, alternatively to their main argument, that, at all events Mr Dunlop's right is limited to the residue, less the amount of what he paid as the price of the consents. I do not think that this claim can be supported as a defence to the demand of the Crown against the trustees who held (and still hold in part) personal estate directed to be applied in the purchase of real estate. The defenders have paid over the whole residue (less the sums retained to meet the present claim and annuities) to Mr Dunlop alone, and in face of the decree of Court they could not have done otherwise. The fact that, in order to become entitled to the residue in fee-simple, he has had to provide for the three next heirs, whose consents he obtained, is not, I think, a matter with which the Crown is concerned. It is clear that if anyone becomes entitled to such money in fee simple, the duty is to be settled for finally; and it cannot make any difference to the Crown whether, in a private negotiation, the heirs have stood out for a large sum, or have given their consents for nothing, if the result is that the institute gets the money in fee-simple.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. I think the trustees are in the

position of holding the residue of this estate for purposes which bring it within the direct operation of the first clause of the 19th section. They hold a sum of money or personal estate which is directed to be applied in the purchase of real estate, and that is to be charged with a particular duty as personal estate, unless it falls within a certain exception. Now, the trustees hold this estate absolutely for one residuary legatee. The exceptions in the clause are to take effect "when money or personal estate shall be so given as to be enjoyed by different persons in succession." Now, it appears to me that what that clause contemplates is not the mere form of expression, but the effective operation of a bequest, and that money or personal estate is not so given as to be enjoyed in any particular way unless it is so given as that it shall be so enjoyed in effect. It is not brought within the exception if it is so bequeathed that it may be enjoyed either by different persons in succession, or by one person alone at the pleasure of the latter. A provision which directs that the money bequeathed shall be enjoyed by different persons in substitution to one another, does not appear to me to bring the bequest within that exception if the substitution has been effectually evacuated by the first taker, while the money is still in the hands of the trustees. And therefore when the trustees are found holding residue for the benefit of one particular person, as his absolute right, I am of opinion that they are not in a position to put forward the exception, because they cannot say that, in the sense of the clause, the money, or the estate which may be purchased by it, is to be enjoyed by different persons in succession.

But if that primary exception were, contrary to my opinion, applicable to the circumstances, I agree with your Lordship that the trustees are again brought within the primary enactment by the proviso which is equally applicable to the circumstances. I think that we must follow the construction put upon that clause by the learned Judges in England in the case to which your Lordship has referred. Taking it therefore that a person who has become entitled to an estate of inheritance in possession in the real estate to be purchased with the money left by this testator, means or includes a person who has become absolutely entitled to the money which the testator directed to be applied in the purchase of an estate, it appears to me that the only question which remains for consideration is that to which your Lordship has adverted, and which formed the subject of the greater part of the argument before us, viz., whether an heir of entail or an institute appointed by the testamentary disposition of the deceased comes into the position of a person entitled in the sense of that clause, —absolutely entitled—to the money or to the estate to be bought with it, if he became entitled, only in consequence of an arrangement with the three next substitute heirs of entail, by which he is enabled to obtain the land or the money in fee-simple. Now, I am quite unable to see any sufficient ground for confining the meaning of the words "becomes entitled" in the manner contended for by the defenders. I am unable to draw any distinction between the operation of a will and the legal effect which the law in force at the time when it comes into operation gives to a will. It is for the law in all cases to say what is the legal effect of a disposition in a will; and the question whether a right is given in fee-simple or absolutely, or whether it is given subject to the letters of an entail, or subject to other restricting and limiting conditions, is always a question of law as well as a question of construction. I do not know that there could be a clearer illustration than that which was given by Lord McLaren in the course of the discussion, when he pointed out that a direction

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

No. 95.

Feb. 6, 1892.
Lord Advocate v. Dunlop's Trustees.

to convey to certain persons in succession by a simple destination would, according to the mere form of words, be a gift to persons in succession, but the law operating upon that direction declares that it shall create an absolute right in the first institute, and accordingly when we have to inquire whether an interest bequeathed by will is absolute or not we must always consider, not the mere form of expression which the will contains, but what is the legal effect and operation of dispositions conceived in that particular form. I am unable, therefore, to see any ground upon which we could exclude from consideration the operation of law upon the clauses contained in the will, when we have to determine whether a particular person has or has not become entitled under the will to a particular right.

The LORD PRESIDENT intimated that he was authorised by Lord M'Laren to say that he also concurred.

THE COURT adhered.

DAVID CHOLE, Solicitor of Inland Revenue—J. & F. ANDERSON, W.S.—Agents.

No. 96.

Feb. 16, 1892.
Martin v. Ferguson's Trustees.

JAMES MARTIN, C.A. (Mrs Ferguson's Curator Bonis) (Petitioner),
Respondent.—*Rankine—Cook.*

ROBERT JAMES FERGUSON AND OTHERS (Ferguson's Trustees)
(Petitioners), Appellants.—*D.-F. Balfour—Jameson.*

Et e contra.

Executor—Appointment—Competition—Trustees appointed to manage estate—Curator bonis—Act of Sederunt, Feb. 13, 1730.—Under a mutual settlement by husband and wife, the survivor was appointed "sole trustee and executor of the predeceaser." By subsequent codicil executed at sea, on 14th June 1890, to which the wife was not a party, the husband directed,—“I wish my estate to be managed by the same trustees as my brother John, dead or alive, including to my wife.” The husband died on 21st June 1890.

After the husband's death competing petitions were presented (1) by the curator bonis of the wife, who had become insane, and (2) by the persons named as trustees under the settlement of the testator's brother John, dated 18th April and recorded 21st May 1891, the former claiming to be appointed executor-dative as representing his ward, and the latter claiming confirmation as executors-nominate under the codicil.

Held (1) that upon a construction of the testamentary writings the unlimited power conferred by the codicil on the persons therein designated to manage the estate along with the wife, who had previously been nominated trustee and executor, implied their nomination as executors as well as trustees, and that they had a title to be confirmed executors-nominate; (2) that the curator bonis had under the Act of Sederunt, February 13, 1730,* no title to be appointed executor-dative, other persons having a title having offered to confirm; and therefore (3) that the trustees were entitled to confirmation.

Opinions that a testamentary conveyance to certain persons as trustees or with a direction to manage does not necessarily imply their appointment as executors.

1ST DIVISION.
Sheriff of
Dumfries and
Galloway.

JAMES CHRISTAL FERGUSON, shipmaster, Kirkcudbright, died on board his ship, when on a voyage to Australia, on 21st June 1890. He was survived by his wife. There were no children of the marriage.

* The Act of Sederunt, February 13, 1730, concerning factors appointed on the estates of pupils not having tutors, and others, sec. 7, provided,—“Where it is necessary by law that money, or effects, or moveables should be confirmed, the said factor may confirm the same in his own name as executor-dative, and as factor appointed by the Lords of Council and Session on the estate of such a person, and for the use and behoof of the said person, and of all that have or shall have interest, unless some other person having a title offer to confirm. . . .”

No. 96.

By deed of revocation and mutual settlement executed by the spouses on 17th January 1878, they recalled a nomination of trustees and executors contained in their antenuptial contract of marriage, and nominated the survivor of them "to be sole trustee and executor of the predeceaser." Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

Captain Ferguson executed a holograph codicil to the above deed on board ship, on 14th June 1890, which contained the following clause:—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife, Mrs Elizabeth J. B. Ferguson, who is to own all in liferent except legacys mentioned, and at her decease to be divided as my brother John Christal Ferguson's estate." The codicil also made provision for the management of Mrs Ferguson's property, in the event of her becoming incapable of managing her own affairs. It did not revoke the preceding mutual settlement.

Mrs Ferguson having become mentally incapable, James Martin, C.A., was appointed curator bonis to her on 12th June 1891.

Martin thereafter presented a petition in the Sheriff Court of Kirkcudbright, praying to be decerned executor-dative to Captain Ferguson, *qua* curator bonis to Mrs Ferguson.

The petitioner founded on the deed of revocation and mutual settlement, nominating the survivor of the spouses "sole trustee and executor of the predeceaser," and stated that the codicil did not contain any valid nomination of trustees or executors, and that it did not recall the nomination of Mrs Ferguson in the mutual settlement, and that that deed was irrevocable, except by the joint act of the spouses.

The petitioner pleaded;—(1) The petitioner being curator bonis to the said Mrs Elizabeth Jane Brown Christal or Ferguson, the widow and executor-nominate of the said deceased James Christal Ferguson, is entitled to be decerned executor-dative of the said James Christal Ferguson.

Robert James Ferguson and others, the trustees under the settlement of the testator's brother, John Christal Ferguson, dated 18th April, and recorded 21st May 1891, who were appointed under the codicil, as above, to act for him along with his wife, lodged answers to Martin's petition, and pleaded that they were entitled to be confirmed to Captain Ferguson's estate.

They also presented a separate petition, claiming to be the executors-nominate of the deceased, as trustees under the settlement of John Christal Ferguson. They stated that, although they were not expressly nominated by the deceased in his codicil as his executors, yet their nomination as trustees *ipso facto* entitled them to the office of executors.

There were averments in this petition, and in the answers lodged by Martin, relating to the power of Captain Ferguson to alter the provisions contained in the mutual settlement by the codicil which he had executed without his wife's consent. The codicil carried his estate to the trustees, and to beneficiaries therein named, his wife having a mere liferent subject to legacies, while, by the mutual settlement, Mrs Ferguson was entitled to the whole beneficial interest in the estate.

Ferguson's trustees pleaded, *inter alia*;—(2) The whole estate dealt with under the mutual settlement having belonged to the husband, he was entitled to execute the codicil referred to, and that without the consent of his spouse. (4) The respondent, *qua* curator bonis, whose office may terminate at any moment, is not entitled to the office of executor in preference to the petitioners, who are the executors-nominate of the deceased, the possessor of the fund. (5) The petitioners being the trustees appointed by John Christal Ferguson and the persons appointed by the said James

No. 96. Christal Ferguson by his said settlement to manage his estate, are thus entitled to be confirmed as executors-nominate to him.

Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

The curator bonis pleaded;—(1) The deed of revocation and mutual settlement by the spouses, by which the survivor is appointed sole executor of the predeceaser, being irrevocable, the codicil by the husband without the wife's consent is inept, and the petitioners having thus no valid title, their petition ought to be dismissed. (2) As the express nomination of Mrs Ferguson, the surviving spouse, as sole executrix of her husband, under the said deed of revocation and mutual settlement, stands unrevoked, and the appointment of trustees under the codicil, even if valid, is not repugnant thereto, the petitioners are not entitled to be confirmed as executors-nominate of James Christal Ferguson. (4) The petitioners not having been named, or otherwise validly appointed trustees or executors under said codicil, the prayer of the petition to authorise them to be confirmed executors-nominate of James Christal Ferguson is incompetent, and ought to be refused. (5) The sole beneficial interest in her husband's estate being vested in Mrs Ferguson, the respondent, as her curator bonis, is entitled to be decerned executor-dative of the said James Christal Ferguson to the exclusion of the petitioners, and their petition ought to be dismissed.

On 4th September 1891 the Sheriff-substitute (Lyell) pronounced this interlocutor in the conjoined petitions (after certain findings in fact):—"Finds in law (1) that the said deed of revocation and mutual settlement was not revocable by the one spouse without the consent of the other; (2) that in so far as the said codicil revokes the provisions of the said deed of revocation and mutual settlement, it is inept and invalid; (3) that the appointment of the petitioners, Robert James Ferguson," &c., "to be executors in place of Mrs Elizabeth Jane Brown Christal or Ferguson, even if implied in the said codicil, was *ultra vires* of the said James Christal Ferguson: Therefore refuses the prayer of the petition of the said Robert James Ferguson," &c., "decern the petitioner James Martin executor-dative of the said deceased James Christal Ferguson *qua* curator bonis to the said Mrs Elizabeth Jane Brown Christal or Ferguson," &c.

On appeal by the trustees the Sheriff (R. V. Campbell), on 31st December 1891, adhered.

The trustees appealed to the Court of Session, and argued;—The Sheriffs had entirely outstepped their duties as Commissaries in going into questions as to the patrimonial effect of the two deeds. The office of executor was purely administrative for the purpose of managing the estate.¹ The appellants here were accordingly entitled to the office of executors-nominate, as they had been named by the deceased to manage his estate. It was not indispensable that they should be specially designated as executors,² and the language of the codicil was sufficient. A curator bonis was not entitled to the position of executor-nominate in place of his ward, but this was really the position to which the Sheriff must be taken to have preferred Martin in this case as representing the ward, although nominally he termed him executor-dative in the note appended to his interlocutor, and this was also the term used in Martin's petition. But a curator bonis or a judicial factor came last in the order prescribed in the Act of Sederunt, February 13, 1730, for the appoint-

¹ Erskine's Insts. iii. 9, 38.

² Alexander's Commissary Practice, p. 67; Currie's Confirmation of Executors, 2d edn. 52, and case of Blair (Jan. 30, 1877) there cited; Dundas v. Dundas, Jan. 27, 1837, 15 S. 427, 9 Scot. Jur. 232; Erskine's Insts. iii. 9, 32; Graham v. Bannerman and Others, Feb. 28, 1822, 1 S. 362.

ment of executors-dative, and creditors even were preferred to them.¹ No. 96. There was nothing decided in the case of *Whiffin*² which could be said to support the view the Sheriff had taken, nor in that of *Johnstone*.³ [The appellants stated that they were prepared to offer an argument upon the construction of the deeds, but this was not entered upon.]

Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

Argued for Martin, the curator bonis;—As matter of practice, it was admitted that testamentary trustees were entitled to be confirmed as executors-nominate where nothing to the contrary was said or implied in the testamentary writings.⁴ The trustees were in such a case in the position of universal legatories, and were entitled to oust all others applying for the office of executor. There was nothing incompetent in the present case in the appointment of an executor in the mutual deed being followed by the appointment of the trustees in the codicil, which did not in any way purport to revoke the preceding deed of revocation and mutual settlement.⁵ They severally had their proper duties, the executor had hers under the mutual deed, and the trustees had theirs under the codicil. The section which had been cited from the Act of Sederunt of February 13, 1730, did not touch the present case, as the respondent here claimed office as the representative of the person who had the sole beneficial interest under the mutual deed, and would thus alone have been entitled to the office of executor-nominate had she remained sane; as representing her, he had a better title than the next of kin. The opinion of the late Lord President in *Whiffin's* case was in point where his Lordship said that "the factor is allowed to confirm because of the title to the office in the person whom he represents."⁶ The same rule applied in the case of a minor, although a minor, and even a pupil might himself be competently confirmed executor.⁷ Indeed the ward, Mrs Ferguson, might herself have been confirmed if her curator had made such an application.⁷ The position of the curator bonis here was therefore very different from that of the judicial factor in the Act of Sederunt, and he ought to be appointed as representing his ward. Further, he would find caution for his intromissions.

At advising,—

LORD PRESIDENT.—The Sheriffs have appointed the curator bonis to Mrs Elizabeth Jane Brown Christie or Ferguson to be executor on the estate of her late husband, and they have done so upon an examination of the relative effects of two deeds which are regarded by all parties, and necessarily so, as having come into collision. The Sheriff-substitute has confined himself entirely to the question as to which of these deeds is to prevail, and his ground of judgment is briefly stated in his fifth finding in fact, and his first and second findings in

¹ Act of Sederunt, Feb. 13, 1730, sec. 7; Alexander's Abridgment of the Acts of Sederunt, p. 61; Bell's Comma. ii. 5th edn. p. 82, 7th edn. p. 78.

² *Whiffin v. Lees*, June 12, 1872, 10 Macph. 797, 44 Scot. Jur. 452; *Johnstone v. Lowden*, Feb. 15, 1838, 16 S. 541, 10 Scot. Jur. 282.

³ *Currie's Confirmation of Executors* (2d edn.), 52.

⁴ *Scott v. Peebles*, July 8, 1870, 42 Scot. Jur. 550, 8 Macph. 959; *Ainslie v. Ainslie*, Dec. 8, 1886, 14 R. 209; *Jamieson v. Clark*, Jan. 24, 1872, 10 Macph. 399, 44 Scot. Jur. 225.

⁵ *Whiffin v. Lees*, *ut supra*, Lord President Inglis, 10 Macph. 800.

⁶ *Johnstone v. Lowden*, *ut supra*, Lord Corehouse, 16 S. 548; *Reid v. Turner*, June 23, 1830, 8 S. 960; *Keith v. Archer*, Nov. 24, 1836, 15 S. 116, 12 F. C. 124, 9 Scot. Jur. 73; *Currie's Confirmation of Executors*, p. 98.

⁷ *Currie's Confirmation of Executors*, p. 67.

No. 96.
Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

law. His fifth finding in fact is—"That the said deed of revocation and mutual settlement proceeded upon onerous considerations, and that there is reasonable proportion between the grants between the spouses therein contained"; and the first and second findings in law are "(1) that the said deed of revocation and mutual settlement was not revocable by the one spouse without the consent of the other"; and "(2) that in so far as the said codicil revokes the provisions of the said deed of revocation and mutual settlement it is inept and invalid."

I cannot say that I am surprised that the appellants should feel uneasy at the pronouncing of these findings, even apart from what was the immediate question before the Sheriff, namely, who was to hold the office of executor. The appellants come here not only seeking that those findings should be recalled, but also claiming the office of executors on the footing that they are the executors-nominate under the last codicil of the deceased. I think the Sheriffs have taken a wrong view of this question, and in any view I should not be inclined to adhere to findings such as those which I have read. The duty of the Sheriff as Commissary is to determine who is entitled to the office of executor on the face either of the deeds which are put before the Court, or of the relation to the deceased which is set out as the title of the applicant.

Now, in the present case the curator bonis stands in this position—He claims the appointment as executor-dative, and he does so upon the ground that his ward is appointed executrix-nominate in the deed of revocation and mutual settlement of 1878, but in order to make out his case he has to found upon the Act of Sederunt of 1730. But the Act of Sederunt of 1730, while giving right to officers of Court in his position to be confirmed to an estate in which their ward has a beneficial interest, is careful to say "unless some other person having a title offer to confirm," and that plainly means that, if any person or persons can satisfy the Commissary that he, she, or they have a right under one of the known heads of the law to the office, they shall be entitled to be confirmed, and the factor shall come in only failing any person having such a title offering himself.

Throwing him therefore out of account until we view the position of his competitors, what do we find? His competitors found upon what undoubtedly is the last testamentary writing of the deceased, and that contains these words,—“I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife Mrs Elizabeth J. B. Ferguson, who is to owe all in liferent except legacys mentioned, and at her decease to be divided as my brother John Christal Ferguson's estate.” Now, the question is, what is the meaning of these words,—“I wish my estate to be managed by the same trustees as my brother John Christal Ferguson”? In the first place, I think it can hardly be doubted that to whatever office this be a nomination, it is not invalidated by reason of its containing a reference to the settlement of another person, be he, as the testator puts it, “dead or alive.” A man may quite competently appoint trustees or executors if he designates the persons sufficiently so as to identify them, even if the criterion of identification be another man's settlement.

Therefore, I think, it can hardly be doubted that this is a valid appointment to some office, and the question is, what is the office to which they are appointed? We have been very urgently invited to observe that this codicil does not at least purport to revoke the preceding deed. I have looked at the preceding deed, and I find this—that it splits up for separate consideration the office of trustee and

the office of executor, but these two offices are so conferred as to give the administration to the same person. The codicil is expressed in much curter and briefer terms, and seems to have been executed at sea in somewhat condensed language. What does the testator mean when he says—"I wish my estate to be managed"? One would naturally suppose that he used the word "manage" as the most comprehensive term available for describing all that required to be done to his estate after he was gone, and I arrive at the conclusion that the "management" included both the kind of management which is given by a trustee, and also the kind of management given by an executor. In short, I regard the word "manage," as used in this codicil, as representing generically all that required to be done with regard to the administration of the whole estate left by the testator.

If that view is sound, then this is a nomination of executors, and accordingly I think the application of the appellants to the Sheriff is in proper form. They do not ask to have the office as executors-dative, but they ask to have it as executors-nominate, and therein I think they have rightly construed the terms of the writings which I have read.

If that be a sound construction of the last writing of the deceased, the appellants occupy the first place in the competition, and the curator bonis is left out because the words of the Act of Sederunt of 1730 have been complied with, as another person having a title has offered to confirm. Upon that ground I think the appeal must be sustained, and that the appellants are entitled to the office of executors.

LORD ADAM.—There were three deeds before the Sheriff, first the marriage-contract between the deceased Mr Ferguson and his wife, who is now insane; second, the deed of revocation and mutual settlement, and third, the codicil. I understand neither party founds upon the marriage-contract. One party founds on the deed of revocation and mutual settlement, and the other founds upon the codicil. The appellants claim the office as executors-nominate of the deceased, and they found upon this clause in the codicil,—“I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife, Mrs Elizabeth J. B. Ferguson, who is to own all in life-rent except legacys mentioned,” &c. Now, they say, and it is the fact, that they are the trustees named by the brother John Christal Ferguson, and that being so nominated by the brother, it is the same thing as if they were nominated in the codicil. I agree upon that point with your Lordship.

I think the question depends upon the clause of nomination in the deed of revocation taken in connection with the clause which I have read from the codicil. I think there is no doubt that under the former deed the widow, Mrs Ferguson, would have been the only party entitled to the office of executor. But then comes the codicil, and what we find in it is this, that the testator wishes his estate to be managed by a set of trustees, the present claimants, including his widow. Now, under the deed the wife, in the character of trustee and executor, would have the management of the estate from the date of the death of her husband until the whole estate was distributed and applied in terms of the settlement, for in my view the management of an estate begins at the moment of the death of the deceased party. I think it is impossible to say that an executor does not “manage” the estate of a deceased party, and that a trustee does, and accordingly I do not think it is a reasonable construction of the terms of the

No. 96.

Feb. 16, 1892.

Martin v.

Ferguson's

Trustees.

No. 96.

Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

codicil to say that so far as the duties of executor are concerned, one of the trustees is to have the sole management, and that thereafter there is to be a different management, and the widow and the other parties are to manage as trustees. I think the intention was that from first to last the management of the estate should be one and the same. The testator drew no distinction between the management of his estate at one time and at another. I think he meant that from the beginning the widow and the appellants should have the management of the estate. That being so, I agree that he meant to associate them with her in the executry. If that is so, it follows that the appellants are entitled, as executors-nominate, to the office here.

I have arrived at that conclusion from the construction of these two deeds themselves. I do not wish it to be inferred that where the management of an estate is left to A, B, and C, in the capacity of trustees, that that will imply necessarily an appointment as executors. But where the trustees are combined with a person who has been previously named as executor, that makes quite a different case. It is upon that specialty I proceed in the opinion which I have formed in this case.

LORD M'LAREN.—I think the Sheriffs have approached this case from a wrong point of view. The question which they had successively to consider was so simple as this—Who is entitled to the office of executor?—a question which is determined by rules which are now very well settled—one of the parties competing for the office claiming as executors-nominate under the codicil, while the other claims as factor, representing the interest of the deceased party's wife under the postnuptial deed of settlement. The Sheriffs seem both to have considered that in order to determine who was entitled to the office of executor they must consider who had the best right to the estate when it came to be distributed—in other words, whether the deceased gentleman was entitled to innovate upon the mutual settlement which he executed in conjunction with his wife.

Now, we have no occasion to consider how far the mutual settlement was a remuneratory deed, and how far it was open to either spouse to give legacies or make alterations on the disposal of the estate. I may observe in passing that it is a very well settled rule of construction, that although two spouses put their wills into the same deed, that by no means prevents either of them from altering his or her will in relation to individual property. It is only in so far as it contains contractual provisions that the deed is irrevocable, but so far as it is testamentary it is revocable. There is one part of a mutual settlement which must always be revocable, and that is the provision for administration—the appointment of trustees and executors. To say, for example, that if after a mutual settlement has been made, and it may be after the death of one of the parties, a trustee becomes insane or bankrupt, the surviving spouse shall not be able to recall that appointment and make another, would be really carrying the doctrine of remuneratory grants to an extravagant extent. In this case the husband, being at sea and without legal advice, and knowing that his wife's state of health and mental capacity was uncertain, made this codicil, leaving certain legacies, and, in the clause which has been read, appointing his estate to be managed by the same trustees as those appointed by his brother. I am of opinion that as regards his own estate it was quite competent to him to make a new appointment of trustees and executors, and in coming to that conclusion

I, of course, give no opinion as to the validity of this codicil in so far as it deals with the estate for testamentary purposes: No. 96.

The only question, then, is whether the appointment made in the codicil is a good appointment of executors in place of the wife, who was the sole executor under the mutual deed. Now, my understanding of the law has been that an executor could only be appointed under that name. I am not aware of any equivalent expression, and consequently when the disponees in a testamentary deed were only declared to be trustees, it was necessary that they should apply to the Commissary or Sheriff for an appointment as executors-dative *qua* trustees or universal disponees—an application which would always be granted of course, because in a petition for the office of executor universal disponees take precedence of all other parties except executors-nominate. The distinction is that in the one case security must be found, which would not be the case where trustees are also appointed executors. I do not pause to examine the considerations connected with the original character of the office of executor which have led to the recognition of this distinction, but it appears to me to be a distinction strongly recognised in the law.

But, then, in the series of instruments which are said to constitute the will, we have a good appointment of trustees and executors—that is, by the mutual deed; and I agree with your Lordships that in the case of a codicil—a writing which is always very favourably construed—the substitution of certain other parties to be managers of the estate, means that they are substituted for those who have been previously well appointed trustees and executors. Therefore that is a good substitution to the office of executors as well as to the office of trustees, entitling the parties there named to take up the office of executors-nominate in their own right.

It follows from these considerations that the interlocutor of the Sheriff ought to be recalled, and that it should be declared that the persons named in the codicil—the competing petitioners—are entitled to be confirmed as executors.

LORD KINNEAR.—I think, for the reasons stated by your Lordships, that the only question we have to consider is, whether this codicil contains or does not contain a nomination of executors. I agree with what I think is the opinion of all your Lordships, that the mere conveyance of an estate to persons with a direction to manage it, or a mere conveyance in trust, is not necessarily a nomination of executors. But, then, we are to read the codicil along with the mutual settlement as one testamentary deed, and taking the two together, I arrive at the same conclusion as your Lordships.

In the mutual disposition and settlement the deceased, who for the purpose of the present question is to be treated as a testator dealing with his own estate, appoints his wife to be his sole trustee and executor. Now, if in the codicil he had appointed certain other persons to be trustees along with his wife, making no mention of the office of executor, there might have been very fair ground for maintaining that he did not thereby intend to give them any active title to ingather the estate, or to conjoin them with his wife in her office of executor, but that he intended merely that after the estate had been ingathered by his executor, they should be conjoined with her in the separate office of trustees. But that is not the way in which the settlement is expressed. Its terms are,—“I appoint my wife to be my trustee and executor”; and in the codicil “I appoint A, B, and C to manage my estate along with my wife.” It appears to

Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

No. 96.

Feb. 16, 1892.
Martin v.
Ferguson's
Trustees.

me that the natural construction of these words is what your Lordship has put upon them, and that the testator intended these trustees to take part, with his wife, in the management of his estate from the beginning, and did not intend to make any distinction between one act of management and another,—that is to say, he intended them to be executors as well as trustees.

THE COURT recalled the interlocutors of the Sheriff-substitute and of the Sheriff, and found that the appellants Robert James Ferguson and others, trustees of the deceased Captain James Christal Ferguson, were entitled to be decerned executors-nominate of the said deceased Captain James Christal Ferguson, and decerned; and remitted to the Sheriff to decern them executors-nominate, and to refuse the petition at the instance of Mrs Ferguson's curator bonis.

R. R. SIMPSON & LAWSON, W.S.—T. & W. A. M'LAREN, W.S.—Agents.

No. 97.

Feb. 20, 1892.
Bruce v. Leisk.

J. W. BRUCE, Pursuer (Reclaimer).—*A. J. Young—A. S. D. Thomson.*
DAVID D. LEISK, Defender (Respondent).—*Comrie Thomson—Saltcen.*

Reparation—Slander—Privilege—Malice—Statements regarding candidate for municipal election.—In an action of damages for slander the pursuer averred that in the course of a municipal election, in which he had been a candidate, the defender, who was an elector, had, in order to influence electors to vote against him, falsely and calumniously stated that the pursuer had been bankrupt, and that he had made a very bad failure, meaning thereby that it was dishonest and disreputable failure, and that his creditors had received only 1s. 6d. per £, and that the pursuer was, in consequence, an unsuitable person to represent the electors.

Held (1) that the words alleged to have been used by the defender might reasonably bear the innuendo put upon them, but (2) that assuming that they did so, the pursuer's statement shewed that the defender was privileged in using them, and that as malice was not averred, the action fell to be dismissed.

1st Division.
Ld. Stormonth
Darling.

JOHN WILSON BRUCE, accountant in Glasgow, and resident in Hillhead, brought an action of damages for slander against David D. Leisk, warehouseman in Glasgow, also residing in Hillhead.

The pursuer averred,—(Cond. 1) "The pursuer is an accountant in Glasgow, and resident in Hillhead, of which he has been a police commissioner since the year 1889. He is at present a bailie of said burgh, having been elected in November 1890. The defender is a warehouseman in Glasgow, and resides in said burgh, and has taken considerable interest in the election of police commissioners for said burgh, and in the question of annexation to the city of Glasgow. The sequestration referred to in answer was never gazetted and it was recalled. The pursuer was not insolvent, and the defender knew or had the means of knowing that the sequestration was recalled immediately after it was granted." The answer to this article referred to was,—(Ans. 1) "Denied that pursuer now a bailie. *Quoad ultra* admitted, subject to this explanation, that the pursuer's estates were sequestrated by warrant of the Sheriff of Lanarkshire on 14th March 1890, and in terms of the Bankruptcy Frauds and Disabilities Act, 1884, the pursuer became disqualified from holding the offices of commissioner and magistrate. Notwithstanding this, the pursuer continued to act in these capacities till the month of November 1891." (Cond. 2) "The City of Glasgow Act, 1891, provides for the annexation of the burgh of Hillhead to the city of Glasgow as at 1st November 1891. . . . At a public meeting of inhabitants of the burgh, which was held on 6th October 1891 within the Burgh Hall, H."

head, pursuer was nominated for election as a councillor for the city of Glasgow." (Cond. 3) "The defender has opposed the pursuer in the various elections of police commissioners, and at the meeting referred to in the previous article he and other ratepayers who were present opposed the nomination of the pursuer."

No. 97.

Feb. 20, 1892.
Bruce v. Leisk.

The pursuer stated further,—(Cond. 4) "In particular, the defender, in order to influence votes against the nomination of the pursuer, and also against his election, and to injure his credit, reputation, and feelings, has, since the date of said meeting—namely, during the month of October—stated at various places within the said burgh, to various ratepayers therein, that the pursuer had been bankrupt as a grocer, that he had made a very bad failure—meaning thereby that it was a dishonest and disreputable failure—and that his creditors had received only 1s. 6d. per £, and that the pursuer was in consequence an unsuitable person to represent the electors in the council of Glasgow, or used other words of similar meaning and effect."

Two specific occasions having been condescended upon on which the alleged statements had been made, the pursuer then averred,—(Cond. 6) "These statements are absolutely false and calumnious, and were intended to injure, and have injured, the pursuer in his reputation and feelings, both as a public and private individual, and as a professional man in the said city of Glasgow, and particularly said statements were intended to prejudice, and did prejudice, the candidature of the pursuer as a councillor for the extended city of Glasgow, and have influenced a number of electors who would otherwise have been friendly to and supported the candidature of the pursuer, and the pursuer will be put to the expense of a contest, which otherwise he avers would have been avoided, in respect that only the requisite number of representatives would have been nominated at said public meeting of ratepayers. Said statements have further grievously hurt pursuer's feelings, and have tarnished his reputation as an honest and upright citizen, and as a professional accountant in the said city of Glasgow."

The defender admitted that he was opposed to the pursuer's return, and that he had had conversations as to the fitness of the pursuer for election with the two persons specified, one of whom was, as he was himself, a member of the ward committee appointed by the ratepayers to recommend suitable candidates for election, and the other of whom was himself a candidate, and that he had asked the latter at a meeting of the ward committee, at which he was present, whether he had heard the rumour. The defender admitted that he had said to the former of these, in answer to a question by him, that he had heard rumours that the pursuer had been a grocer and had failed, and had paid 1s. 6d. per £ to his creditors. He had now ascertained that the rumour was unfounded, and he unreservedly withdrew and expressed regret for what he had said.

The defender pleaded ;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (3) *Separatim*, The statements complained of being privileged, the defender is entitled to absolvitor.

The proposed issues were whether on a day and at a place specified the defender did falsely and calumniously state to the persons named "that the pursuer had been bankrupt as a grocer, that he had made a very bad failure—meaning, thereby, that it was a dishonest and disreputable failure—and that his creditors had received only 1s. 6d. per £, and that the pursuer was, in consequence, an unsuitable person to represent the electors in the council of Glasgow, or did use words of a like import and effect of and concerning the pursuer," to his loss, injury, and damage.

No. 97. The Lord Ordinary (Stormonth Darling), on 12th January 1892, found that the summons did not disclose any issuable matter, disallowed the issues, and dismissed the action.*
 Feb. 20, 1892. *Bruce v. Leisak.*
 The pursuer reclaimed.¹

LORD PRESIDENT.—The Lord Ordinary has considered the argument in this case as relating to two separate points. The first is whether the innuendo put upon the words said to have been used is such as the words will support, that is, whether the record as framed entitles the pursuer to say that the construction he puts upon the language in the innuendo may be reasonably ascribed to it, and that he will satisfy a jury that this is so. In my opinion the record is somewhat bald upon this point. The primary meaning of the language used I should have taken to be, not that the failure was dishonest and disreputable, but that it was bad, inasmuch as only 1s. 6d. in the £ has been paid. At the same time I am not prepared to differ from the Lord Ordinary upon that matter, and although there is an absence of circumstantial statement of the surrounding facts which are said to have invested the language used with a meaning more invidious than primarily belongs to it, yet I think it might be going too far to exclude the pursuer from his right of action if he has a case otherwise.

The second question is one of more importance. It is whether, having regard to the occasions on which the words complained of are said by the pursuer him-

* "NOTE.—The defender objected to the issues proposed by the pursuer on two grounds—(1) that the words used were not capable of bearing the innuendo sought to be put upon them; and (2) that the defender having been a voter in the municipal election for which the pursuer was a candidate, he was privileged in making the statement complained of, and the word 'maliciously' must enter the issues. I am against the defender on the first of these grounds, because I think the innuendo conveys a possible meaning of the words used, although it may not be their obvious or primary meaning. But his second objection seems to me well founded. The pursuer admits in cond. 3 that the defender was an elector in the ward for which he (the pursuer) was standing, and he does not expressly deny that the defender was a member of the ward committee appointed at a meeting of ratepayers to recommend suitable candidates. Even if he were only an elector, it seems to me that there is disclosed on record a case of privilege, and that the pursuer must prove malice. It is contrary to public policy that electors should not have considerable latitude in discussing the qualifications of those who solicit their suffrages, and, so long as they do not speak maliciously, I think they ought to be protected. In the recent case of *Anderson v. Hunter*, 18 R. 467, which related to a county council election, and in which an allegation of impending bankruptcy was the point of the slander, it was held that there was no privilege where the defender was not an elector in the division for which the pursuer was standing, but the opinions of the Judges, I think, clearly imply that if the defender had been an elector, the decision would have been otherwise. I gave the pursuer an opportunity of considering whether he should offer to amend the record by adding an averment of malice, but he intimated that he did not desire to do so, and I have therefore dismissed the action."

¹ *Pursuer's Authorities.*—On first point—*Broomfield v. Greig*, March 10, 1868, 6 Macph. 563, 40 Scot. Jur. 299; *Fraser v. Morris*, Feb. 24, 1888, 15 R. 454; on second point—*Campbell v. Spottiswoode*, 1863, 3 Best & Smith, 769.

Defender's Authorities.—On first point—*M'Laren v. Robertson*, Jan. 4, 1859, 21 D. 183, 31 Scot. Jur. 111; on second point—*Auld v. Shairp*, July 14, 1875, 2 R. 940, L. J.-C. Moncreiff, p. 946; *Anderson v. Hunter*, Jan. 30, 1891, 18 R. 467.

No. 97.

Feb. 20, 1892.
Bruce v. Leisk.

self to have been used, they can found a claim of damage, even assuming them to bear the more invidious sense which the pursuer promises to infuse into them, without an allegation of malice. When I examine the record, I think the pursuer has been very candid and anxious to possess the Court very fully with the idea that, each time the defender spoke of him, he, the defender, was taking part in an election of a candidate for a councillorship in Glasgow. What he states to that effect is consecutive, deliberative, and, in some cases, emphatic. Indeed a better record for connecting the language used with the fulfilment of a public duty could hardly have been desired by the defender. The defence is that on the face of the pursuer's record there is a privileged occasion of speaking, and that the circumstances disclosed on record are such that malice is not implied, as it would be in circumstances which were devoid of the elements of privilege. The statements were made during an election by a person legitimately interested in the election, at places within the burgh, and to persons who, like himself, were charged with the responsibility of electing a councillor; and the sum of the defender's statement is alleged to be that the pursuer was an unsuitable person to be elected. The question is whether, the defender being so placed, by the averments of the pursuer, in the discharge of a public duty, the statements which he made were or were not germane, pertinent, and relevant to the question whether the pursuer was or was not a person who should be elected to the vacant office.

The statements complained of are that the pursuer has been bankrupt as a grocer, that he has made a very bad failure—meaning, thereby, that it was a dishonest and disreputable failure—and that his creditors received only 1s. 6d. per £. Now, can it be said that those are not matters, I will not say relevant, but, at all events, which may legitimately be deemed relevant to the election of a councillor? The topics which arise upon them are, of course, obvious. It may well be said that a man who has been bankrupt once may become bankrupt again; at all events, that if a person who has not been bankrupt were standing, he was more eligible than a person who had been. It may be said, also, that the facts indicate a want of success in business not encouraging to electors asked to entrust a man with their business; and when we come to the most invidious part of the statement—that it was a dishonest and disreputable failure—that would seem to be highly relevant to the question whether, the office vacant being an office of trust and high public responsibility, the choice of the electors would fitly fall upon a person who had gone through these vicissitudes. I must answer these questions in favour of the defender. I think that when electors are considering, as the defender is asserted by the pursuer to have been, with laudable interest, who shall be elected, they are quite entitled to state to other people, similarly concerned, what they know, or believe they know, upon the delicate subjects which are then mentioned. That the statements are ~~injurious and invidious~~ is quite true; but then, unfortunately, that brings us, perhaps, the more sharply into the region of relevancy, and into the region also of the duty of an elector to give due weight to them, and to communicate them to others whom he is legitimately seeking to influence. I will add that I do not think that should your Lordships agree with me we should thereby be giving any unlimited licence to slander during an election. We do not lay it down that anybody is entitled to say anything against a candidate. Our decision is merely that the occasion of speaking being what it was, and the thing said what it was, there is no presumption in law that there was malice. If this pursuer had not declined to allege malice his action would have lain. Whether, in other

No. 97.

Feb. 20, 1892.
Bruce v. Leisk.

cases, action would lie must depend entirely upon whether there is an occasion for the discharge of a public duty set out in the record such as there is here, and also whether the subject-matter of the alleged slander is so germane to the question of fitness for election as common-sense pronounces this to be, and as is plainly implied in the Statute of 1884; because although the Statute of 1884 (Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, 47 and 48 Vict. c. 16) did not make a past condition of bankruptcy a ground of disqualification, yet at the same time it very plainly points out that the condition of bankruptcy, however that condition may have been brought about, is not one which is consistent with the proper discharge of the duties of a public representative. As I have said, I think one of the reasons why the question of a man's bankruptcy is relevant in circumstances like the present is, that once a thing of that kind happens, it, in human experience, is apt to recur; and, accordingly, an elector who discusses that subject may fairly be influenced by regard to the undesirableness of the constituency having on their hands a member whose possible relapse into bankruptcy would necessitate a fresh election.

Upon these grounds I think the judgment of the Lord Ordinary is sound, and ought to be affirmed.

LORD ADAM.—The Lord Ordinary has disposed of two points,—(1) whether the words used will bear the innuendo sought to be put upon them, and (2) whether, assuming that they do, the pursuer is entitled to an issue without the insertion of malice in it.

Upon the first point, it is not for us to construe the language complained of. That is a matter for the jury. But it is for us to say whether or not it will bear the innuendo proposed to be put upon it. The Lord Ordinary says that he is against the defender, because he thinks "the innuendo conveys a possible meaning of the words used." If his Lordship had said "a reasonable meaning," I think he would have employed a more correct term. I do not understand the defender to dispute that if the language used had stopped with the word that the pursuer had made a very bad failure, they might not have implied that the failure had been dishonest. But the argument is that the words bear their own glossary, and it is contended by the defender that the additional statement that the pursuer's creditors had received only 1s. 6d. in the £1, explains and discloses the meaning to be attached to the first part of the language. I do not say that if it were my duty to construe the language I would not come to agree with the defender, but I think that the question is one which might fairly be sent to a jury.

Upon the second point, as to whether the statement was in the circumstances privileged, I think the word "privilege" is a very elastic term. There are many kinds and descriptions of privilege. There is the privilege of a Member of Parliament, and of Judges and counsel in the conduct of a case, which is absolute. There are other cases of privilege which require proof, not only of malice, but also of want of probable cause. There are others again, perhaps of lesser degree which require not only that malice shall be averred, but also that special facts and circumstances inferring malice shall be set forth in the condescendence. The present case is different from all these. The pursuer, standing for an important public office, for which he had been nominated at a meeting of the inhabitants of Hillhead, where it is not disputed that the defender is a ratepayer and an elector. The question we have to consider is whether

an elector has a right and privilege to state to other electors, or to another elector, what is germane to the election, and what he believes at the time to be true? If it is not already implied in the judgment in the case of *Anderson* ~~No. 97.~~
~~Feb. 27, 1892~~
~~Brace v. Leisk~~
 that where a candidate is standing for an important public office, one of the disagreeable incidents of it which he has to face from the electors is such language as is here complained of, I have no difficulty in laying this down now. If it is alleged that the statement was made maliciously, then he will have an action, but not otherwise. I think the Lord Ordinary's judgment is right.

LORD KINNEAR.—I am of the same opinion. If I were construing for myself the words ascribed to the defender I might not be disposed to put the innuendo upon them alleged by the pursuer, namely, that his bankruptcy had been bad because dishonest and disreputable. But if a jury, having heard the defender examined in the witness-box, and being informed of all the circumstances in which the language was used, had found that the words had been used in that sense, I should not be prepared to hold that it was such an unreasonable verdict that we should set it aside. I therefore think the Lord Ordinary was right in allowing the pursuer to prove that the words were used with the meaning alleged if he chooses to take upon him so heavy a burden.

But then I agree with his Lordship in thinking that the occasion was privileged, and that the pursuer would not be entitled to damages unless he proved malice. The pursuer's own statement is that when the words of which he complains were uttered the defender was engaged in the exercise of a public right, with a view to the performance of a public duty. If the defender was not acting in the honest discharge of a public duty, but from some indirect motive for the purpose of injuring the pursuer, or even if, although he had no personal ill-will towards the pursuer, he had taken up some unfounded notion about the pursuer's conduct, without any reasonable ground, and spread abroad an injurious report against him, recklessly and without any concern for his neighbour's good name, the pursuer might have had a good ground of action, whether the occasion was privileged or not, because he would then have been in a position to aver malice, and the jury would have been required to say whether the defender was speaking honestly in the exercise of a public right, or whether he was maliciously slandering the pursuer. But that is just the question which the pursuer declines to put to the jury. If he had been prepared to prove malice he might have had an issue; but when he declines to aver malice, he says, in effect, that the defender's statements, although false in fact, were not malicious or false in the knowledge of the defender, but such as a man with reasonable regard for his neighbour might have made, and that he did not make them for the purpose of injuring anybody, or from any indirect motive, but only for the purpose of influencing the electors by considerations which it was proper for them to take into account; and, since that is the true import of his averment, he is not entitled to an issue.

LORD McLAREN was absent.

THE COURT adhered.

D. HOWARD SMITH, S.S.C.—W. R. PATRICK & WALLACE-JAMES, S.S.C.—Agents.

No. 98. DAVID STRATHIE (R. S. Lang's Trustee), Appellant (Respondent).—*Salvesen—Crabb Watt.*

Feb. 23, 1892.
Lang's Trustee v. Steele.

ROBERT STEELE AND OTHERS, Respondents (Appellants).—*Watt.*

Bankruptcy—Sequestration—Meeting of creditors—Notice to trustee—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 98.—The Bankruptcy Act, 1856, sec. 98, enacts that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors."

On 26th October one of the commissioners in a sequestration sent a notice to the *Gazette* calling a meeting of the creditors. The *Gazette* containing the notice was published on 27th October between 6 and 7 P.M. On the afternoon of the 27th October the commissioner sent a notice of the meeting to the trustee, but this notice was not delivered to the trustee till 10 A.M. on the 28th, in consequence of its being contained in a registered letter, which could not be delivered after business hours on the 27th, the trustee's office being then shut.

In an appeal by the trustee against a resolution passed at the meeting, held that due notice had not been given to the trustee, and therefore that the meeting had not been duly called.

1ST DIVISION.
Sheriff of
Lanarkshire.

ON 18th November 1891 David Strathie, C.A., Glasgow, trustee on the sequestrated estates of R. S. Lang, manufacturer, Glasgow, appealed to the Sheriff of Lanarkshire against a resolution of the creditors in the sequestration removing him from office.

The ground of the appeal was that there had not been due notice to the appellant, as trustee, of the meeting of creditors at which the resolution appealed against was carried.*

The facts regarding the notice were thus stated by the Sheriff-substitute in his note,—“In the present case one of the commissioners sent to the *Gazette* a notice, dated 26th October, to be published in the *Gazette* on 27th October, calling a meeting for 4th November. The *Gazette* was published on the 27th between 6 and 7 P.M. On the afternoon of the 27th, the same commissioner sent, by registered letter, a notice to the trustee, addressed to his place of business. It was not delivered till 10 A.M. on the 28th, as, being registered, it could not be delivered after business hours on the 27th, the trustee's office being then shut.”

On 9th December the Sheriff-substitute (Erskine Murray) recalled the resolution complained of.

Robert Steele and certain other creditors appealed to the Court of Session.¹

LORD PRESIDENT.—The 98th section of the Bankruptcy Act of 1856 entitles a commissioner to call a meeting of the creditors, but that power is qualified by the words, “with notice to the trustee.” I take it as quite clear that these words qualify the word “call,” so as to make it a good call if it is a call with notice, and a bad one if without notice. We have been told that the calling of the meeting in the present case was by a notice in the *Gazette*, and the question before us is, whether that calling took place with notice to the trustee, or without such notice. The *Gazette* containing the notice was published on the evening of the 27th of October, and the trustee did not *de facto* receive notice

* The Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 74, enacts that a majority of creditors present at any meeting duly called for the purpose may remove a trustee. Section 98 provides that,—“Any commissioner, with notice to the trustee, may at any time call a meeting of the creditors.”

¹ *Authority.*—*M'Fadyean (Todd's Trustee) v. Campbell*, March 11, 1884, 11 S. L. R. 478.

until the 28th. *Prima facie*, therefore, the *Gazette* notice was a bad calling No. 98.
of the meeting. The trustee received his notice after the appearance of the Feb. 23, 1892.
notice in the *Gazette*, and it seems to me impossible to hold that such a notice Lang's Trust-
tee v. Steele.
can have a retrospective effect so as to rehabilitate the *Gazette* notice. It was said
however, that means were taken to give the trustee notice upon the evening of
the 27th. At best that was only giving him notice at the same time as the
notice appeared in the *Gazette*. But what were the means taken to apprise the
trustee of what was going to appear in the *Gazette*? A registered letter was
despatched upon the afternoon of the 27th, to be delivered into the hands of
Mr Strathie, himself if he could be found, or into the hands of someone who
had his authority to receive such letters for him, but if neither Strathie himself
nor someone authorised by him could be found, delivery would necessarily be
delayed until the following day. That is the meaning of registering a letter.
It does not necessarily mean delivery at the earliest date at which ordinary
letters are delivered. Its object is to ensure that the delivery should be personal,
which may render a postponement of delivery possible. *De facto*, then, the
trustee did not receive notice until the 28th, and that will not suffice to validate
the *Gazette* notice.

Mr Watt argued that we should decide the matter upon the documents before
us. Well the Sheriff-substitute sets out in a distinct narrative that the letter
"could not be delivered after business hours on the 27th, the trustee's office being
then shut." I take it that when the postman came to the office it was after
business hours, when the trustee might reasonably be expected to be away. No
offer was made to displace that fact by evidence, and indeed I doubt if any
evidence would suffice to make up for the commissioner not giving notice before
the appearance of the notice in the *Gazette*.

I am of opinion that we should dismiss the appeal.

LORD ADAM.—The question here depends upon the construction of the 98th
section of the Bankruptcy Act, which provides that "any commissioner, with
notice to the trustee, may at any time call a meeting of the creditors." In
this case one of the commissioners on a sequestrated estate called such a meet-
ing, and gave notice to the trustee, but the question is, whether that notice
was given in time? As matter of fact the *Gazette* notice appeared upon the
evening of the 27th of October, and it is admitted that in point of fact
notice to the trustee did not reach him until the next morning. Therefore, if
there is nothing to make this case exceptional, it is clear that the notice to
the trustee was given after the publication of the *Gazette*—that is, after the
calling of the meeting—and was accordingly bad. The question of whether the
calling of the meeting simultaneously with giving notice to the trustee is effectual
was raised in the case of *M'Farlyean* to which we were referred. But a trustee's
receiving notice at the very moment of the publication of the *Gazette* is so un-
likely to occur, that I think the consideration of such a possibility would be
unprofitable discussion. In any case, notice to the trustee must not be after
publication of the *Gazette*. It will be time enough to consider the question of
simultaneity when it occurs. Here the notice was given after the *Gazette* notice
appeared, and that, I think, is sufficient for the decision of this case.

But then it was said that although the actual delivery of the letter containing
the notice was not until the 28th, that was owing to the trustee's own actings,
and it was said that if the trustee had happened to be at his office when the

No. 98. registered letter was brought, the notice would probably have been in time. The facts however were different. The effect of registering the letter was to make it necessary that it should be delivered to him personally, and as he had left his office that was postponed. There was nothing here unusual in the actings of the trustee. Had the letter been brought at ten o'clock in the forenoon, and the office had then been found shut, it might have made a difference. There was no such case here, and I agree with your Lordship in thinking that the appeal should be dismissed.

Feb. 23, 1892.
Lang's Trustee v. Steele.

LORD KINNEAR.—I agree with Lord Adam that the Act cannot mean that notice is to be given to the trustee simultaneously with notice to the world, and that was never seriously suggested in the argument or in the previous case. The only thing there suggested was that notice might have been sufficient if given at the same time as the publication of the *Gazette*, and that if it so happened that might be enough. I thought at the time that there was a great deal to be said in support of the stricter view expressed by Lord Young and Lord Craighill, to the effect that that would not be enough, but that notice to the trustee must precede the notice calling the meeting. It is not necessary to consider that question here, and it is enough to say that the notice to the trustee must not be later than that calling the meeting. The fact here is that the meeting was called by a notice in the *Gazette* upon the 27th, and the notice was not given to the trustee until the 28th, therefore the notice to the trustee was later than that calling the meeting. It was said that the failure to give timeous notice was owing to the absence of the trustee from his place of business. I think we cannot give effect to that view,—implying that it is the duty of a man of business to be at his office at all hours. Where the duty of giving notice is sufficiently discharged by sending a letter through the post, it may be enough if the letter is addressed to the office of the person receiving the notice, without the necessity of proving that the addressee was at home, or did not receive it through failure to open his letters. But here the precaution was taken of sending a registered letter, to be delivered only to the addressee personally, with the inevitable consequence that if it was after business hours delivery would be postponed until next morning. I concur in thinking the appeal should be dismissed.

LORD M'LAREN was absent.

THE COURT dismissed the appeal.

SIMPSON & MARWICK, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

No. 99. MRS AGNES CRAWFORD OR BRYAN, Pursuer (Respondent).—*G. R. Gillespie*—*Dykes*.

Feb. 23, 1892. BUTTERS BROTHERS & COMPANY, Defenders (Reclaimers).—*Fleming*.

Bryan v. Butters
Brothers & Co.

Loan—Partnership—Power of partner to borrow money—Proof—Writ.—A partner of a mercantile firm borrowed, as for his firm, a sum of £100 from his wife. She requested an acknowledgment from the firm, and, in compliance with that request, he handed her an acknowledgment which bore that the money had been received from her by the hands of her husband "on temporary loan." The acknowledgment was written by a clerk of the firm and was signed by their cashier *pp.* of the firm. It was proved that the cashier had so signed on the verbal instructions of the husband; that the money was paid to the cashier and put to the credit of the husband in the books of the firm. In an action by the wife against the firm for repayment of the loan, *held* (1) that the

husband, as partner of a mercantile firm, had power to borrow money and to bind the firm for the debt; (2) that the writ having been signed by the cashier on the instruction of such a partner was writ of the firm; and (3) might be used *in modum probationis*, although it was neither holograph nor tested, and that therefore the loan to the firm had been established,—*diss.* Lord Young, who was of opinion that the document could not be received as proof of the loan, being neither holograph nor tested; and that a partner of a firm had no power to grant procuration to any person to bind the firm, and had no power to borrow money except for mercantile purposes, whereas the circumstances shewed that this money had not been applied to the mercantile purposes of the firm.

No. 99.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

MR J. W. F. BRYAN was a partner of the firm of Butters Brothers & Company, contractors, engineers, and machinery merchants, Glasgow. On 29th October 1886 Mr Bryan borrowed £100 from his wife. He stated that it was borrowed for the firm, and in lending it the wife stipulated that she should get a receipt from the firm. The same evening Mr Bryan brought his wife an acknowledgment in these terms, viz.:—"Received from Mrs J. W. F. Bryan, by the hands of Mr J. W. F. Bryan, the sum of one hundred pounds sterling (£100), on temporary loan, for which we are obliged. *pp.* BUTTERS BROS. JOHN GIBSON." The body of this receipt was in the handwriting of a clerk of the firm. Mr Gibson, who signed it, was cashier to the firm. Mrs Bryan kept this acknowledgment, and for three and a-half years she received interest on the sum by the hands of her husband.

2^D DIVISION.
Ld. Kyllachy.

Mr Bryan deserted his wife, and left the country. She raised an action against the firm for payment of £100. She pleaded;—(1) The sum sued for having been advanced by the pursuer out of her own proper funds and estate, and not having been repaid to her, or to anyone authorised by her, is still due and resting owing by the defenders to her, and she is entitled to decree as concluded for, with expenses.

The defenders pleaded;—(2) The alleged loan can only be proved by writ or oath of the defenders. (4) The said receipt, having been *ultra vires* of Mr Gibson, does not bind the firm to any creditor other than the true creditor, as appears in their books.

A proof was led. Mr Butters, the leading partner of the firm deponed,—"I understand Mr Bryan handed the £100 to Mr Gibson, who applied it, I suppose, in the usual way for the firm's purposes. Mr Gibson informed me that Mr Bryan had got the money back. The firm were not exactly in difficulties at the time the money was handed to Mr Gibson, but we were verging on difficulties. . . . Mr Gibson was our cashier, and he is my cashier still. He had a power of procuration for the bank. . . . Cross.—I never authorised Mr Bryan to borrow money for the firm's purposes. I never gave Mr Gibson authority to do so either. I was not aware that either of them had ever done so until this question was raised; the letter from Mrs Bryan's agents was the first I knew about it. I never heard of any interest being paid to Mrs Bryan. I did not give any authority for interest to be paid; and we never paid interest as a firm. The books do not contain any entries of the payment of interest. I cannot tell what was done with the £100 when it was received, but I suppose Mr Gibson would put it in the bank in the usual way. That was all that I meant when I said it was used for the firm's purposes."

Mr Gibson deponed,—"Mr Bryan brought the £100 to me on the date it is entered in the cash-book—29th October 1886. He told me to put it to the credit of his private account, not to the credit of the firm. He made the clerk write out a receipt for the money, and he asked me to sign it for the firm. He said he had got the money from his wife for a short time. . . . Mr Bryan assisted his uncle, Mr Butters, in con-

No. 99. nection with the outside department of the business, and he also assisted me in the financial and commercial management. . . . All that appears on 29th October 1886 is, that £100 was put to the credit of Mr Bryan's private account with the firm. On 5th November he drew out £100, which he told me was to repay Mrs Bryan, and I debited his private account with that sum on that date."

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

The Lord Ordinary (Kyllachy), on 18th June, gave decree in terms of the conclusions of the summons.*

* "OPINION.—The facts of this case do not present any difficulty. The pursuer is the wife of a late partner of the defenders' firm, and on 29th October 1886 she lent to her husband, out of her separate funds, as she understood for the firm's purposes, a sum of £100, stipulating that she should receive in exchange the firm's acknowledgment of the loan. I have no doubt of the pursuer's good faith, and that the account which she gives of the transaction is entirely true. Her husband took the money to the cashier of the firm, and it was paid into the firm's bank account, and applied to the firm's purposes; and, acting on the husband's instructions, the cashier, who appears to have had the charge of the firm's financial transactions, granted to the pursuer the acknowledgment which is quoted in the record. This acknowledgment was written out by a clerk, signed by the cashier, booked in the firm's private letter book, and delivered through her husband to the pursuer. The money, however, although applied to the firm's purposes was, it now appears, put to the credit of the pursuer's husband in the books of the firm; and it is said that he shortly afterwards drew it out, and that the firm is now dissolved, and that there is no sum now to his credit in the firm's books.

"In these circumstances the pursuer sues the firm and the remaining partner (her husband and she having apparently separated) for repayment of the loan; and, as I indicated at the close of the proof, I have no doubt of her right to recover, provided the loan is proved by competent evidence. That is to say, I hold it to be sufficiently clear that it was within the authority of the husband as a partner of the defenders' firm, if not also within the authority of the firm's cashier, to borrow money on the firm's credit, and that the credit of the firm was in fact pledged by both of those parties for the amount of the loan. I have delayed, however, disposing of the case, because of the averment and plea by the defender, to the effect that the acknowledgment produced is neither signed nor tested, and that, therefore, the alleged loan is not instructed by legal evidence.

"The question thus raised appeared to me to require a careful examination of the authorities—the point being sharply taken that the loan of money, according to our law, cannot be proved except by a probative writing, unless—which is not the case here—the transaction falls within the exception of *res mercatorie*.

"The result has been to satisfy me not only that the contract of loan, like other consensual contracts, may be constituted without writing,—in other words that writing is not required as matter of solemnity,—but also that where writing is required not as matter of solemnity but only by way of proof, the writing need not be probative, but is sufficient if it be shewn to be genuine.

"On principle, I confess I should not have much doubt that this must be the law. The question depends after all upon the construction of the old Scotch statutes regulating the authentication of deeds; and these statutes, in my opinion, relate not to writings produced *in modum probationis*, but only to operative writings—writings founded on as constituting a title or constituting an obligation. An improbativ obligation, at least if within the class to which the statutes apply, is no doubt inoperative,—that is to say, it cannot (except in *mercatoria* or where there is *rei interventus*) form the substantive *vinculum* which action may be raised. Possibly also—although the distinctions here run into subtlety—an improbativ obligation cannot be received even in evidence of an antecedent obligation lying behind it; and such antecedent obligation must require to be proved by competent evidence *aliunde*. But while that is the

The defenders reclaimed, and argued;—A partner had no implied power to borrow, and, at all events, could only do so in matters connected with

No. 99.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

law with respect to obligatory writings, I can find nothing in the statutes or in the principles of our law of evidence to require that all writings put in evidence shall be *per se* probative. The constitution of obligations is one thing. Their proof is another; and where—as in the case of loan—the obligation may be constituted verbally, and may be proved either by writ or by oath, it would require, I think, some positive rule of law to make more necessary than that the writ, if writ is adduced, shall be genuine.

“An examination of the authorities leads, I think, to the same result. There are, no doubt, some *dicta* to be found in the books which are incautiously expressed and have given rise to misapprehension. But certain points are established by decisions which are, I think, quite conclusive of the principle. Thus, it is settled that in the proof of trust (where by statute writ or oath is necessary) any writ of the truster proved to be genuine is sufficient.—Bell’s Principles, 1995; *Bathie v. Wharnclyffe*, 11 Macph. 490, 45 Scot. Jur. 318; *Thoms v. Thoms*, 6 Macph. 174, 40 Scot. Jur. 99; *Ross v. Fidler*, 24th Nov. 1809, F. C.; *Fraser v. Bruce*, 20 D. 115, 30 Scot. Jur. 70; *McLaren v. Hovie*, 8 Macph. 106, 42 Scot. Jur. 32. So, in the case of leases and other contracts relative to land, where there has been *rei interventus*, and writing is only required by way of proof, the writ requisite may be any genuine writing, and may even be a writing which is not subscribed. So also in the case of acknowledgments of the receipt of money paid, and in the case of acknowledgments granted to rebut the presumptions arising on bills of exchange.

“These are all cases, I think, quite *in pari casu* with loan. But even in the case of loan itself the authorities are numerous—Ersk. iv. 2, 4. Thus entries in a debtor’s books, although in the handwriting of a clerk, have been held sufficient. So also have indorsations or signatures appended to accounts, *e.g.* in the books of a bank. So also, at least in some cases, have writings in the handwriting of the creditor but found in the debtor’s possession, and so dealt with as to be constructively the debtor’s writ. In all these cases loan of money has been held sufficiently instructed by improbativ writings.

“The only decision the other way which was cited, or which I have been able to discover, is that of *Stewart v. Syme*, 12th December 1815, F.C., which is said to derive importance from being referred to without disapproval by the present Lord President in the case of *Haldane v. Speirs*, 10 Macph. 539, 44 Scot. Jur. 305. I am bound to say that I think the judgment in that case does appear to require explanation, but the case was one of a rather special character, arising on a bill of exchange, and where the acknowledgment of indebtedness founded on was not only not probative, but was, as the Court held, not sufficiently connected with the bill to which it was sought to be applied. I cannot think that this case is an authority for the proposition that loan must always be proved by a probative writ; and I am satisfied that in citing the case, which he did for another purpose, the Lord President did not intend to affirm that proposition.

“Therefore, both on principle and authority, I think an acknowledgment proved to be the writ of the debtor is sufficient evidence of the loan, and it may be proper to observe that in the case of loan there is this additional consideration. It is elementary law that even where writing is required by way of solemnity, the solemnities of execution are dispensed with where the circumstances exclude *locus penitentiæ*. In other words, where there has been *rei interventus*, an improbativ obligation is as good as one that is probative. And if this be so—and it is not disputed—I confess I do not see how any question as to the statutory solemnities can arise under the contract of loan, where, from the nature of the case, there can be no *locus penitentiæ*, or, to put it otherwise, where there must always be *rei interventus*. Having borrowed money, you cannot—money having passed—resile from your contract; or if you do resile you can only do so on the footing of restoring matters, which just means repayment of the money. I do not speak of contracts to make a loan or to take a loan. There writing is probably required as a matter of solemnity, and there being no *rei interventus* the

No. 99. the business of the firm.¹ Still less had a partner power to grant procuration to another to sign for the firm, unless that were specially conferred on him by the firm. *Delegatus non potest delegare*. There was no pretence that any such special authority had been granted to Bryan here; hence Gibson had no authority to bind the firm by signing the acknowledgment in question. But, in any event, a writ to prove loan must be either holograph or tested,² unless it were *in re mercatoria*, which this transaction was not.³ The rule applied not merely to obligatory writs, but to any writs used for the purpose of proving loan.⁴ Entries in books had indeed been admitted as sufficient evidence, but that was as being *in re mercatoria*.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

Argued for the pursuer;—The rule as to writ or oath was not statutory, but a rule of the common law.⁵ All that it meant was that written evidence was required. Entries in books would suffice.⁶ Receipts were not in practice either holograph or tested, but to hold that on that account they could not be admitted as writ of the granter would be monstrous.⁷ It must always be kept in view that the pursuer did not sue on this acknowledgment as on a bond; she sued on the fact of money having been advanced, and produced the acknowledgment as evidence. That distinction rendered it unnecessary to comply with the statutes as to authentication of writs as matter of solemnity.⁸ A partner in a trading firm had power to bind his firm for money borrowed;⁹ nor did it matter whether the money was applied for the purposes of the firm or not in a question with the lender, however important that might be *inter socios*.¹⁰ How could a lender find out what became of the money he lent to the firm? What right had he to inquire? The cashier signed as the agent of the firm on the direct instructions of a partner, who had power to borrow and to bind the firm.

At advising,—

LORD JUSTICE-CLERK.—This case relates to a small matter, but the questions involved are of considerable importance. The pursuer demands repayment of a sum of £100, which she alleges she lent to the defenders, and in proof of this alleged advance she produces an acknowledgment in these terms, viz:—
“Received from Mrs J. W. F. Bryan, by the hands of Mr J. W. F. Bryan, the sum of one hundred pounds sterling (£100), on temporary loan, for which we are obliged. *pp.* BUTTERS BROS. JOHN GIBSON.”

writing probably must be probative. But in the case of an obligation granted as here in exchange for money borrowed, I do not at present see how any question of the improbateness of the document of debt can well arise.”

¹ Lindley on Partnership, p. 126.

² Erskine, iv. 2, 1-4.

³ See Dickson on Evidence, sec. 795; Hamilton's Executors v. Struthers, Dec. 2, 1858, 21 D. 51, 31 Scot. Jur. 42.

⁴ Smith v. Smith, Dec. 4, 1869, 8 Macph. 239, 42 Scot. Jur. 104; Christie's Trustees v. Muirhead, Feb. 1, 1870, 8 Macph. 461, 42 Scot. Jur. 215.

⁵ Stair, iv. 43, 4; Erskine, iv. 2, 4.

⁶ Knox v. Martin, Feb. 12, 1850, 12 D. 719, 22 Scot. Jur. 244.

⁷ Lord Benholme in M'Laren v. Howie, Nov. 6, 1869, 8 Macph. 106, 42 Scot. Jur. 52.

⁸ Lord Young in Neilson's Trustees v. Neilson's Trustees, Nov. 17, 1883, 11 R. 119.

⁹ Sinclair, Moorhead, & Co. v. Wallace & Co., June 4, 1880, 7 R. 874, per Lord Rutherford Clark (Ordinary); Bank of Australasia v. Breillat, 1847, 6 Moore, P. C. Apps. at p. 194.

¹⁰ Okell v. Okell & Eaton, 1874, 31 L. T. 330.

The Gibson who signed this receipt, bearing to be by procuration for the firm, No. 99. was the cashier of the defenders' firm. The question is whether the pursuer can by this document prove the debt to be due. For it is, of course, clear that a debt for borrowed money can only be proved by the writ or oath of the alleged debtor. The document is neither holograph nor tested, nor does it bear the signature of any member of the defenders' firm. The questions, therefore, are (1) whether such a document can be used *in modum probationis* to establish a loan; and (2) whether this document has been established *habili modo* to have been granted for the firm by the authority of the firm, and therefore to be an acknowledgment of debt on which the pursuer can sue.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

I am of opinion that both of these questions must be answered in the affirmative.

The facts are within small compass. Bryan, the partner, borrowed the money from his wife for the firm, delivered it to the cashier, Gibson, and directed Gibson to make out and sign as per procuration the acknowledgment which he delivered to his wife. If, then, Bryan had an express or implied mandate to borrow for his firm, there can be no doubt that the defenders received the amount of the loan through Bryan, who borrowed for them, and Gibson, who received the money and gave the acknowledgment. For there can be no doubt that, if the money was received on loan, the partner who got it on loan ordered Gibson to acknowledge the loan as for the firm. Now, here I cannot doubt that Bryan, as a partner of a mercantile trading firm, did have an implied mandate to borrow money and to bind the firm for it. It is, I think, settled law that a partner can bind his firm in such circumstances. If Bryan himself had granted the acknowledgment it seems clear that that would have been conclusive. If a partner of a firm asks for a loan of cash for his firm, and obtains such loan, the lender is entitled to rely on his acknowledgment for the firm. It is a circumstance to be noted that this lady would not have lent the money on her husband's acknowledgment. She says in her evidence,—“I made the loan to the firm of Butters Brothers, and not to my husband. He asked it for the firm, and I expressly stipulated that he should bring the firm's acknowledgment for the money, and he did so the same evening.” But if Mr Bryan could bind his firm by his own writ, could he not equally do so by giving orders to the cashier of the firm to sign for the firm the acknowledgment which was to be handed to the lender? I hold that he could.

But then it is said that the acknowledgment of the loan is not established by the document signed by Gibson, even if signed by procuration for the firm, because it is not holograph nor tested. I do not think that this contention is sound. The document is used in proof only of the existence of the loan. It is founded on as writ to prove the truth of the pursuer's allegation of subsisting loan, and that being so, I think, if it be shewn to be the writ of the defenders, it is not a good objection to its being used as a document of debt by the pursuer producing it from her custody as proof that the debt subsists, and is undischarged, to say that it is not holograph nor tested. I agree with the observations of the Lord Ordinary upon this point.

I have purposely avoided saying anything as to the facts spoken to in evidence as occurring after the £100 reached the coffers of the defenders, which they certainly did, as they were duly entered as cash received in the firm's cash-book. What was done afterwards with the money does not appear to me to affect the question. Bryan, the partner, borrowed the money for the firm from the lender,

No. 99. directed Gibson as the servant of the firm to sign the acknowledgment for the firm, and handed the money to him as the cashier of the firm. In these circumstances, it is in my opinion sufficiently established that the firm is liable to pay the sum claimed by the pursuer, and that the interlocutor of the Lord Ordinary should be affirmed.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

LORD YOUNG.—As your Lordship has observed, this case is not in itself of any magnitude or considerable interest. Mr Bryan had a wife with money, and he got at least £100 of it from her; we do not know how much more. He was a knave, and in the end he deserted her, and we do not know what has become of him. He had an uncle as well as a wife, Mr Butters, who took him into partnership, and the question is, who is to be the sufferer as regards this £100, his uncle or his wife.

Nevertheless, the case raises legal questions of some importance and interest. After all the consideration I have been able to give it, and I have considered it over and over again, I have arrived at a conclusion different from that reached by the Lord Ordinary, your Lordship, and, I understand, Lord Trayner, so that the probability is large that what I fear has been an overconsideration of the questions raised has not been fruitful. But it is my duty to state the conclusions to which I have come.

The first point in the case regards the law of Scotland as to proof of the contract of loan, and involves a consideration of our law with respect to the formalities and the authentication of writs. On these matters our law is different from the law of England. Generally speaking, this is the rule, viz., that bargains, which are usually the subject of writing, cannot be proved by parole. In illustration of that general rule Stair and Erskine take as the most prominent instance a loan of money. Further, we have the rule that writings must be holograph or tested, unless again they fall under the well-known exceptional class of writs *in re mercatoria*. That is an elastic term, and is extended so as to cover cases where the operation of the general rule would, looking to the exigencies of business, and the despatch required in commercial matters, be altogether inconvenient and out of place.

But it is an important enough rule, carrying with it considerable safeguards protecting the public, *i.e.*, the parties, from all risk of misunderstanding, and securing that important writs shall be deliberately executed.

That, then, is the rule, not confined to documents affecting landed property. It will apply to all contracts of importance, the test of importance being that the subject of them is above £100 Scots, not being mercantile contracts.

This contract is a pure and simple contract of loan of money, not incidental or connected with any mercantile contract. This is the document,—“Receive from Mrs J. W. F. Bryan, by the hands of Mr J. W. F. Bryan, the sum of one hundred pounds sterling (£100), on temporary loan, for which we are obliged to pp. BUTTERS BROS. JOHN GIBSON.” It is not suggested that Mrs Bryan had any mercantile dealings with the firm connected with their business as a company. She says she lent £100 to the company, and the case would have been the same if it had been £10,000. The loan might have been made in the same terms to another lady, or to a landed proprietor, or to anyone you like, totally unconnected with business. I ask this question, to what legal category does this writ belong? If it is anything at all it is a bond for borrowed money. In what respects—as regards its legal character—is it distinguished from a bond

for borrowed money? What else is it? Now, does the law of Scotland No. 99.
 require a bond for borrowed money to be tested or holograph, or does it not? Feb. 23, 1892.
 Is there any authority for saying that such writings require no formalities? I Bryan v.
 I am of opinion, therefore, that this is not a bond for borrowed money; I mean Butters
 we cannot receive it as such, since it is not holograph or tested. It is out of Brothers & Co.
 the question to say that the exigencies of business, the necessary rapidity of
 mercantile transactions, required such an informal document in this case.
 There were no such exigencies here.

If we take the other view, as your Lordship does, then I think that there is an
 end to the rule of law that writings, not connected with mercantile transactions,
 shall be in a certain form, that rule being a wholesome and useful rule for the
 protection of parties.

But the document, such as it is, is not signed by the alleged borrower. It is
 said that it is signed *per procuracionem* of the alleged borrower. Let me put
 aside for a moment the feature that this is a partnership question. You have a
 bond for £100, £1000, £10,000, £100,000—the amount is indifferent—signed
per procuracionem, and no procuration produced. Now, I do not think that
 the law of Scotland permits that. It would require a carefully prepared
 mandate or authority to authorise one man to give a bond for borrowed money
 for another.

I now proceed to consider the question as to the power of a partner to grant
 a procuration to borrow money, or to borrow money himself so as to bind the
 firm. Is there any authority for saying that any partner may grant a procura-
 tion to anyone to sign for the firm? The firm may. Take the case of a young
 man just admitted as a partner of a large firm,—the most important firm in the
 country. Has he authority to grant procuration to anyone, a servant or a door-
 keeper, to sign for the firm? And he may do it verbally. May he? Is that
 a tenable proposition? What we have here is a cashier who had power from
 the firm to sign other documents, and who says,—“The partner, Mr Bryan,
 told me to put my name to this document, and I did it.” Is there any distinc-
 tion because this Mr Gibson was the cashier? It would have been all the
 same if it had been anyone else you please, and it emphasises the matter that
 he had power to sign a different class of documents.

As regards the power of a partner to borrow money, I assent to the proposi-
 tion that he has such a power, but with this important qualification that it
 must be in connection with the firm's business. One typical illustration is the
 power that a partner has of drawing bills on which money may be obtained by
 the everyday process of discounting. Another typical illustration is where
 money is obtained on the deposit of goods—not pawning, I do not mean that—
 but where goods are handed to an agent for sale, and he advances money on
 them. That is business, that is *res mercatoria*. I think it is stated somewhere¹
 that a partner cannot borrow money to increase the capital of the firm. The
 money-lender there is not dealing with the company in a mercantile transaction.
 The whole company may do it, but one partner is not the authorised agent of
 the others to do so. The case that goes furthest in the direction of the com-
 pany being liable for a loan to a partner was one about no larger a sum than
 £10.² There a partner of a London company, who was travelling the country

¹ See Lindley on Partnership, p. 132.

² Rothwell v. Humphreys & Howell, 1795, 1 Esp. 405.

No. 99. buying goods for his company to sell in London, went to Manchester and bought goods from a producer there, which were to be sent to London, and a bill for the price was drawn on the company in London. But at the same time he said,—
Feb. 23, 1892. “I am short of money to take me back to London”—it was in the coaching days—“give me £10, and include that in your bill for the price of the goods.”
Bryan v. Lord Kenyon directed the jury that they, being commercial men, might, if they thought fit, consider this as incidental to the mercantile transaction. That goes further than any other case in the direction of making the company liable, but does it even approach this case? This is the case of a man going to his wife and saying “Lend me £100,” and I repeat it might have been £10,000, “and I shall lend it to my firm.” I think he had no authority to do that for behoof of the company.

The Lord Ordinary dwells on the fact that the money was put into the firm's bank account, and that the firm got it. But that is a fallacy. There is no evidence but that of the wife that Bryan got the money from his wife. It is proved that on that day he took £100 to the cashier, and told him to put it to his account. Mr Butters says,—“I understand Mr Bryan handed the £100 to Mr Gibson, who applied it, I suppose, in the usual way for the firm's purposes.” Mr Butters knew nothing of the matter till four years after, and then he got his information from Gibson. He adds,—“I cannot tell what was done with the £100 when it was received, but I suppose Mr Gibson would put it in the bank in the usual way. That was all that I meant when I said it was used for the firm's purposes.” The money was entered in the books of the firm as paid to the credit of Bryan's account. It is ridiculous to speak of that as applied to the company's purposes. The money was at Bryan's call, and in fact he took it out for his own purposes.

I am of opinion that the whole thing was a trick on the part of a knavish husband, and cannot make his uncle liable. He kept up the trick for three years and a-half, paying his wife interest. Then he absconded, and the truth came out.

I must again apologise for taking up so much time in stating the result of a not very fruitful consideration of the subject, that result being that the contract of loan to the company is not proved.

LORD TRAYNER.—The following facts have, in my opinion, been established in this case :—(1) That the pursuer's husband in October 1886 asked the pursuer to lend the defenders' firm (of which her husband was then a partner) the sum of £100; (2) that the pursuer, in compliance with the request addressed to her, gave her husband, out of her own private means and estate, the sum of £100 as a loan to his firm; (3) that the pursuer's husband in direct course handed the £100 so received by him to the cashier of the defenders' firm; (4) that on the express instructions of the pursuer's husband, as a partner of the defenders' firm, the acknowledgment of the loan produced by the pursuer was prepared and signed by the cashier of the defenders' firm as on behalf of the firm; and (5) that the acknowledgment was delivered to the pursuer by her husband as the acknowledgment or voucher for said loan, of the date it bears, and that it has been in the pursuer's possession ever since. If these facts are established, I should think it clear that the pursuer is entitled to the decree which the Lord Ordinary pronounced in her favour. Indeed, I do not understand the defenders to maintain anything to the contrary of this. Their defence rather is (1) that the

facts have not been established *habili modo*, and (2) that their partner (the pursuer's husband) had no power to bind them as obligants for borrowed money. In a word, the facts themselves are not disputed, but the parties are at variance as to the legal consequences of these facts.

No. 99.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

I think it is a proposition good in law, and one which is now long past the region of controversy, that the partner of a trading or mercantile firm (and the defenders' firm was of that class) has an implied mandate to borrow money in the name and on the credit of his firm, and to bind his firm as obligants therefor by granting an acknowledgment or voucher in his firm's name for the money so borrowed. This being so, the defenders' liability for the sum sued for (undoubtedly borrowed from the pursuer by her husband for his firm) cannot be disputed, if the alleged loan is established *habili modo*. Such a loan can only be proved, according to our law, by the writ or oath of the borrower.

Accordingly the real question—indeed the only question—in the case is, whether the document produced by the pursuer is the writ of the defenders proving the loan. On this question the defenders maintain first, that the document produced by the pursuer cannot be looked at as their writ, or receive any effect, because it is not probative or holograph. I think this view cannot be sustained, for the reasons which the Lord Ordinary has given.

Whatever the law may have required in regard to deeds constituting obligation or title, it does not require the same, as matter of solemnity, in documents used only *in modum probationis*. I add no more upon this point, because I adopt what the Lord Ordinary has said.

The defenders maintain, in the second place, that the writ (the genuineness of which is admitted) is not their writ, but the writ of their cashier, Gibson, who had no authority to borrow money for the firm, and no authority in their name to grant such a writ.

I assume that Gibson had no power to borrow money in the name and on the credit of his employers, the defenders, but I scarcely see the bearing of that fact on this case. Nobody suggests that Gibson borrowed the £100 now sued for. It was borrowed by Mr Bryan, one of the partners of the firm. It is a different matter whether Gibson had not authority to sign the document in question. Here, again, I assume that the general procuration granted by the defenders' firm in Gibson's favour enabling him to sign for the firm certain documents in connection with their banking transactions, did not authorise him to grant such a document as that now produced by the pursuer. He might have authority, however, to sign that document apart altogether from the general procuration I have referred to, and on authority derived from the same source. I take it for granted that Mr Bryan, having power to borrow money on the credit of his firm, had also the power to grant an acknowledgment in the firm's name that he had done so, and if he had adhibited the firm's signature to the document in question, it would have been the writ of the firm. But it seems to me to be quite as much the writ of the firm although signed by the cashier for the firm, because the cashier so signed it on the authority and by the direct instructions of one of the partners, who himself had power to grant such a writ. In signing that document Mr Gibson says,—“I was always acting under his,” *i.e.*, Mr Bryan's, “instructions in connection with the firm, and did exactly what I was told.” Mr Gibson therefore signed the document in question on the direct authority of that partner, who could have validly signed it himself, and the signature of an authorised agent is equal to the signature of the principal, and binding on him.

No. 99. Mr Gibson's general procuration is not needed to validate his signature in the present case. The direct authority on which he acted was a procuration *quod hoc*. I come therefore to the conclusion that the writ produced is the writ of the defenders, and that it establishes the loan to them of the sum sued for.

Feb. 23, 1892.
Bryan v.
Butters
Brothers & Co.

The plain justice of the case points also to the pursuer being entitled to decree. Her £100 was not retained by her husband. It was actually delivered by him to the cashier of the firm, and went into the firm's bank account, and should now be accounted for by them. That their cashier subsequently allowed one of the partners to deal with that money as his own, by putting it to his private account, and afterwards withdrawing it, is a matter with which the pursuer has no concern. The pursuer can scarcely be called on to suffer for what she could in no way control. But that the pursuer's money was a *bona fide* loan to the defenders' firm, and was so treated when the money first reached the hands of the defenders' cashier, is quite evident from the facts which have been proved, among which are these important items, namely, that the acknowledgment for the money was copied into the firm's financial letter-book, which all the partners might see, and the money itself duly entered when received in the columns of the firm's cash-book.

LORD RUTHERFURD CLARK was absent.

THE COURT adhered.

E. A. & F. HUNTER & Co., W.S.—FORRESTER & DAVIDSON, W.S.—Agents.

No. 100. HUGH HOUSTON ROSS (Judicial Factor on Mr and Mrs Fraser's Marriage Contract Trust), Petitioner.—*Dudley Stuart*.

Feb. 26, 1892.
Fraser's
Judicial
Factor.

Judicial Factor—Cautioner.—An unmarried woman may be cautioner for a judicial factor.

1ST DIVISION. HUGH HOUSTON ROSS, judicial factor on the trust-estate created by the antenuptial contract of marriage of Mr and Mrs Edward Fraser, presented this note, in which he prayed the Lord President to move the Court to authorise the Clerk of Court to accept Mary Charlotte Ross as cautioner for him. He stated that it was necessary that new caution should be found in consequence of the death of his mother, Mrs Ross who had formerly been accepted as cautioner in succession to her husband the original cautioner; that the proposed cautioner was his sister; that she was unmarried, forty-four years of age, and possessed of ample means looking to the amount of the trust-estate; but that the Clerk of Court had expressed doubts as to the competency of accepting her as cautioner because of her being a woman.

Argued for the judicial factor;—There was no absolute incompetency in accepting a woman as cautioner for a judicial factor. That was sufficiently shewn by the case of the present factor, the previous cautioner in which had been the factor's mother, and she had been accepted and the matter had been brought under the notice of the late Lord President. It might be that a cautionary obligation could not be enforced against a female cautioner in the event of her marriage; but the abstract competency being assumed, the question was one of circumstances in each case. There might be an objection to accepting a young woman who might marry soon after she had become cautioner, and thereby involve the estate in the expense of finding new caution; but the circumstances of the present case made that contingency improbable.

LORD PRESIDENT.—That no disqualification attaches to a woman as cautioner **No. 100.**
 is pretty well shewn by the proceedings in the present factory ; for the vacancy
 in the office of cautioner which it is now proposed to supply has been occasioned **Feb. 26, 1892.**
 by the death of Mrs Ross, the mother of the factor, who was appointed on the **Fraser's**
 death of her husband, the original cautioner ; and we were told that Mrs Ross **Judicial**
 was accepted as cautioner with the approval of the late head of the Court. I **Factor.**
 think that there may be a difficulty in the event of this lady marrying, but
 unless she marries I do not think it necessary to give any opinion on that
 point.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT granted the authority craved.

MACRAE, FLETT, & RENNIE, W.S., Agents.

JOHN M'KNIGHT & COMPANY, LIMITED, AND LIQUIDATOR, Petitioners.— **No. 101.**
D.-F. Balfour—M'Lennan.

DANIEL MONTGOMERIE, Respondent.—*Strachan—Clyde.*

Company—Liquidator—Removal—Voluntary liquidation—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 141.—The shareholders of a public company, whose liability was limited by shares, unanimously resolved that the company should be wound up voluntarily, on the ground of its inability to carry on business owing to its liabilities ; and appointed as liquidator one of their own number, who had formerly been a director. Subsequently a petition was presented for a supervision order, and for confirmation of the liquidator's appointment. A creditor of the company lodged answers objecting to the confirmation of the liquidator's appointment, on the ground of his connection with the company as a shareholder and a former director. It appeared that his shares were fully paid-up, and also that all the creditors of the company, except the objector, had expressed their approval of the appointment. The Court *confirmed* the appointment, holding that due cause in the sense of the 141st section of the Companies Act, 1862, had not been shewn for the removal of the liquidator. **Feb. 27, 1892.**
M'Knight & Co., Limited,
v. Montgomerie.

On 16th April 1890, John M'Knight & Company, Limited, was incorporated under the Companies Acts for the purpose of acquiring and carrying on the brickmaking and quarrying business at Binny, Uphall, belonging to the firm of M'Knight & Marshall. The capital of the company was £12,000, in shares of £1 ; of these 6650 were subscribed. The registered office was at Binny. **1ST DIVISION.**

On 26th January 1892, at an extraordinary general meeting of the company, it was unanimously resolved, by extraordinary resolution, that the company should be wound up voluntarily, on the ground that it had been proved to the satisfaction of the shareholders that the company, by reason of its liabilities, could not continue its business ; and the meeting further appointed William Hardie, C.A., Greenock, to be liquidator.

On 30th January the company and Hardie presented a petition to the Court for a supervision order, and for the confirmation of Hardie's appointment as liquidator.

Daniel Montgomerie, a creditor of the company for £357, lodged answers objecting to the confirmation of Hardie's appointment as liquidator. He stated that the company was practically a private company, of which the vendors Messrs M'Knight and Marshall retained a controlling interest, the remaining capital being subscribed for by their friends ; that no communication of any kind had been made to the creditors of the company as to its affairs prior to the resolution to wind up voluntarily ; that the object of the liquidation was to enable a new company to be formed, which

No. 101. should take over the plant and machinery of the old company at a greatly depreciated price; that questions of liability relative to the shares and the calls in arrear would have to be investigated in the course of liquidation, and that it was necessary in the interests of the creditors that an independent person, not connected with the company, should be appointed liquidator, especially to attend to the interests of the company in the transfer of the assets to any new company; and that Hardie therefore was an unsuitable person for the office of liquidator, as he was a shareholder, and had been a director of the company. The respondent further complained that the liquidator had refused to give him information regarding the position and creditors of the company.

Feb. 27, 1892.
M'Knight &
Co., Limited,
v. Mont-
gomerie.

The petitioners lodged a minute in answer to these objections. They stated that Messrs M'Knight and Marshall had not a controlling power in the company, and that the shares had not been allotted to them and their friends exclusively; that the whole shares issued had been fully paid up except £570; that all the shareholders (except two who, being in arrear, could not take any part in the deliberations of the company), and all the creditors of the company, except the respondent, had expressed their concurrence in the steps taken for the liquidation of the company, the number of these creditors being thirteen, and the amount of their claims being £621; and that Hardie, who had been unacquainted either with M'Knight or Marshall before the formation of the company, held 600 shares, all of which were fully paid up, but that, although at one time a director, he had ceased to hold office some time before the liquidation.

Argued for the respondent;—By the 141st section of the Companies Act, 1862 (25 and 26 Vict. cap. 89), the Court was empowered "on due cause shewn" to remove a liquidator in a voluntary winding-up. Such cause had been shewn in the present case, for Mr Hardie's position as a shareholder and former director of the company made it possible that his personal interests would conflict with his duties as liquidator. That was a sufficient ground; it was not essential to prove any actual misconduct on the part of the liquidator.¹ His position was analogous to that of the trustee in a sequestration, and such a conflict of interests and duties would be fatal to the appointment of anyone as trustee.² The Court, under the Act of 1862, sec. 149, might have regard to the wishes of the creditors of the company in reference to the appointment of a liquidator, and the Court here ought to take steps for ascertaining the wishes of the creditors; for although it was said that they all concurred with the petitioners, yet the respondent had been unable to consult with them on this point, owing to the refusal of the liquidator to give him any information as to who the other creditors were.

Argued for the petitioners;—Mr Hardie was the unanimous choice of the shareholders and all the creditors, except the respondent, concurred in thinking that his appointment was a suitable one. The respondent therefore would have to make out a very clear case for removal before the Court would interfere. No such case existed here. Mr Hardie had ceased to be a director before the liquidation was resolved upon, and his interest as a shareholder, his shares being fully paid up, was obviously to get a large price for the business as possible, for it was only after the creditors had been paid in full that the shareholders would get anything. At the same time the petitioners were quite willing that the Court should order that any proposed sale should be submitted for the approval of the Court.

¹ Marseilles Extension Co., 1858, 4 Eq. 692.

² Macfarlane v. Grieve, Jan. 29, 1848, 10 D. 551, 29 Scot. Jur. 172.

LORD PRESIDENT.—The respondent in this case does not oppose the granting **No. 101.** of the supervision order, which accordingly will be pronounced, but he asks that the liquidator appointed by the shareholders should be removed and another appointed in his place. We have therefore the question whether due cause in the sense of the statute has been shewn for the removal of Mr Hardie, the liquidator appointed by the shareholders.

Feb. 27, 1892.
M'Knight &
Co., Limited,
v. Mont-
gomerie.

Now, in the first place, it is, I think, very important to observe that Mr Hardie is the unanimous choice of the shareholders, and that all the creditors, with the exception of the respondent, have expressed an opinion in favour of the continuance of Mr Hardie's administration. That is a material fact in the case, and is one which to a large extent displaces the objection first urged against him, founded on the fact that he is a shareholder. It was further urged that Mr Hardie was a director of the company, and if that had been so, it might have raised a question of a different complexion, but the petitioners have explained that Mr Hardie was not a director at the date of the liquidation, but merely during the first year of the company's existence. Accordingly, I do not think that we are called upon to assign high importance to his past directorship, but leaving this to be decided on its merits when the question arises I confess to thinking that no adequate cause has been shewn for removing Mr Hardie from the office of liquidator. It is true that he is a shareholder, but it is not asserted that he is in arrears as regards the calls, and he has therefore a strong interest to see that other shareholders pay up the calls due by them. It has not been shewn that he has any interest adverse to a favourable realisation of the estate, and nothing has been said against him personally. He is a business man, quite able to wind up what is not a large estate. As the Dean of Faculty has stated that he has no objection to the insertion of the condition that the liquidator should consult the Court before any sale of the estate is carried through, I think that condition should be inserted in our interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Direct and ordain that the voluntary winding-up of John M'Knight & Company, Limited, resolved upon by the members of the said company on 26th January 1892, be continued, but subject to the supervision of the Court in terms of the Companies Acts, 1862 to 1886: Confirm the appointment of William Hardie, chartered accountant, Greenock, as liquidator of said company in terms of and with all the powers conferred by said Acts: Declare that any of the proceedings under the voluntary winding-up may be adopted as the Court may think fit: And declare that the creditors, contributories, and liquidator of the said company, and all other persons interested, are to be at liberty to apply to the Court as there may be just occasion: And further direct and ordain that unless and until it shall be otherwise directed and ordained by the Court the liquidator shall not dispose of the company's works except with the special leave of the Court: Direct that the expenses of this application for a supervision order be treated as expenses in the liquidation, and decern: Find the respondent, Daniel Montgomerie, liable in the expenses occasioned by his appearing and opposing the granting of the petition," &c.

JAMES SKINNER, S.S.C.—JAMES AYTON, Solicitor—Agents.

No. 102. THE DUKE OF SUTHERLAND, Petitioner (Respondent).—*Lord-Adv. Pearson*
—*Sol.-Gen. Murray*—*Don Wauchope*.

Feb. 27, 1892. THE MARQUESS OF STAFFORD, Respondent (Reclaimers).—*D.-F. Balfour*—*Asher*—*Dundas*.
Duke of Sutherland v. Marquess of Stafford.

THE DUKE OF FIFE (Earl Gower's Curator ad litem), Respondent.—*D.-F. Balfour*—*Ure*.

THE DUKE OF WESTMINSTER (Lord Alistair Gower's Curator ad litem), Respondent.—*D.-F. Balfour*—*Blackburn*.

Entail—Disentail—Disentail of a portion of an entailed estate—Entail Amendment Act, 1848 (11 and 12 Vict. c. 36)—Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. c. 61)—Entail (Scotland) Act, 1882 (45 and 46 Vict. c. 53).—The provisions of the Entail Acts authorising the Court to dispense with the consents of the succeeding heirs apply, although the application is for authority to disentail a part only of an entailed estate.

Opinions that in the disentail of part of an entailed estate the part should be valued at the loss to the entailed estate by the separation, and not merely at its intrinsic value.

Entail—Disentail—Agreement—Effect of supervening legislation.—In 1878 the Duke of Sutherland, heir of entail in possession of an entailed estate under an entail dated in 1835, entered into an agreement with his son and nearest heir for the time, which proceeded upon the narrative that it was “desirable for the preservation of the dignity and honour of the earldom of Sutherland that the estate should be secured by fetters of entail, so far as legally may be done, from being alienated from the earldom of Sutherland, or wasted or charged with debt except as aftermentioned.” The parties therefore agreed that the estate should be disentailed, and that the Duke should be bound to execute “a valid deed of strict entail” on certain heirs. The Duke further agreed to bring within the entail certain estates held by him in fee-simple, and to renounce his right to charge the estate with a large sum expended by him in improvements, while his son agreed that his father should have power to charge the fee of the estate to a considerable amount. The agreement also circumscribed the limits within which the heirs of entail would have been entitled under the Aberdeen Act to grant provisions to husbands and wives.

In pursuance of this agreement, the estates were disentailed and, along with the fee-simple lands, were re-entailed. At the date of the agreement the Duke could not under the Entail Acts then in force have disentailed without the consent of his son.

In a petition for disentail of part of the entailed estate presented by the Duke in 1891, *held* that the petitioner was not barred by the agreement from taking advantage of the provisions of the Entail (Scotland) Act, 1882, which empowers heirs of entail in possession to disentail without the consent of the nearest heir.

Appeal—Leave to appeal.—Circumstances in which the Court *refused* to grant leave to appeal to the House of Lords.

1ST DIVISION.
Lord Low.

IN October 1891 the Duke of Sutherland, as heir of entail in possession of (1) the estate and country of Reay, and (2) the earldom and estate of Sutherland, presented a petition to the Court under the Entail Act for authority to disentail a certain part of each of these estates. The estate of Reay was held by him under and in virtue of a deed of entail dated 16th October 1861, and the estate of Sutherland under a deed of entail dated 16th July 1878.

The petitioner was born on 19th December 1828. The three nearest heirs of entail who at the date of the petition were for the time entitled to succeed in their order successively immediately after the petitioner under both entails were the petitioner's eldest son, the Marquess of Stafford, and the Marquess' two sons, Earl Gower and Lord Alistair St Clair Leveson Gower. The Marquess was of full age, but his sons were pup-

The petitioner stated that deeds of consent by the Marquess and by Earl Gower's curator to disentail both the portions of ground would be produced, failing which the expectancies and interests in the subjects of the Marquess and Earl Gower respectively, "with reference to this application, will be ascertained and provided for in terms of section 5 of the said Act 38 and 39 Vict. cap. 61, and section 13 of the Act 45 and 46 Vict. cap. 53."

No. 102.
Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

The respondent the Marquess of Stafford lodged answers, in which he stated that the portion of the Reay estate which it was proposed to disentail was situated in close proximity to the mansion-house of Tongue, and that the portion of the Sutherland estate was close to the policies of Dunrobin, and at no great distance from the Castle itself. He averred that to disentail these portions would cause such injury to the entailed estates as could not be adequately met by the statutory compensation of money.

It was further maintained that it was incompetent for the petitioner to proceed with the petition upon two grounds, (first) that the petitioner was barred from disentailing the Sutherland estates, or any part of them, in respect of an agreement entered into between him and the Marquess of Stafford in 1878, in pursuance of which the present entail of the Sutherland estates, dated July 1878, was executed; and (second) that upon a sound construction of the Entail Acts (quoted, *infra*, p. 508), it was incompetent for the Court to dispense with the consents of the next heirs, upon the value of their interest or expectancy being paid or secured, where the application was for authority to disentail a portion only of the entailed estates, the actual consents of the next heirs being, it was maintained, in such a case still necessary.

The facts bearing on the first of these pleas were as follows:—

In 1878 the Sutherland estates, which were then held under an entail dated in 1835, could have been disentailed by the Duke with the consent of the Marquess, but having regard to the provisions of the Entail Acts then in force he could not disentail without that consent. The parties accordingly entered into the agreement mentioned, which proceeded on the narrative "that it is desirable for the preservation of the dignity and honour of the earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the earldom of Sutherland, or wasted or charged with debt except as aftermentioned." The narrative then declared that the lands of Embo had been acquired by the Duke, "and it is desirable that the said lands and others should be added to and in future form part of the entailed estate"; that since his succession the Duke had expended very large sums in improvements which he was now entitled to charge on the entailed estate,—“Therefore, and in consideration of the various prestations in favour of the said Marquess of Stafford agreed to and granted by the said Duke and Earl in connection with the re-entail of the family estates in England,” the parties agreed, first, that the estates should be disentailed; second, that the Duke should renounce his right to charge the estate for certain improvement expenditure; third, that he execute “a valid deed of strict entail of the said lands formerly entailed, and also of the fee-simple lands and others foresaid,” upon himself, whom failing, the Marquess, whom failing, the other heirs called to the succession by the deed; fourth, the Duke was to have the power of charging the fee of the estates with a sum of not more than £100,000; fifth, it was agreed that the statutory powers of the heirs of entail to grant Aberdeen provisions to the husbands and widows of heirs in possession or heirs-apparent should be restricted, so that no jointure should exceed £4000 a-year; that

No. 102. the whole jointures on the estate should never exceed £7500 a-year; and that the statutory powers of providing for younger children should be entirely excluded.

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

In pursuance of this agreement the estates were disentailed, and along with the fee-simple lands re-entailed, power being given under the new entail to the Duke, whom failing, the Marquess, to charge the fee of the estates to the extent of £100,000.

On 24th October 1891 the Duke of Fife and the Duke of Westminster were appointed curators ad litem to Earl Gower and Lord Alistair Leveson Gower respectively.

On 15th December 1891 the Lord Ordinary (Low) repelled the objections of the respondents to the competency of the petition, and appointed the petition to be enrolled for further procedure.*

* "OPINION.— . . . The question is whether there is anything in the contract which prevents the Duke of Sutherland taking advantage of the power which the Entail Act of 1882 gives to heirs of entail in possession of having the consent of the nearest heir for the time dispensed with in an application to disentail? In my opinion that question must be answered in the negative. The agreement has been fully implemented, and the Marquis of Stafford, having got all that he bargained for, I do not see how he can demand anything more. The Legislature has given to an heir of entail in possession certain powers, and the Duke of Sutherland is heir of entail in possession, and he is in that position, not contrary to, but in accordance with, and in pursuance of, the agreement. How then can the agreement prevent him exercising a power which has been conferred by subsequent legislation? The respondents relied greatly on the part of the narrative of the agreement in which one of the inducing causes is stated to be 'that it is desirable for the preservation of the dignity and honour of the earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the earldom of Sutherland, or wasted or charged with debt except as after-mentioned.' But the counterpart of this consideration in the operative part of the agreement was the obligation of the Duke to re-entail the estates upon a certain series of heirs, and under certain conditions. The Duke came under no obligation not to exercise any powers which subsequent legislation might confer upon heirs of entail, and it seems to me to be impossible to read any such obligation into the deed. I am therefore of opinion that the present application is not barred by the agreement.

"In the next place, the respondents contend that the power of the Court to dispense with consents is confined to the case of an application to disentail the whole of an entailed estate. The power to dispense with consents was first given by the Act of 1875, and, so far as I am aware, it has never until now been suggested that the enactment did not apply to an application to disentail a part, as well as to an application to disentail the whole of an entailed estate. If, however, the construction put upon the Act by the respondents is sound, I apprehend that the fact that for many years an erroneous construction has in practice been acted upon is of no moment.

"The argument of the respondents I understand to be as follows:—

"By the 3d section of the Rutherfurd Act, power is given to an heir of entail in possession of an entailed estate to acquire in fee-simple 'such estate in whole or in part' with certain consents, if he is not the only heir in existence. By the 5th section of the Act of 1875, which amends the 3d section of the Rutherfurd Act, power is given to the Court, upon certain conditions, to dispense with the consents required by the Rutherfurd Act, except the consent of the nearest heir for the time. In that section no mention is made of part of an entailed estate, the case with which the section deals being spoken of as an application for authority to disentail 'an entailed estate.' Further, in the same section, the Court is directed in the event of an heir (other than the nearest) whose consent is required under the Rutherfurd Act refusing to consent, to

The respondents reclaimed.

No. 102.

It was argued for the Marquess of Stafford ;—1. The agreement of 1878

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

ascertain the value in money of the expectancy or interest of that heir 'in the entailed estate.' The respondents contended that an application to disentail only part of an entailed estate was designedly omitted from the section, the reason being the great injury which the next heirs might sustain if the heir in possession had power capriciously to disentail without their consent any part of the estate such as the mansion-house and policies. The Legislature, therefore, while recognising that it was quite reasonable that part of an entailed estate should be disentailed if everyone interested consented, and while providing that if the whole of an estate was disentailed, the precise money value should be ascertained and the next heirs compensated in proportion to their interests, had not provided any machinery for ascertaining the compensation to be paid to the next heirs in the case of a partial disentail for injury suffered by reason of the remainder of the estate being injuriously affected by severance or otherwise.

"The respondents submitted a similar argument upon the 3d section of the Act of 1882, which empowers an heir of entail in possession 'of an entailed estate,' under a new entail, 'to disentail the estate, and acquire it in fee-simple,' if he shall obtain the like consents as are required by the 3d section of the Rutherford Act. The respondents also pointed out that in section 12, subsection 5, of the Act of 1875, certain provisions are made for the case of an application to disentail an estate in whole or in part, while section 19 of the Act of 1882 provides for an application for an order of sale, of an entailed estate, or part of it. These sections, the respondents contend, shew that the Legislature did not omit to refer to part of an entailed estate in the 5th section of the Act of 1875, or the 3d section of the Act of 1882, through inadvertence, but because it was intended to exclude the case of an application to disentail part of an entailed estate.

"The respondents' argument is ingenious, but I am of opinion that it is not well founded.

"1. The 5th section of the Act of 1875 proceeds upon the narrative that it is expedient that the 3d section of the Rutherford Act should be amended, and then it proceeds to state what the amendments are, these being—(1) that the consent of any heir in any application to disentail an entailed estate may be competently given after the application has been presented; and (2) that in the event of any heir, except the nearest, refusing to consent, the Court may, upon certain conditions, dispense with his consent. The changes operated by the 5th section of the 1875 Act are thus *prima facie* co-extensive with the provisions of the 3d section of the Rutherford Act, and if it had been intended that the change in the law should not apply to a partial disentail, I think that the Legislature would have said so, and would not have permitted so important a limitation in the scope of the amendment to be gathered from a minute and subtle analysis of the phraseology.

"2. It seems to be clear that whatever is the scope of the amendment made by the 5th section of the Act of 1875, both parts of that section deal with the same thing, I mean that the first subsection does not deal with a larger or more extensive amendment than the second subsection. The respondents at all events cannot maintain the opposite view, because the words upon which they mainly rely, viz., 'an entailed estate' occur only in the first subsection. Now, as I have already pointed out, all that the first subsection does is to provide that the consent of any heir, whose consent is required by the Rutherford Act to a disentail, may competently be given after the application has been presented to the Court. But that is an enactment which has regard solely to convenience of procedure, and no reason was suggested, or could, I apprehend, be suggested, why it should be confined solely to the case of an application to disentail the whole estate.

"3. Upon what principle, if the respondents' view is sound, is it to be ascertained whether an application is for the disentail of 'an entailed estate,' or only 'part of it'? The difficulties which would arise in determining that question are so obvious that if it had been intended that the 5th section of the 1875 Act

No. 102.
 Feb. 27, 1892.
 Duke of
 Sutherland v.
 Marquess of
 Stafford.

was onerous and could not be affected by what was not within the contemplation of the parties to it at the time it was entered into. Its object appeared very clearly from its terms, and was to prevent such an alienation as was here proposed, and which was incompatible with the "preservation and dignity and honour of the earldom of Sutherland." The clause dealing with the lands of Embo shewed that what the parties looked to was such a preservation "in future." Indeed, if the Duke had intended to reserve the right to disentail there would have been no use for each of the carefully framed clauses in the deed. What, *e.g.*, would have been, in such a state of matters, the use of inserting a clause reserving the lesser right to charge for improvement? It was quite competent for the Duke to enter into an agreement excluding himself from exercising powers conferred by future enabling statutes upon every heir of entail.¹ The Lord Ordinary had assumed that the agreement had been duly implemented by the Duke. That was not so. It was partly carried out, no doubt, by the execution of the deed of entail, but it could only be fully implemented by the Duke's abstaining from disentailling during his life.

(2) On a sound construction of the Entail Acts, 1848 to 1882, the power of the Court to dispense with consents was confined to applications to disentail the whole and not a part of an entailed estate.

Under the 3d section* of the Rutherford Act, an heir of entail in pos-

should be more limited in its scope than the 3d section of the Rutherford Act, that would have been clearly expressed, and some definition given whereby it could be ascertained whether a case did or did not fall within the enactment.

"4. The respondents contend that it is impossible under the 5th section of the Act of 1875 to compensate the next heirs in the case of a partial disentail, because what the Court is directed to ascertain is the value in money of their expectancy or interest 'in the entailed estate.' The respondents, however, leave out of view that the value of the interest or expectancy in the entailed estate is to be ascertained 'with reference to such application.' Now, the only kind of applications with which the section deals are applications for authority to disentail, and the Court must ascertain the value of the expectancy with reference to the particular application to disentail. The words in which the direction to the Court is given seem to me to be carefully chosen to cover every case whether of a partial or of a total disentail, and the powers which the Court have under their discretion are, I think, wide enough to enable the Court to do substantial justice to the next heirs in every case.

"5. As regards the Act of 1882, the respondents' contention would have the anomalous result that, by the third section, the distinction between old and new entails would be abolished only in the case of applications to disentail the whole estate, and not in the case of applications for a partial disentail. The 13th section of the Act of 1882, however, seems to me to be conclusive of the question. It is there provided that in 'any application under the Entail Acts in which the consent of the heir-apparent or other nearest heir is required,' such consent may be dispensed with by the Court. Now, an application to disentail part of an estate is an application to which the consent of the heir-apparent or other nearest heir was at the date of the Act required, and I fail to see how it is possible to limit the generality of the words, 'any application.'

"I am therefore of opinion that the argument of the respondents upon the Entail Acts cannot be sustained."

¹ Scott Douglas, June 9, 1883, 10 R. 952; Pringle v. Pringle, June 12, 1891 18 R. 895.

* By the Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), entitled "An Act for the Amendment of the Law of Entail in Scotland," it was enacted (section 3) "That it shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland, holden by virtue of a tailzie dated prior to the said 1st day of August 1848, to acquire such estate

session of an entailed estate held under an old entail, might apply to the Court to acquire the estate "in whole or in part" with certain consents. But in the subsequent statutes which were really passed to enlarge the rights of an heir of entail in possession, there was no reference to disentailing a "part" of the estate.

The power to dispense with consents was first given by the Act of 1875, and by the 5th section,* which amended the 3d section of the Rutherford Act, power was given to the Court upon certain conditions to dispense with the consents required by the Rutherford Act, except

No. 102.
Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

in whole or in part, in fee-simple, by applying to the Court of Session for authority to execute, and executing and recording in the Register of Tailzies, under the authority of the Court, an instrument of disentail in the form and manner hereinafter provided: Provided always that such heir of entail in possession shall be the only heir of entail in existence for the time, and unmarried, or otherwise shall have obtained the consents of the whole heirs of entail, if there be less than three in being at the date of such consents, and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs, who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail, and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent: Provided also that the nearest heir of entail for the time entitled to succeed to such estate immediately after such heir in possession, where any such other heir exists, shall be of the age of twenty-five years complete, and not subject to any legal incapacity."

* The Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. cap. 61), entitled "An Act to further Amend the Law of Entail in Scotland," enacted (section 5), *inter alia*, "Whereas it is expedient that section 3 of the Act of the 11th and 12th years of the reign of Her Majesty, chapter 36, should be amended: Be it enacted as follows:—(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same: (2) In the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir-apparent or not, entitled to succeed, declining or refusing to give, or being legally incapable of giving, his consent, the Court may dispense with such consent in terms of the provisions following (that is to say):—(a) When any of the foresaid heirs entitled to succeed, except the nearest heir for the time, declines or refuses to give, or is legally incapable of giving, his consent, the Court shall, on a motion to that effect by the petitioner in the application, and on a statement by him of the declinature, or refusal, or incapacity of such heir or heirs aforesaid, and after such intimation to the heir or heirs so declining or refusing, or to the guardians or other persons interested in the heir or heirs incapacitated as aforesaid, as the Court shall think necessary, ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining or refusing or incapacitated to give consent as aforesaid. (b) Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid. (c) Upon such value in money being so paid or secured, to the satisfaction of the Court, the Court shall dispense with the consent or consents of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, and shall thereupon proceed as if such consent or consents had been obtained. Provided always,

No. 102. that of the nearest heir for the time. But then the section referred to an application to disentail "an entailed estate." Again, in subsection (a) of that section, the Court was directed, in the event of an heir (other than the nearest), whose consent was required by the Rutherford Act, refusing to consent, to ascertain the value of his expectancy "in the entailed estate."

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

The Act of 1882 conferred on heirs of entail in possession of an estate held under a new entail the same powers of disentailing as those holding under an old entail had. But the section * conferring this power confined the application to the case of disentailing "an estate."

All this clearly shewed that the Legislature had designedly omitted to refer to disentailing a part of an entailed estate in the amending Acts of 1875 and 1882, and the reason was quite obvious. It was reasonable that where all interested consented a part of an estate might be disentailed, but it was unreasonable that an heir of entail in possession should be invested with the dangerous power of capriciously disentailing without consents a part of an estate, the abstraction of which would, as here, seriously diminish the value of the remainder of the estate. It was also noteworthy that in section 12, subsection 5, of the Act of 1875, certain provisions were made for disentailing an estate, "in whole or in part," while in section 19, and subsequent sections, of the Act of 1882, provision was made for an application for an order of sale of an entailed estate "or part of it." The Legislature, while omitting the word "part" in these Acts with reference to disentailing without consents, had expressly used it where other purposes were considered. That implied that where the amplification was not expressed it was not intended.

Further, there was no machinery provided by the 5th section of the Act of 1875,† as in the Lands Clauses Act, 1845, for assessing the compensation to the next heirs for injury arising to the portion of the entailed estate remaining entailed by the severance therefrom of the disentailed part. The Court was directed to ascertain the value of the next heirs' expectancy in the "entailed estate." The words immediately following, "with reference to such application," were words of generality.

Counsel for the Duke of Fife and Duke of Westminster adopted the above argument.

Argued for the petitioner;—I. He had duly implemented all he undertook in the agreement, and the Marquess had got all he bargained for in it. The counterpart of the consideration contained in the clause dealing with the "preservation of the dignity and honour of the earldom of Sutherland" was the re-execution of a valid deed of entail upon a certain series of heirs and upon certain conditions. This deed had been duly implemented. The Duke certainly came under no obligation in the agreement to refrain from exercising any powers which might be conferred upon heirs of entail by future enabling statutes.

that nothing herein contained shall render it competent to dispense with the consent of the nearest heir for the time entitled to succeed to any entailed estate sought to be disentailed."

* The Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), entitled, "An Act to Amend the Law of Entail in Scotland," enacted (section 3),—"It shall be lawful for an heir of entail in possession of an entailed estate, held under an entail dated on or after the 1st day of August 1848, to disentail the estate and acquire it in fee-simple by applying to the Court in the manner provided by the Entail Acts, if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the third section of the Entail Amendment Act, 1848, in the case of entails dated prior to the said date."

† *Supra*, p. 509, note.

II. The 13th section of the Act of 1882 applied in terms to this application. Section 13 * provided that "in any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required," the Court may dispense with his consent, and ascertain the value in money of his expectancy. Now, this was unquestionably an application under the Entail Acts, to which such consents were required.

No. 102.

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

It was said, however, that under the Act what was to be valued was only an entire estate, "the entailed estate," and not a "part" of that estate, and that this limitation was also to be found in the 5th section of the Act of 1875, which was incorporated by reference into the 1882 Act.

But then this 5th section of the 1875 Act was in its turn announced in the preamble as an amendment of the 3d section of the Rutherford Act. The latter section was therefore intended to supply a gloss on the word "estate" used in the later statutes. The word must, in this view, be read in the same sense as in the Rutherford Act, as "in whole or in part." Further, the Court had ample powers for doing justice to the next heirs in valuing their expectancies with reference to partial disentails. The words "entailed estate," in the 5th section of the 1875 Act, must be read along with the words "in reference to such application." That meant that in a case of partial disentail compensation was to be given in respect not only of the portion disentailed, but of the injury to the next heirs in respect of its severance from the lands remaining under the entail.

At advising, on 23d February,—

LORD PRESIDENT.—I. The first question debated before us under this reclaiming note was whether the petitioner is barred by the agreement of February 1878 from insisting in the present application, and I am of opinion, with the Lord Ordinary, that his Grace is not.

The contract binds the petitioner to do and to abstain from doing certain specified things, which are articulately enumerated. It announces in the narrative that what is declared to be "desirable for the preservation of the dignity and honour of the earldom of Sutherland," viz., "that the estates should be secured from being alienated from the earldom," is to be accomplished "by letters of entail, so far as legally may be done." Accordingly, this appointed way of accomplishing the object is made matter of express and definite stipulation, for the leading provision is that the petitioner is to execute a sound or valid deed of strict entail. But the agreement goes on, in the fifth article, to circumscribe the limits within which (apart from stipulation) the heirs of entail would have been entitled, under the Aberdeen Act, to grant provisions to husbands and widows. This having been done, and special clauses having been

* The Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), enacted (section 13),—"In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir, or the curator ad litem appointed to him in terms of this Act, shall refuse or fail to give his consent the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security therefor shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act, 1875, shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date."

No. 102. authorised to be inserted in the entail under the third and fourth articles, the parties have left the attainment of their purposes to depend on the legal effects of the deed of entail so provided for.

Feb. 27, 1892. Duke of Sutherland v. Marquess of Stafford.

Now, the contention of the noble reclaimers is that there is to be read into the agreement an obligation to abstain from the exercise of one of the legal rights of an heir of entail by virtue of the Entail (Scotland) Act, 1882, a statute passed subsequent to the date of the agreement. I can find no warrant for such interpolation in the contract. It has been maintained that certain passages in the agreement imply that the faith of the contract was that the lands were to remain under the entail. But I do not think that this comes to more than that the provisions of the contract all apply to the inception, execution, and continuance of the entail, and that they (quite naturally) do not deal with a legal condition which did not exist and was not in contemplation. It does not follow that the Court is to read in overt and prohibitory stipulations applicable to a state of matters which the parties never considered, and about which there is nothing in this contract to shew that they ever in fact agreed. Accordingly, there is no occasion to consider how, or how far, it was possible by agreement in 1878 to exclude the petitioner from exercising powers conferred in 1882 by an enabling statute upon every heir of entail.

II. The second question discussed was whether, under the Entail Acts, 1848-1882, the Court is authorised to dispense with the consent of the next heir of entail, where the application is for authority to sell a part, as distinguished from the whole, of an entailed estate.

The Lord Ordinary has examined the statutory enactments carefully and in detail, and I substantially concur in his Lordship's exposition and in his conclusion. I do not therefore repeat his deduction of the related sections of the successive statutes, but shall state my view of the controversy as it is thus brought to a point.

The 13th section of the Act of 1882 is that on which the petitioner is primarily to found. Now, that section is, in terms, said to apply to any application to which the consent of the heir-apparent or other nearest heir was required. Unquestionably an application to sell part of an estate was an application recognised by the Entail Statutes, and was an application to which (under the law prior to the Act of 1882) such consent was required. The section goes on to say—"The Court shall ascertain the value in money of the expectation or interest in the entailed estate." If these last words apply solely to the case of an entire estate, and do not apply to a part of an estate, then the latitude of the introductory words receives an unexpected contraction in the enactment, the scope of which they purport to define.

But this same section proceeds to apply to the case of the next heir the provisions of the 5th section of the Act of 1875, and to this enactment it is not necessary to turn. Now, that section is announced in its preamble as an amendment of the 3d section of the Act of 1848, and its contents are directly relative to the section which it amends. The term "entailed estate" is used, just as in the Act of 1882, by which it is itself amended, and no definition is given. It is, therefore, natural to ascertain the sense of the term by reference to the original enactment of 1848, of which the subsequent enactments of 1875 and 1882 are pendants. Now, the 3d section of the Act of 1848 does contain a gloss on the definition of the word "estate," for where that term is first used there is added the explanatory and parenthetical words "in whole or in part." It seems

to me therefore that where in the amending sections of 1875 and 1882 the term "estate" is used, it is to be read in the same sense as in the principal enactment, and that it was quite accurate that in the later statutes the parenthetical explanation should not be repeated, it having, for all purposes of reference, ascertained the meaning of the term referred to.

No. 102.
Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

Accordingly, taking the terms of the sections primarily concerned, and on which the petitioner has to found, I think that his application is sustained by their true construction. I may add that if the subject-matter of the 5th section of the Act of 1875 be regarded, and taking that part of it which is not directly in dispute as the criterion, it is extremely difficult to suggest any reason for a limitation to estates as a whole of the provision which is there contained, for it is concerned with an improvement of procedure, the reason of which is equally applicable to partial or to total disentails.

Two arguments, however, have been advanced by the reclaimers which require consideration. They point to the fact that, both in the Act of 1875 and in the Act of 1882, there are sections in which the words "in whole or in part" are expressly used, and they argue that this implies that in those sections in which the amplification is not expressed it is not intended. I am not aware, however, that such a variance can do more than supply an aid to determining the meaning of the section primarily under consideration, and the use in some passages of the more expansive of two expressions does not demonstrate an intention to abate the proper meaning of the other. Now, for the reasons which I have already stated, I think the proper meaning of the other is sufficiently clear.

The other argument was that, if the sections in question do apply to part of the estate as well as the whole, there is no provision for compensating the heir, whose consent is dispensed with, for the injury done to his interest in the remanent part of the estate by the severance of the portion disentailed. I have come to be satisfied, however, that this difficulty does not exist. When the dissenting heir is compensated, what is valued is "his expectancy or interest in the entailed estate, with reference to such application." Now, I agree that, in the case in hand, "the entailed estate," as used in the passage quoted, must consistently be held to mean the part of the estate which is to be disentailed. But, then, the interest in that part is to be valued to a man who, *ex hypothesi*, is to remain heir of entail of the rest of the estate. And if, as is suggested in the present instance, the abstraction of the part disentailed will seriously diminish the value of the remainder, that means that, to the owner (and future owner) of the remainder, the retention of the part to be taken away has a correspondingly high value. It seems to me therefore that the value to be ascertained is the value, not as in the market to third parties, but the value to the man who, on the assumption of the proceeding, is to be deprived of the subject of the disentail, and is to retain the estate, as an accessory to which that part has an exceptional value.

It is perhaps inconvenient that the Court should be forced incidentally to decide upon a question which will necessarily arise at a later stage in concrete form, and with the interests of the disputants reversed. But the argument of both parties has peremptorily challenged our judgment upon it. I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—The petitioner, the Duke of Sutherland, is heir of entail in possession of the estate and country of Reay and of the earldom and estate of Sutherland, under two separate deeds of entail, both dated after the 1st August 1848.

No. 102.

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

The object of this application is to obtain the authority of the Court to record in the Register of Tailzies an instrument or instruments of disentail of parts only of each of these entailed estates.

It appears to me that the first question which arises for consideration is whether it is competent for an heir of entail in possession of an entailed estate, under an entail dated after 1st August 1848, to apply for authority to disentail a part only of the entailed estate, or whether it is competent for such heir to apply for disentail only of the whole estate. If an application, such as this, for authority to disentail a part only of the entailed estate, is incompetent, then of course no question as to the competency of dispensing with the consents of the next heirs will arise. If, however, the application be competent, then I do not think that question is attended with difficulty.

The power conferred on an heir of entail to disentail was given by the 3d section of the Rutherford Act, which authorised an heir of entail in possession of an entailed estate, held under an entail dated before 1st August 1848, to apply to the Court to acquire such estate, in whole "or in part," under certain conditions, these being, generally speaking, that he should have obtained the consents of the three next heirs of entail, or of the heir-apparent, and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heirs-apparent. It is not doubtful, therefore, that an application by an heir of entail in possession of an entailed estate, held under an entail dated before 1st August 1848, to acquire a part only of the estate, would be perfectly competent, for the Act says so in so many words. Then by the 3d section of the Entail Act of 1882 (45 and 46 Vict. c. 53), it is declared that it shall be lawful for an heir of entail in possession of an entailed estate, held under an entail dated on or after 1st August 1848, to disentail the estate, and acquire it in fee-simple, by applying to the Court in the manner provided by the Entail Acts, if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the 3d section of the Rutherford Act, in the case of entails dated prior to the said date.

It is argued by the respondents that the words, "the estate," here used mean the whole estate—and not part of it only—and we were referred to the 19th and subsequent sections of the Act, by which an heir of entail is authorised to apply to the Court for an order for sale "of the estate or part of it," as shewing that when the Legislature intended to give authority to deal with part only of an estate the Act was so expressed.

But I do not think that this argument is sound. It appears to me that the object and intention of the Act of 1882 was to confer on heirs of entail in possession of estates held under entails dated on or after 1st August 1848 the same powers as regards disentailing as belonged to those who held estates under entails dated prior to that date. Accordingly, when the Act authorised such heirs of entail to disentail the estate and acquire it in fee-simple by applying to the Court in the manner provided by the Entail Acts, it refers, *inter alia*, to the 3d section of the Rutherford Act, which authorises an heir of entail to acquire an entailed estate either in whole or in part in fee-simple, by applying to the Court in the manner therein directed.

If the respondent's contention were sound it would lead to this very anomalous result, that an heir of entail in possession of an estate under an entail dated after 1848 could not acquire part of the estate in fee-simple, although he had obtained the consents of the three next heirs, while an heir of entail in possession of a

estate under an entail dated before 1848 could do so—so also if the heir of No. 102. entail happened to be the only heir of entail in existence, he could in the one case acquire part of the estate in fee-simple, but not in the other. No plausible reason why the powers in this respect of one heir of entail should be different from those of another was suggested, and I can see none.

Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

I am of opinion, therefore, that this application is not incompetent, because it applies for authority to disentail a part only of each of the entailed estates.

But, in the circumstances of the family, the consent of the Marquess of Stafford, who is heir-apparent, and of the tutor ad litem to his son, Earl Gower, who is a pupil, are required to the disentail. These facts are set forth in the petition, which proceeds to state that deeds of consent by them will be produced in the course of the proceedings, failing which the values in money of the expectancies or interests in the foresaid subjects of the said Marquess of Stafford and Earl Gower respectively, "with reference to this application, will be ascertained and provided for in terms of section 5 of the said Act 38 and 39 Vict. cap. 61, and section 13 of the said Act 45 and 46 Vict. cap. 53."

The Marquess of Stafford and the tutor of Earl Gower decline to give their consents to the disentail, and it is maintained by the respondents that it is incompetent to dispense with the consents of the next heirs, where the application is for authority to disentail a portion only of the entailed estates.

That contention is founded on the terms of the 5th clause of the Entail Amendment Act of 1875 (38 and 39 Vict. cap. 61), which, on the preamble that it is expedient that the 3d section of the Rutherfurd Act should be amended, proceeds to enact that in any application for authority to disentail an entailed estate ~~which~~ by virtue of any tailzie dated prior to 1st August 1848 certain things may competently be done.

The respondents found on the words "application to disentail an entailed estate," which they say, as before, does not include an application to disentail part only of the estate.

The 3d section of the Rutherfurd Act, among other things, required that the instrument of disentail should be executed at the sight of the Court, and that the petitioner should have obtained the requisite consents at or before presenting the application. The first of these requisites was amended by the 4th section of 16 and 17 Vict. cap. 94, the second of them is one of the matters dealt with by the 5th clause of the Act now under consideration, which enacts that the requisite consents of the heirs of entail "may competently be given after such application has been presented to the Court, and in the course of the same."

Now, it is impossible to doubt, as I have said, that an application to disentail a part of an entailed estate was competent under the 3d section of the Rutherfurd Act, and no reason has been suggested why, in a matter purely of procedure like this, consents should not be produced in the course of the proceedings in an application to disentail part of an estate, as well as in an application for the disentail of the whole estate. It is difficult to accept a construction of the Act which leads to that result. Accordingly, I think that when the 5th section refers to an application to disentail an entailed estate, it refers to an application to disentail an estate, which in terms of the 3d section of the Rutherfurd Act may be either an application to disentail an estate in whole or in part.

But if this first amendment applies to both kinds of applications, so also must the next, which is the one with which we are more immediately concerned, and by it the Court is empowered, in the event of any of the heirs of entail, except

No. 102.

Feb. 27, 1892.
 Duke of
 Sutherland v.
 Marquess of
 Stafford.

the nearest heir for the time, refusing to give or being legally incapable of giving his consent, to dispense with such consent in terms of the provisions therein set forth, viz.:—that the Court shall ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs, and shall provide for such value in money being properly paid or secured. It is said, however, that the provisions in respect of which the consent of the heir may be dispensed with do not provide for the case of the disentail of a part only of an estate, in respect that they do not provide any means for ascertaining the value in money of the expectancy or interest of such heir in the part of the estate disentailed. It appears to me that the difference in value of the entailed estate before the disentail, and the value of the part remaining after the disentail represents the loss to the heirs of entail by the disentail, and that this furnishes the means of ascertaining the money value of the interest of any particular heir or heirs in the part of the estate disentailed.

These provisions, however, only apply to the consent of Earl Gower, and the question remains as to the competency of dispensing with the consent of the Marquess of Stafford. If, however, I am right in holding that the present application is a competent application, then no difficulty arises as to his consent, because the 13th section of the Act of 1882 provides that in any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall dispense with the consent of the heir, and shall proceed as if such consent had been obtained, and that the provisions of sections 5 and 6 of the Entail Act of 1875 shall apply to the nearest heirs as well as other heirs. It is indisputable that this is an application under the Entail Acts to which the consent of the heir-apparent is required, and therefore the clause applies in terms to it. I think, moreover, that the clause is also conclusive as regards the consent of Earl Gower, because it goes on to provide that the 5th and 6th sections in question shall apply to all applications to which consents are required, and to entails dated on or after 1st August 1848, as well as to entails dated prior to that date. Assuming the competency of the application, I think that the consents of the heirs of entail may be competently dispensed with, and as the application is competent, I think the Lord Ordinary's interlocutor is right.

But it is said that the petitioner is barred from disentailing in respect of the agreement entered into between him and Lord Stafford in 1878. This objection, if well founded, only applies to the proposed disentail of part of the Sutherland estates. But I concur with your Lordship that it is not well founded.

At the date of the agreement the petitioner could not have disentailed the Sutherland estates without the consent of the Marquess, but they together could do so. They accordingly agreed that the estates should be disentailed and again re-entailed along with the lands of Embo and others, which the petitioner held in fee-simple, under the conditions set forth in the agreement. No doubt one of the objects sought to be effected by the agreement was, as set forth in the narrative, that the estates should be secured by fetters of entail from being alienated from the earldom of Sutherland, or wasted, or charged with debt.

The agreement was implemented in all its parts. The estates were disentailed and re-entailed, and as the law then stood, it was out of the power of the peti-

tioner to have disentailed them, or any part of them. But the change of the law introduced by the Entail Act of 1882 put it in his power to do so, and this change in the law, which neither party could have foreseen, has given rise to the present question. The petitioner has done everything that he was bound to do by the agreement, and I can see nothing in it to debar him from taking advantage of the change in the law, and disentailing the estates with the requisite consents.

No. 102.
Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

LORD KINNEAR.—I am of the same opinion. The Duke of Sutherland agreed to re-entail certain estates, and to bring into the new entail certain other estates which he held in fee-simple. I think that obligation was fully performed by the execution of the deed of entail which followed upon it, and indeed I do not understand that to be disputed. I think that the obligation was not only performed but exhausted by the execution of that deed of entail, and that the Duke cannot be required to do anything further to give effect to his agreement. The legal effect of the entail so executed is determined not by the contract, but by a series of Acts of Parliament which limit and define the powers of heirs in possession of entailed estates; and I find nothing in the contract which subjects the heir in possession under the new entail to any further restriction than may be imposed upon him by the law in force for the time being, or which gives the substitute heirs any other or more effective right against the heir in possession than that law gives them. The contract appears to me to have been that the Duke of Sutherland should execute a deed of entail which would have all the efficacy which the law allows, or may in future allow to deeds of entail, but no other or further efficacy than that.

Upon the second point also I agree with your Lordship. The power of the heir in possession to disentail his estate in whole or in part is given by the Rutherfurd Act under certain conditions. The subsequent Acts altered the conditions by dispensing on certain terms with consents which were essential under the Rutherfurd Act, but they do not restrict or enlarge the power of the heir of entail in possession in so far as regards the subject over which it is to be exercised. I agree with your Lordships in the construction that you have put on the Act of 1875, but if there were room for any doubt as to the effect of that enactment I think it would be entirely removed by the Act of 1882, because that Act is applicable in terms to all applications under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required. Now that is the position of the present application. The consent of the Marquess of Stafford, who is the nearest heir, is required, and accordingly the petitioner is entitled to found on the 13th section of the Act of 1882, which provides that in any application under the Entail Acts to which the consent is required the Court is to ascertain the value in money of the heir's expectancy or interest, and to proceed in terms of the previous Act of 1875. But then there follows another clause which is directly applicable not only to the case of the Marquess of Stafford, but to the case of all other persons who may be affected by such a petition, because the statute proceeds to enact that certain sections of the Entail Amendment Act of 1875 shall apply to all applications in which consents are required, whether on or after the 1st of August 1848. Now, I confess I can see no room for doubt that these provisions are applicable to the present case, although the petitioner does not propose to disentail the whole of the lands which are affected by the fetters of the deed of entail under which he holds the subjects included

No. 102. **Feb. 27, 1892.** **Duke of Sutherland v. Marquess of Stafford.** in this petition. I agree with your Lordship that while the Act of Parliament authorises the disentail of a part of an estate, although the remaining part may still be held under the fetters, it does not preclude the heir of entail, whose interest is to be valued, from getting the full value of his interest, whatever that may be. The value to be ascertained is not that of the heir's right in any part of the estate as a separate subject. The value to be ascertained is the heir's expectancy or interest in the entailed estate, and if it be the case that when the estate is divided upon an application of this kind, so that one portion of it is left within the fetters, and another portion relieved from them, the aggregate value of the two separate portions is less than the value of the estate as a whole,—which is the suggestion that is made to us,—I can see no room to doubt that the substitute heir of entail is entitled to say that what is to be valued for the purpose of dispensing with his consent is his interest in the portion to be taken away, not as a separate subject but as part of the entailed estate; and I agree with what your Lordships have said, that he does not get the full value of his interest in terms of the Act of Parliament if he receives anything short of the difference between the value of the estate to which he is still to succeed after the portion to be disentailed has been severed from it and the value of the whole estate to which he would have succeeded if there had been no such separation.

Upon the other points of the case also I am entirely of the same opinion as your Lordships.

LORD M'LAREN was absent.

THE COURT adhered, reserving all questions of expenses.

On 27th February the Marquess of Stafford presented a petition for leave to appeal to the House of Lords.

LORD ADAM.—This is an application by the Duke of Sutherland for authority to disentail, and we have decided that he has a title to insist in it, and to have the part of the estate disentailed which he desires to have disentailed. It appears to me that in such a matter the Duke has a pre-eminent interest to have the case decided with as little delay as possible, for the reason which has been suggested, namely, that if any mischance occurs the whole proceedings may prove abortive, and by allowing the delay which an appeal occasions we are increasing the chance of such an occurrence. That, I think, is a very material consideration for refusing leave to appeal at this stage.

When we look at the interest of the other side, no doubt we find that they have an interest to have the question of their right to prevent this application being proceeded with decided before further proceedings under the petition are taken, but that is not so strong an interest as the interest of the petitioner to have the matter determined without delay.

Looking to these considerations, I think we should refuse leave to appeal.

LORD M'LAREN.—It seems to me that it may now be regarded as an established practice in entail petitions that, unless in exceptional circumstances, leave to appeal to the House of Lords against an interlocutory judgment of this Court will not be granted, the reason being that the death of any of the parties to such a proceeding materially alters the conditions of the question. The right may be lost altogether, or at anyrate a new party will intervene in the proceedings. The case is not so strong here as in some instances, because the applica-

tion is not for a disentail of the whole estate, but it is difficult to draw a distinction between one case and another on that ground, because what is a small part of one estate may be as large as the whole of another estate of smaller size. I am rather in favour of refusing the application.

No. 102.
Feb. 27, 1892.
Duke of
Sutherland v.
Marquess of
Stafford.

LORD KINNEAR concurred.

LORD PRESIDENT.—I was at first impressed by the consideration that there are here legal questions of magnitude and importance which are undoubtedly detachable from the sequel of the case. On the other hand, there is very great weight in what has been advanced by Lord Adam, and I have come to think that the balance of considerations is in favour of refusing this application. Two points weigh with me in coming to this conclusion. The first is, that having regard to the relative interests of the disputants, the peculiarity of proceedings of this kind that the death of the petitioner before decree terminates the litigation gives the Duke an exceptional right to be considered. In the second place, I do not think, after all, that the proceedings here will necessarily or naturally be of a highly complicated character. I sympathise greatly with the difficulties the parties may have in working out the subsequent procedure so as to promote their own pecuniary interests without hampering their argument on the main question, but the responsibility for this rests with themselves, and I am afraid we are not called upon to delay proceedings by allowing an appeal to the House of Lords merely in order to facilitate their dialectics.

THE COURT refused the petition.

TOO, MURRAY, & JAMIESON, W.S.—MACPHERSON & MACKAY, W.S.—MACKENZIE & BLACK, W.S.—Agents.

WILLIAM J. VALENTINE (Oncken's Judicial Factor), Petitioner.—
D.-F. Balfour—Salvesen.

ALEXANDER G. REIMERS AND HIS CURATOR AD LITEM, Compearer.—
A. O. M. Mackenzie.

No. 103.

Feb. 27, 1892.
Oncken's
Judicial
Factor v.
Reimers.

Parent and Child—Bastard—Aliment.—A claim for aliment by an illegitimate child against his parents is a claim for debt and transmits against their representatives.

PAUL GERHARD ONCKEN died on 19th June 1888, leaving four children. By his trust-disposition and settlement special provision was made for his eldest son, and the residue of the estate was bequeathed to the three younger children. 1st DIVISION.
Lord Kin-
cairney.

On 15th July 1890 William John Valentine, C.A., was appointed judicial factor on the estate, and after the other provisions of the settlement had been satisfied a sum of £1296, 5s. 7d. remained for distribution as residue.

In a petition to the Junior Lord Ordinary for special powers and for discharge, the judicial factor stated that there was in existence an imbecile illegitimate son of the truster, named Alexander G. Reimers, twenty years old, who was boarded out at a cost of £30 per annum; that the truster had recognised the paternity, and had maintained the lad during his lifetime; that the lad's mother was dead, and that he (the judicial factor) considered the estate liable for his maintenance, the cost of which he put at not less than £30 per annum. The prayer of the petition accordingly asked the Court (1) to fix what sum, if any, the petitioner was bound to retain for the maintenance and support of Reimers, and expenses

No. 103. connected therewith; (2) to authorise division of the balance of residue; (3) to authorise division of any balance remaining at Reimers' death out of the sum set apart for him; and (4) to grant the petitioner his discharge.

Feb. 27, 1892. Oncken's Judicial Factor v. Reimers.

The opinion of the Accountant of Court, which had been obtained by the judicial factor, was to the effect that if the claim for Reimers' aliment was to be held to be a debt due by the truster, the judicial factor might be authorised "(1) to retain £750, the income and capital of which to be applied by him in meeting Reimers' board and maintenance, and the expenses of the factory, at a rate not exceeding £35 a-year; (2) to divide the balance of the estate among the beneficiaries; and (3) upon Reimers' death, to divide the said sum of £750 or balance thereof, among the beneficiaries."

The Lord Ordinary (Kincairney) reported the case to the First Division.

When the case was called, counsel for the petitioner intimated that he was to argue that there was no legal obligation on him to pay aliment to Reimers out of the trust-estate.

The Court thereupon appointed a curator ad litem to Reimers. The curator subsequently lodged a minute, in which he submitted that the claim of the ward was a claim of debt for which the truster's estate was liable, and that the Court should give effect to the opinion of the Accountant of Court as to the amount necessary to be retained.

Argued for the petitioner;—The claim which an illegitimate child had against its parent for aliment was not based either on contract or on delict, but arose *ex jure naturali*. It did not therefore transmit,—as a claim of debt did,—against the representatives of the deceased parent. There was a distinct decision to that effect.¹ The case of *Clarkson*,² which was relied upon by the other side, was hardly in point, as it was brought at the instance of the mother against the father's representatives and her position was not *in pari casu* with that of a child. The action at her instance was in the nature of a claim of relief for which she was jointly liable with the father. The same criticism applied to the decision in the recent case of *Gourlay*.³ So long as the father lived there was authority for holding that a claim for aliment was not recognised as debt.⁴ It had also been held that such a claim was not discharged by ranking in a sequestration.⁵ The mere fact that there was no case where such a claim had ever been sustained led to the inference that it had no legal existence. In any view, the sum which the Accountant proposed to set aside was excessive.

Argued for the compearer;—The claim of a bastard for aliment was on an entirely different footing from that of a legitimate child. Whether it arose to any extent *ex jure naturali* or not, it had always been regarded as partaking of the nature of an ordinary debt.⁶ It must therefore transmit against the representatives of a deceased parent.⁷ The criticisms which had been made by the petitioner on the cases of *Clarkson* and *Gourlay* did not affect their authority in the present question, because

¹ *Ker v. Moriston's Trustees*, 1692, M. 1363.

² *Clarkson v. Fleming*, July 7, 1858, 20 D. 1224, 30 Scot. Jur. 725.

³ *Downs v. Gourlay*, July 7, 1886, 13 R. 1101.

⁴ *Reid v. Moir*, July 13, 1866, 4 Macph. 1060, L. J.-C. Inglis, p. 1064, L. Benholme, p. 1067, 38 Scot. Jur. 551.

⁵ *Marjoribanks v. Amos*, Nov. 30, 1831, 10 S. 79.

⁶ *Bell's Comm.* i. 680-1.

⁷ *Fraser on Parent and Child*, 124; *Gairdner v. Munro*, Feb. 8, 1848, 10 650, 20 Scot. Jur. 213; *Clarkson v. Fleming*, 20 D. 1224; *Downs v. Gourlay*, 13 R. 1101.

the mother could have no claim of relief against the father's estate unless that estate were first liable for the child's aliment. The *dicta* in *Reid v. Moir* were entirely *obiter*. The case of *Marjoribanks* decided that a claim for aliment which was continuous and ran on from year to year was not discharged by the sequestration, and the claim there was for payment of aliment falling due subsequently to the sequestration. The decision in *Ker v. Moriston's Trustees* had been specifically overruled in *Clarkson's* case. Assuming the validity of the claim, the sum suggested by the Accountant was not too large.

No. 103.
Feb. 27, 1892.
Oncken's
Judicial
Factor v.
Reimers.

At advising,—

LORD ADAM.—This is a petition at the instance of the judicial factor on the trust-estate of the late Mr Oncken for special powers and discharge, and comes before us on the report of the Lord Ordinary.

The question is whether the judicial factor is bound to retain any, and if so, what sum for the aliment of an illegitimate imbecile son of the late Mr Oncken. It is admitted that Mr Oncken was the father of this child.

Mr Oncken left four legitimate children. It appears from the Accountant's report that the amount of the trust-estate available for distribution is £1296, 5s. 7d. The sum proposed to be retained in respect of the claim for aliment is £750, so that, if this claim be sustained, the result is that the illegitimate child may carry off the major part of the estate, leaving a sum of little more than £500 for distribution among his widow and three of his legitimate children.

It was not disputed that the father and mother of an illegitimate child are, jointly and severally, liable to aliment the child until he is able to support himself.

The usual way in which this obligation is implemented is that the mother supports the child, and recovers from the father his share of their joint debt. The action brought by the mother against the father is an action of relief, and is founded on the ground that he as well as she is liable to aliment the child.

It is said, however, that the obligation to support an illegitimate child is not an obligation arising either *ex contractu* or *ex delicto*, and so giving rise to an ordinary civil debt, but that it is an obligation arising *ex jure naturali*, and giving rise to a debt having different characteristics. One of these is said to be that the debt or obligation, though valid during the life of the parent, does not transmit against the representatives. If that be so, the claim of the illegitimate child in this case must be repelled.

But while I agree that the debt arises *ex jure naturali*, and may possibly have some characteristics different from an ordinary civil debt, it is clear that whatever the nature of the debt may be, it has been recognised and enforced by the civil law, and I am of opinion that it is conclusively settled by authority that the debt does transmit against the representatives of the deceased parent, and will be enforced against them.

The first case to which I would refer is that of *Gairdner v. Munro*, February 8, 1848, 10 D. 650. In that case Gairdner died in 1836, and Munro was appointed judicial factor on his estate. A sum of £100 was set aside to meet a claim which had been intimated for aliment, present and prospective, for an illegitimate daughter, Cecilia. The rest of the estate was divided among the creditors, who received a dividend of 9s. in the pound. From the date of her father's death in 1836 till 1847 Cecilia Gairdner had been alimented by a person of the name of Laing. In that year, with Laing's concurrence, Cecilia

No. 103. Gairdner raised an action against Munro for arrears of aliment. She claimed the whole sum which had been set aside to meet her claim, but the Court found her entitled only to a dividend of 9s. in the pound on the amount of her claim, on the ground that she was in no different or better position than any other creditor on the estate.

Feb. 27, 1892.
Oncken's
Judicial
Factor v.
Reimers.

It appears to me that this case distinctly affirms the liability of the father of an illegitimate child for the aliment of that child, and that that liability transmits, after his death, against his estate. I do not see how otherwise the pursuer could have been ranked for a dividend.

The next case to which I would refer is that of *Clarkson v. Fleming*, mentioned in the report of the Accountant of Court. In that case the mother of an illegitimate child, in the year 1847, raised an action of aliment against the father, in which she obtained decree against him for aliment for seven years, commencing as at 30th December 1844, reserving to her her claim on behalf of the child for a further extension of the period for aliment. This decree expired on 30th December 1851. The father of the child died during that year. In 1854 she raised an action of wakening and transference against William Fleming, as the representative of his deceased brother, for further aliment.

The Court found that "the defender as representing his deceased brother, the father of the child, is liable in a reasonable sum for the aliment of the said child from the time he attained the age of seven years," again affirming the proposition that the estate of a deceased father of an illegitimate child is liable for his support.

It was maintained that the claim in that case, being by the mother of the child against the father, for relief of his share of the aliment, which they were jointly bound to contribute, was a proper claim of debt, and was different from a claim at the instance of the child against the father, which it was said was only due *ex jure nature*, and was not a proper civil debt, and did not transmit against his representatives.

But I do not think there is any substance in this distinction. No doubt the action was an action of relief, but the ground on which the pursuer was found entitled to relief was that the deceased father's estate was equally liable with her for aliment to the child. If the father's estate had not been directly liable to the child for the debt, she could have had no ground of action.

The last case to which I would refer is that of *Downs v. Gourlay*, 13 R. 1162.

In this case Downs gave birth to an illegitimate child, of which Wilson was admitted to be the father. Wilson died on 27th April 1885, when the child was two years old. After Wilson's death his estates were sequestrated, and Gourlay was appointed trustee on the sequestrated estates.

Downs claimed to be ranked on the sequestrated estates for aliment for her daughter until she should attain thirteen years of age. The trustee rejected the claim. The Court remitted to the trustee to rank the claim as a contingent claim.

The Lord President in giving judgment says,—“The question here is whether the mother was a proper creditor. If she was, there is no answer to her claim. I think the mother of an illegitimate child is always entitled to sue the putative father for a contribution towards the maintenance of the child so long as it is unable to maintain itself, on the ground that it is a debt. It does not matter whether it is a debt or a right arising out of natural law. It is a debt incurred on proof or admission of his having begotten the child. I do not think that the

is a rule confined to the circumstances of this particular case. It must hold good as a general rule, and accordingly I think the mother is entitled to rank upon his estate." No. 103.

Lord Shand says,—“The claim for the aliment of an illegitimate child lies against both parents. The claim arises from the father and mother being the cause of the child’s existence. Primarily it is the child’s claim, but as the mother is bound to maintain the child, she has a claim against the father for contribution. Whether the claim is the claim of the child or the claim of the mother, it is the claim of a creditor, and accordingly I am of opinion that the mother is entitled to rank on the bankrupt estate of the admitted father of her illegitimate child.”

Feb. 27, 1892.
Oncken’s
Judicial
Factor v.
Reimers.

This case again was the case of a mother suing, but for the reasons I have previously stated, that can make no difference.

It will be observed that in the cases of *Gairdner* and *Downs* the claims were claims on sequestrated estates, in which legitimate children could have had no claim, but in both the claims of illegitimate children were sustained.

In *Clarkson’s* case there would appear to have been no legitimate children.

However inequitable, therefore, it may appear to be that in a case like the present the claim of an illegitimate child should be preferred to that of legitimate children, the law would appear to be clear on the subject.

We were referred to the case of *Reid v. Moir*, in which it was said that the late Lord President threw doubts on the authority of the case of *Clarkson v. Fleming*.

In the case of *Reid v. Moir* his Lordship had occasion to consider the reciprocal obligations of parents and their legitimate children, and in the course of his opinion referred to those of parents and their illegitimate children. I do not, however, gather from his opinion that he intended to express any dissent from the decision in *Clarkson’s* case. It appears to me that he merely gave expression to some criticisms on the terms in which some of the Judges had expressed their opinions, which he thought were somewhat loose and indiscriminating.

But however that may be, the observations there made were entirely *obiter*, and it appears to me that as the case of *Clarkeon* cannot be distinguished in principle from that of *Downs*, his Lordship’s opinion in the latter case must be taken as his final opinion on the subject.

Assuming the claim of the child in this case to be well founded, the question is as to the sum which ought to be retained by the judicial factor to meet the claim. The Accountant of Court is of opinion that £750 is the proper sum, and I see no reason to doubt that he is right.

The LORD PRESIDENT and LORD KINNAR concurred.

LORD M’LAREN was absent.

THE COURT authorised the judicial factor to set aside the sum of £750 for the maintenance of Reimers, and expenses connected therewith, and *quoad ultra* granted authority as craved.

JOHN RHIND, S.S.C., Agent.

No. 104. GEORGE LUDOVIC HOUSTOUN, Pursuer (Reclaimer).—*D.-F. Balfour—Ur*
—*Constable.*

Mar. 1, 1892.
Houstoun v.
Buchanan.

WILLIAM BUCHANAN, Defender (Respondent).—*Johnston—Craigie.*

Superior and Vassal—Casualty—Implied entry—37 and 38 Vict. cap. 94 (Conveyancing Act, 1874), sec. 4, subsecs. 2 and 3—Statute—Retrospective effect.*—A proprietor of heritable subjects was infeft in them by registration of his disposition in 1873. At this date the last entered vassal had been dead for several years, although the fact was not then ascertained. In 1891, the superior raised an action against the proprietor in statutory form for payment of a casualty, it being by this time ascertained that the last entered vassal had died before 1873. The Lord Ordinary (Stormonth Darling) *held* that the casualty due was the rent of the subjects for the year 1873, the year in which the infeftment was registered. On a reclaiming note, *held* that the measure of the casualty was the rent of the year 1874, the year in which the statute giving the vassal an implied entry was passed.

2D DIVISION.
Ld. Stormonth
Darling.

BY disposition dated 2d, 3d, and 5th May 1873, William Buchanan acquired certain subjects in the High Street of Johnstone, and having recorded this disposition in the General Register of Sasines, on 19th May 1873, was duly infeft in them as of that date.

On 30th March 1891 George Ludovic Houstoun, immediate lawful superior of the subjects so acquired by Buchanan, raised an action against him concluding for declarator that in consequence of the death of William Robertson, who was the vassal last vest and seized in the subjects, a casualty, being one year's rent of the said subjects, became due to the pursuer. There was a corresponding conclusion for payment of £65 being the rent for the year 1874.

The contest between the parties came to be confined to this, viz., which year's rent was to be taken as the measure of the casualty admittedly due. While the case was in the Outer-House no admission was made as to the year of Robertson's death; a proof was led, which was quite inconclusive on the point, and the pursuer contended that the year 1881, in which year Robertson would have attained 100 years of age must be taken as the year of his death, and that the rent of that year must be taken as the measure of the casualty.

The Lord Ordinary (Stormonth Darling), however, rejected that year and took 1873, the year of infeftment, as the year the rent of which should determine the casualty,† and gave decree for £48, 1s.

* Section 4.—“When lands have been feued, whether before or after the commencement of this Act . . .

“(2) Every proprietor who is at the commencement of this Act, or thereafter shall be duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice . . . but such implied entry shall not be held to confer or confirm any right more extensive than those contained in the original charter or feu-right of the lands, or in the last charter or other writ by which the vassal was entered therein. . . .

“(3) . . . Provided always that such implied entry shall not entitle a superior to demand any casualty sooner than he could, by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter to pay such casualty irrespective of his entering.”

† “OPINION.— . . . If the date of William Robertson's death were known, and that date had been subsequent to the infeftment of the defender, the year to be taken would be the year in which the death occurred. It could

In the Inner-House it was admitted that Robertson had died many years before 1873, and the pursuer now maintained that 1874 must furnish the standard for computing the rent, that being the year in which the statute giving right to demand it was passed. His interest to maintain 1874 as against 1873 was that there was a rise of rent in 1874 to the amount of £18 or thereby. It was further explained at the bar that the present action was a test action, and would rule many other cases in Johnstone.

No. 104.
Mar. 1, 1892.
Houstoun v.
Buchanan.

Argued for the pursuer;—The meaning of the statute in short was that every infeftment was also a confirmation; but till the statute passed an infeftment had not that quality, and therefore the defender's infeftment in 1873 had not that quality. It first put on that character when the Act came into force. That then was the year the rent of which was to be taken, for by the old law the year's rent was paid when the charter of confirmation was given, in exchange for that charter, and the measure of the payment was necessarily the rent of that year. No statute was presumed to be retrospective; it must expressly be made so. Now, the provision as to the operation of confirmation did not necessarily imply a retrospective effect in this matter of payment. All that was meant was that the rights of the vassal were to be confirmed as from the date of the infeftment. That was so under the old law as much as under the new, and the statute said that its provisions were to have no further effect. If 1873 was taken as the year, then a casualty was due and payable before it was asked, *i.e.* before it was due, for no casualty was due till it was

not be an earlier year, for subsection 3 of section 4 of the Conveyancing Act provides that the implied entry established by that Act shall not entitle a superior to demand any casualty sooner than he could have demanded it under the old law, and under the old law he could not have raised a declarator of non-entry to enforce payment of a casualty while the fee was full. Nor could it be a later year, for the only later year possible would be the year of demand, and that view was expressly rejected in the case of *Stuart v. Murdoch*, 19 S. L. R. 649, which was a judgment by Lord Curriehill acquiesced in by both parties.

"Here, however, it has not been found possible to fix the date of the last vassal's death. The pursuer came into Court alleging that he died 'about thirty years ago.' The proof, so far as it goes, supports the view that he died in America about forty years ago, and that his relatives went into mourning for him at the time. But there is nothing like a definite date assigned to the event, and the pursuer now invites me to adopt an arbitrary date, *viz.*, the expiration of 100 years from the date of his birth, which happens to be known. It seems to me that there is no warrant for such a course, which would be inconsistent with the pursuer's own averments and with the tenor of the proof. A hundred years may mark the extreme limit of the presumption of life, but that is a very different thing from fixing the actual date of death.

"In these circumstances the only year which can be adopted is the year in which the defender was infeft; for that is the date from which, by force of the statute he must be held as having been duly entered with the superior. If authority be required for that proposition, I find it in Lord Curriehill's opinion (above cited), and also in Schedule B of the 1874 Act, which, in giving the form of a summons like the present, makes the date of the defender's infeftment the only alternative to the date of the last vassal's death. The reason obviously is that a casualty is primarily exigible for the year of entry (though of course it could not be demanded till the commencement of the Act), and it is postponed to a later year only where it can be shewn that the last entered vassal was alive at the date of the implied entry. Nobody can shew that here. The defender does not allege it. The pursuer has not proved it, and on record he alleges the contrary.

"The defender was infeft on 19th May 1873. I therefore take the year from Whitsunday 1873 to Whitsunday 1874. . . ."

No. 104.

Mar. 1, 1892.
Houstoun v.
Buchanan.

asked. Again, suppose that in 1870 a vassal A sold to B with an *a me* holding, and B took infeftment. In 1872 A again feued to C with a *de me* holding and infeftment followed. If the superior then confirmed B's rights, then the result would be at common law that B would have a mere mid-superiority. But if the view of the defender as to the retroactive effect of the statute were sound B would have the full right, because C's title would flow *a non habente potestatem*. If such an anomalous interference with titles was the result of the defender's view it was plain that it could not be sound. The point now argued had never come up for decision. The cases¹ had turned upon the question whether the year of demand or the year of entry gave the proper measure of the casualty. This point as to the retroactive effect of the statute had not been argued, although Lord Shand had *obiter* favoured the pursuer's view.²

Argued for the defender;—Although it was true that this point had not been argued in the case of *Stuart v. Murdoch*,³ the rent of a year before the passing of the statute had been taken. Against Lord Shand's *dictum* might be set that of Lord Deas in the same case (*The Straiton Estate Company*). This much at all events had been settled by the cases referred to, viz., that it was not the rent of the year of demand, but the rent of the year of entry that was to be taken. Now, if that were so, then the words of the statute made it retrospective. To avoid giving them a retrospective effect the pursuer had to add to the words "as at the date of registration," these words "if that be subsequent to the statute, or if not, at the date of the statute." That anomalous results might arise was immaterial, for the statute in pursuit of its main object, the simplification of conveyancing, had left out of view a good many pecuniary results. Undoubtedly, superiors had been much benefited by its operations, although that had not been intended. However that might be, it was certain that the statute, *q* in taking the year of the death of the last entered vassal as the year in which casualty fell to be paid, where that was posterior to the statute, had made large pecuniary questions dependent on a mere accident. Hence it was vain to resist the plain interpretation of the words of the clause by the argument that the results were anomalous.

At advising,—

LORD TRAYNER.—The defender in this case is the proprietor of certain heritages situated in Johnstone, held by him of and under the pursuer, who is the superior of the same. The defender acquired the subjects in 1873, and the conveyance in his favour is recorded on 19th May of that year, from which date he therefore stood infeft. The subjects were, at the date of the defender's infeftment, in non-entry, but he became entered with the superior by operation of the statute on 1st October 1874. The pursuer claims from the defender a casualty of a year's rent in respect of such entry, and this the defender admits to be due.

But the parties differ, and this is the only question between them, as to what year's rental is to be taken as the criterion or standard for fixing the amount due to the superior. The pursuer maintains that the rental of the year 1874

¹ See *Leith Heritages Co. v. Edinburgh and Leith Glass Co.*, June 8, 1876, 13 S. L. R. 731; *Sivwright v. Straiton Estate Co.*, July 8, 1879, 6 R. 150; *Straiton Estate Co. v. Stephens*, Dec. 16, 1880, 8 R. 299; *Campbell v. Stuart*, Dec. 11, 1884, 22 S. L. R. 292; *Stuart v. Murdoch & Rodger*, June 6, 1885, 19 S. L. R. 649.

² Lord Shand, at p. 1314 of *Straiton Estate Co. v. Stephens*, *at supra*.

³ *Supra*, note 1.

must be taken, that being the year of his vassal's entry; the defender, on the other hand, maintains that it is the rental of 1873, that being the year of his infeftment. The determination of this question depends on the construction of the Conveyancing Act of 1874, which provides (sec. 4, subsec. 2),—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment, duly entered with the nearest superior, . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice."

No. 104.
Mar. 1, 1892.
Houstoun v.
Buchanan.

The defender maintains the meaning of that provision to be that any proprietor infeft at the date of the Act should be held to be entered as at the date of his infeftment, and that, as the date of entry is the time at which the year's rental is to be taken for ascertaining the amount of the casualty, so the amount of composition due by him should be taken as at May 1873, the date of his infeftment, and, according to his view, the date also of his entry. This is the view which the Lord Ordinary has adopted, and a very plausible argument was submitted in support of it. But I differ from that view, which I think is not the meaning nor the fair construction of the Act.

In my opinion the entry, which was operated by force of statute, took place at 1st October 1874, the date when the Act came into operation, and no sooner. The defender was not entered with the superior, as matter of fact, before that date; he became an entered vassal then by force of the statutory provision. The words of the Act, that by such implied entry the vassal is to "be deemed and held to be" duly entered as at the date of his infeftment, must be read with the words that follow, viz., "to the same effect as if the superior had granted a writ of confirmation according to the existing law and practice." When so read I do not think that the meaning of the provision is doubtful.

By the law and practice existing before 1874 a writ of confirmation had the effect of entering the vassal as from the date of his infeftment in any question with the superior. It perfected the vassal's title as from the date of his infeftment. But the date of the entry, as regarded any question of casualty, was the date of the writ of confirmation. Accordingly, when the statute provides that every entered vassal at its date should be thereby held and deemed entered as from the date of infeftment, to the same effect as if the superior had granted a writ of confirmation, it only provides that the implied or statutory entry shall have the same, but no greater effect than a writ of confirmation granted at its date by the superior would have had—they operate "to the same effect." While, therefore, the implied entry under the Act has the same retroactive effect as a writ of confirmation (and to declare that it has seems to me the purpose of the part of the clause I am dealing with), it does not interfere with any law or practice, or any claim which might be affected by the date of entry.

I think the defender's entry both in fact and law was at 1st October 1874, and therefore I am of opinion that the pursuer's casualty is to be ascertained on the basis of the year's rent from Whitsunday 1874 to Whitsunday 1875.

LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and gave decree in terms of the conclusions of the summons.

CARMENT, WEDDERBURN, & WATSON, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 105. JOSEPH JACKSON AND ANOTHER, Pursuers (Reclaimers).—*R. V. Campbell—F. T. Cooper.*

Mar. 1, 1892.
Jackson v.
MacDiarmid.

MRS MARGARET T. JAMIESON OR MACDIARMID AND HUSBAND, Defenders (Respondents).—*Guthrie.*

MR AND MRS MACDIARMID'S MARRIAGE-CONTRACT TRUSTEES, Defenders (Respondents).—*Lord-Adv. Sir C. Pearson—Dundas.*

Husband and Wife—Personal obligation of married woman—Novation.—Testamentary trustees, as directed by the testator, divided the residue of his estate among his son A and three daughters, each receiving over £4000. Ten years afterwards a claim was made upon the deceased's estate by a bank upon a cash-credit bond for £5000, in which the testator had become bound as cautioner for his son's firm of A and B, along with B's father.

A new transaction was then entered into in which A paid £2500 to the bank for B's share of the firm business, and a new cash-credit bond for £2500 was granted to the bank for A's behoof, which was signed by A, by the husbands of two of his sisters, and by the third sister, with consent and concurrence of her husband. The new bond proceeded on the narrative that the prior bond had been discharged, and the latter was delivered up by the bank.

A having become bankrupt, his two brothers-in-law who had signed the £2500 bond paid that sum to the bank, and obtained an assignation to the bond.

In an action by the assignees against the testator's third daughter for declaration that she and her separate estate were bound to relieve the pursuers of her share of the bond, *held* (1) that the £5000 bond had been discharged, and (2) that the defender having been a married woman when she signed the bond for £2500, it was not binding upon her,—*diss.* Lord Young, who was of opinion that the transaction was virtually a consent by the testator's representatives to B and his father getting a discharge on paying their half of the £5000 bond, and the continuance of the existing liability of the deceased's estate for the remainder by the granting of the new bond, and (2) that it was competent for the defender to enter into this transaction, and that she was liable under it, as she would have been under the original bond, to the extent of her share of her father's estate.

2D DIVISION.
Lord Low.

DR JOSEPH JACKSON, Denholme, Bradford, and Alexander Wylie, W.S. raised an action against Mrs Margaret Turnbull Jamieson or MacDiarmid, wife of Rev. A. MacDiarmid, and her husband as her administrator-in-law and also against the marriage-contract trustees of Mrs MacDiarmid, for declaration that Mrs MacDiarmid and her separate estate were bound to free and relieve the pursuers "of the obligations undertaken by them to her and for the benefit of her estate, and of the payments to the amount of £1006, 10s. 11d. made by the pursuers equally between them for her and for the benefit of her estate," under certain deeds to be referred to. The summons also contained a petitory conclusion for payment.

The circumstances in which the action was raised were as follows:—The late Peter Jamieson, merchant in Edinburgh, died on 21st January 1872. He was survived by a son James, and by three daughters, Jane, wife of the pursuer Mr Wylie, Jane, wife of the pursuer Dr Jackson, and the female defender, who was then unmarried.

By Mr Jamieson's settlement he directed his trustees to divide his estate among his four children at the first term of one year after the youngest should reach majority. The female defender was the youngest and had attained majority when her father died.

The trustees, among whom were the testator's son James Jamieson and his son-in-law Alexander Wylie, who acted as agent for the trustees, divided the residue of the estate among the testator's four children, each receiving £4717, 8s. 0½d., and on 11th December 1873 they granted the trustees a discharge of their whole actings and intromissions.

During his life Mr Jamieson had taken the titles of certain heritable property himself, and to his then unmarried daughter Margaret (Mrs MacDiarmid).

as substitute to him. Her share of the succession thus amounted in all **No. 105.**
to £6000.

Mrs MacDiarmid was married in 1875. By an antenuptial contract of marriage then entered into, she conveyed her whole property, heritable and moveable, to trustees for the purpose, *inter alia*, "of paying any debts or obligations due or contracted by her prior to the celebration of her marriage." Mar. 1, 1892.
Jackson v.
MacDiarmid.

The pursuers stated that it appeared after the division of the estate that Mr Jamieson had at the time of his death been bound as a cautioner in a cash-credit to the National Bank for £5000, dated 16th and 18th October 1871, Mr James Jamieson, the son, having gone into partnership as a brewer with a Mr Jenkinson, and Mr Peter Jamieson and Mr Jenkinson's father having each become cautioner to the bank, but being liable *inter se* for half the sum; that this sum was all drawn out and not repaid; that the estate had been divided without the trustees, other than James Jamieson, becoming aware of the existence of the bond.

They further stated that in 1885 this amount of £5000 was claimed by the bank from Mr Jenkinson and the beneficiaries on Mr Peter Jamieson's estate; that James Jamieson was then taking over the whole business of Jamieson & Jenkinson, and arranged to take over Jenkinson's half of the bond, and actually paid up £2500 with interest to the bank; that there remained the other £2500, for which all the beneficiaries on Peter Jamieson's estate were liable to the bank. (Cond. 4) "The original bond could then have been put in force against the defender Mrs MacDiarmid and her estate for the half then remaining unpaid, with relief as accords. She was saved immediate payment of this half by the interposition of the pursuers, and her concurrence with them in a new bond. This half it was then arranged should be transferred to a new account opened in name of the said James Jamieson, and the pursuers, along with the defenders Mrs MacDiarmid and her husband, recognised their liability therefor to the bank, and obtained delay, the pursuers as acting for the respective wives, and Mrs MacDiarmid acting for herself with the concurrence of her husband. A new bond of cash-credit for £2500 was accordingly granted to the bank, dated 28th, 29th, and 31st December 1885 (quoted below).

. . . By the new bond the said defender acknowledged liability for the said £2500 remaining unpaid of the original debt of £5000 owing by her father and his estate, with accruing interest of not less than 5 per cent per annum, along with the said James Jamieson as the principal obligant, and the pursuers as, along with her, his cautioners. The defender Mrs MacDiarmid and her estate took benefit by the pursuers' interposition. Neither she nor they desired or intended that she should obtain this benefit gratuitously, or that her just share of the family liability as at her father's death should be transferred to and borne by the pursuers without recourse against her and her estate. The pursuers never in any way discharged this right of recourse for her share. No discharge of the original bond for £5000 was granted by the bank. In the new bond for £2500 the discharge of the original bond for £5000 is narrated as conditional on the said payment of the half thereof by the said James Jamieson, and on the granting of the new cash-credit by the said James Jamieson as principal obligant, and by the pursuers and the defender Mrs MacDiarmid and her husband as cautioners. The counter statements (quoted *infra*) are denied. Shortly after the date of the second bond the first bond was handed by the bank to Mr Wylie intact, to be held, as it now is held, for himself and his co-pursuer as their voucher or document of debt until Mrs MacDiarmid's share is paid. The deletion of the deceased William Jenkinson's name was thereafter made by the agent for his trustees and representatives,

No. 105. as in pursuance of the arrangement above mentioned, for James Jamieson taking over the business. Mrs MacDiarmid and her husband were, at and from the date of the second bond, fully aware that Mrs MacDiarmid's liability was thereby continued as for half the original bond; they made repeated inquiries as to the principal obligant's business, and they, in all their dealings with the pursuers and other members of the Jamieson family, held themselves out as fully recognising Mrs MacDiarmid's continued liability, and as accepting their equal share in this family obligation." . . . (Cond. 5) "The pursuers were compelled by the bank on 27th February 1890 to pay to them, and for the benefit of Mrs MacDiarmid and her estate, her third, amounting to £833, 6s. 8d., with interest from 31st December 1885, amounting to £170, 15s. 5d., and the further sum of £2, 8s. 10d. of expenses—in all, £1006, 10s. 11d. The counter statements are denied."

Mar. 1, 1892.
Jackson v.
MacDiarmid.

The pursuers produced the original cash-credit bond for £5000. They also produced the cash-credit bond for £2500 granted as above stated in 1885.*

They also produced an assignation by the bank, dated 15th June 1891, of the cash-credit of 1885 for £2500 in favour of the pursuers.

Separate defences were lodged for Mr and Mrs MacDiarmid, and for their marriage-contract trustees. The former defenders stated;—(Ans. 4) "Explained that Mr and Mrs MacDiarmid were pressed to sign the bond by the said Alexander Wylie in ignorance of the real state of affairs, and without having an opportunity of consulting an independent agent. The personal obligation granted by the defender Mrs MacDiarmid, as a married woman, is null, and cannot be enforced, and the pursuers have therefore no right of relief against her. Although no formal discharge of the original bond for £5000 was granted by the bank, the said bond was delivered to the said Alexander Wylie in exchange for the new bond

* "I, James Jamieson, . . . and we, Alexander Wylie, . . . Doctor Joseph Jackson, Denholme, Bradford, and Mrs Margaret Jamieson or MacDiarmid, wife of the Reverend Alexander MacDiarmid, . . . with the consent and concurrence of the said Reverend Alexander MacDiarmid—Considering" (the cash-credit bond for £5000 was here narrated), "and that said cash-credit has since been operated on to the full extent: And considering further that the said firm of Jamieson & Jenkinson has now been dissolved, and that I, the said James Jamieson, am now to carry on the business of brewer and maltster on my own account and for my own behoof, and that one-half of said cash-credit, viz., £2500, has now been paid into said bank account on behalf of me, the said James Jamieson, and in respect of the cash-credit hereinafter written the said cash-credit for £5000 has been discharged: Therefore I, the said James Jamieson, and we, the said Alexander Wylie, Joseph Jackson, and Mrs Margaret Jamieson or MacDiarmid, with consent of the said Alexander MacDiarmid—Considering that the National Bank of Scotland, Limited, have agreed to allow us credit on a current account to be kept in the books of said bank in name of me the said James Jamieson, and to be operated on by me, or by anyone duly authorised by me, and that to the extent of £2500 sterling, on these presents being granted, have therefore bound and obliged, likeas we, the said James Jamieson, Alexander Wylie, Joseph Jackson, and Mrs Margaret Jamieson or MacDiarmid, with consent and concurrence foresaid, hereby bind and oblige ourselves, conjunctly and severally, each as full debtor, . . . to repay to the National Bank of Scotland, Limited, aforesaid, or assignees thereof, on demand, the foresaid principal sum of £2500, or whatever portion thereof may appear to be due to said bank on the foresaid current account, and also whatever monies the said bank have advanced or may advance, or have or may become engaged for on account of the said James Jamieson."

for £2500. The bond for £5000 was delivered to the said Alexander Wylie on 5th January 1886, a few days after the new bond for £2500 was signed by Mrs MacDiarmid. The bank would, if called on, have granted a discharge of the said bond, but the usual practice in such cases is for the bank to deliver the bond itself when paid or satisfied, and to regard delivery as equivalent to discharge. Apart from this, the signature of William Jenkinson, one of the granters of the said bond for £5000, was deleted before the bond was delivered to the said Alexander Wylie, and in this way the bond was effectually cancelled."

No. 105.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

The marriage-contract trustees stated ;—(Ans. 4) "The new bond, dated in December 1885, bears to be and was granted by Mrs MacDiarmid and the other granters, not as the representatives of Peter Jamieson, but as individuals. On the narrative, *inter alia*, that the said cash-credit for £5000 had been discharged, the bank, in respect of said new bond, granted a new and independent credit to the extent of £2500, as therein set forth. The obligation against Peter Jamieson contained in the original cash-credit bond was by said new bond, and in respect of the consideration therein set forth, extinguished and discharged, and could not thereafter be enforced against his representatives. A new and independent account was accordingly opened in the bank's books in name of James Jamieson, beginning with the entry, '1886, Jany. 27. To cash, £2500,' and bearing no reference to the prior account in name of Jamieson and Jenkinson." They further stated,—(Ans. 5) "Explained that by the marriage-contract after referred to, dated 10th June 1875, Mrs MacDiarmid conveyed to these defenders as trustees her whole property, heritable and moveable, for the purpose, *inter alia*, of paying 'any debts or obligations due or contracted by her prior to the celebration of' her marriage, which took place in 1875. No obligation which Mrs MacDiarmid may have incurred in respect of the said cash-credit bond in 1885 falls within the terms of the said direction in the marriage-contract. Mrs MacDiarmid had after her marriage no power to effectually burden her estate by personal obligations. The assignation by the bank to the pursuers is referred to for its terms. Explained that it assigns to them only the said new cash-credit bond for £2500."

The pursuers pleaded, *inter alia* ;—(1) The defender Mrs MacDiarmid and her separate estate being liable for and burdened with the sums of principal and interest now sued for, and the pursuers having advanced the same for the benefit of her and her estate, they are entitled to be reimbursed for the same, as concluded for. (2) The pursuers having paid the defender Mrs MacDiarmid's share under her bond along with them to the bank, they are entitled to repayment of the same from her and her estate. (3) The pursuers having incurred obligations and made payments for a debt of the defender Mrs MacDiarmid and her estate contracted before and continued by the pursuers' interposition for her benefit after her marriage, they are entitled to decree against her and her marriage-contract trustees, in terms of the conclusions of the summons, with expenses.

Mr and Mrs MacDiarmid pleaded, *inter alia* ;—(1) The pursuers' averments, so far as directed against these defenders, are not relevant or sufficient to support the conclusions of the summons. (2) The cash-credit bond for £5000 having been discharged by novation, Mrs MacDiarmid, as one of her father's representatives or otherwise, is not liable in respect of his obligations thereunder. (3) The defender Mrs MacDiarmid having been a married woman at the date of the said bond for £2500, she is not liable to implement the obligations contained therein.

The marriage-contract trustees pleaded ;—(1) The pursuers' averments

No. 105.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

are irrelevant and insufficient to support the conclusions of the summons as against these defenders. (2) These defenders ought to be assoltized, with expenses, in respect that the estate under their charge as trustees foresaid is not liable in payment of the sum sued for, nor any part thereof. (3) The cash-credit bond for £5000 having been discharged by novation, Mrs MacDiarmid, as one of her father's representatives, is not liable in respect of his obligation thereunder. (4) Mrs MacDiarmid's obligation under the cash-credit bond for £2500 being a new obligation contracted after the date of her said marriage-contract, these defenders are neither bound nor entitled to make payment to the pursuers as concluded for.

—The Lord Ordinary (Low), on 14th November 1891, pronounced this interlocutor:—"Sustains the first and third pleas in law for the defenders Mr and Mrs MacDiarmid, and the first four pleas in law for the defenders Mr and Mrs MacDiarmid's marriage-contract trustees: Assoltizes the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

* "OPINION.—If in 1885, before the bond of cash-credit, to which the pursuers and the defenders Mr and Mrs MacDiarmid were parties, was granted, the bank had demanded payment from Mrs MacDiarmid and her marriage-contract trustees of the sum for which Mr Peter Jamieson, if alive, would have been liable under the cash-credit bond of 1871, I do not think that either Mrs MacDiarmid or her trustees could have resisted the claim. The claim when it emerged was a good claim against Mr Peter Jamieson's estate, whether in the hands of his testamentary trustees before division or in the hands of beneficiaries after division. Mrs MacDiarmid would have been liable in so far as she was *lucrata* by succession to her father, and her trustees, apart from the clause in the contract obliging them to pay her antenuptial debts, would, I apprehend, have been liable to the same extent, because they, as her assignees, were only entitled to the amount to which she had right under her father's settlement, and the result of a debt due by her father's estate, emerging after division among the beneficiaries, would simply have been to shew that she, or her trustees as in her right, had received more than they were entitled to.

"The claim of the bank under the first bond was not, however, met by payment, but a new bond was substituted for the old bond, and in my opinion the obligation under the old bond discharged. It is true that there was no formal or separate discharge of the old bond, but the new bond narrates that, 'in respect of the cash-credit hereinafter written, the said cash-credit for £5000 has been discharged,' and the old bond was delivered over to Mr Wylie, one of the obligants under the new bond. It thus appears to be clear that, so far as the creditor—the bank—was concerned, the obligation under the old bond was satisfied and extinguished.

"It was only, however, in respect of the obligation under the old bond that any liability could attach to the funds in the hands of Mrs MacDiarmid's trustees. The case would not, I think, be different if, instead of the claim being under a cautionary obligation undertaken by Mr Peter Jamieson, it had been for a debt incurred by him during his lifetime, which his trustees had omitted to pay before dividing the estate. If in such a case a third party had paid the debt, the creditor could of course have had no claim against Mrs MacDiarmid's trustees, and the third party who paid the debt could have had no claim unless he had obtained an assignation of the debt and claimed as in the creditor's right. Here the pursuers hold no assignation of Mr Peter Jamieson's obligation, and they do not sue as in right of the creditor. They simply say that they have paid or satisfied a debt which the trustees might have been called upon to pay, and that therefore the trustees are bound to relieve them. I do not think that there is any warrant in law for such a claim, and therefore I assoltize Mrs MacDiarmid's trustees.

"The claim, however, is also made against Mrs MacDiarmid, and it is necessary to consider what her position is. She, and her husband as co-tenants,

The pursuers reclaimed. They argued;—The debt which the pursuers had paid was a debt which belonged to Peter Jamieson, and the defender Mrs MacDiarmid, to the extent she was *lucrata* by the succession, was liable for it.¹ It was said that the old bond was at an end, having been discharged by novation, and that Mrs MacDiarmid was not liable under the new one. But the new one for £2500 was just a transference to a new account of an existing obligation in which she was liable, and her liability was not altered.² A transaction including a personal obligation by her, though a married woman, in taking over an inheritance, that she would guarantee a debt connected with it was good.³ Apparently the Lord Ordinary would have thought novation not operated, and that the pursuers were right if they had had an assignation to the original bond for £5000. The pursuers were willing to obtain that, though they held it to be unnecessary.⁴ Even if the cash-credit bond for £2500 were held to be quite a new obligation instead of being a mere transcription of an old one, it was at least *in rem versum* of Mrs MacDiarmid, and should

No. 105.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

were parties to the bond of cash-credit of 1885. The pursuers have paid the amount in the bond, and have obtained an assignation, and they now claim payment from Mrs MacDiarmid of her share. Mrs MacDiarmid pleads, however, that, having been a married woman at the date of the bond, her obligation, even although granted with the consent of her husband, is null. I think that the question is whether Mrs MacDiarmid's bond was enforceable in a question with the bank, because if it was not, the pursuers cannot claim either as assignees of the bank, or on the ground that Mrs MacDiarmid was bound to the bank along with them as co-cautioner. It was conceded that the husband's consent did not make the bond good if it would otherwise have been null, but it was contended that the object of the bond being to postpone payment of a debt which otherwise might have been enforced against Mrs MacDiarmid's estate, in so far as derived from her father, the obligation must be held to be *in rem versum* of her and therefore enforceable. No doubt at the time when Mrs MacDiarmid signed the bond, the bank might have made a claim against her as representing her father, and she became a party to the bond in order to carry over the claim, and in the hope probably that she might never be called upon to fulfil her obligation. I do not think, however, that that was a transaction *in rem versum* of Mrs MacDiarmid of a kind which renders a personal obligation of a married woman enforceable. The present case seems to me to be ruled by the decision in *Ewing v. Lady Strathmore's Trustees*, 9 S. p. 558. There Lady Strathmore had prior to her marriage granted a bill. After her marriage she granted a renewal bill for the sum in the first bill, with interest and expenses, the first bill being discharged. It was held that Ewing could not claim on the first bill, it being discharged, and that the second bill, being granted after marriage, could create no obligation against Lady Strathmore. I think that all the arguments which were adduced for the pursuers in the present case were open to Ewing in his claim against Lady Strathmore's trustees, and there is not, to my mind, any such difference between the circumstances of the two cases as to render the principle which was applied in the one inapplicable to the other. It is important to remember that the claim of the pursuers against Mrs MacDiarmid is rested entirely upon the second bond. They hold an assignation to that bond, but they have no assignation to the first bond, or for the rights of the bank thereunder, against Mr Peter Jamieson and his representatives. If they had held such an assignation, the result might have been different, but I must deal with the case as it stands."

¹ Stair, iii. 8, 70; Grierson v. Wallace, May 16, 1821, 1 S. 13; Poole v. Anderson, Feb. 22, 1834, 12 S. 481, 6 Scot. Jur. 285.

² Society of Journeymen Dyers, Feb. 11, 1802, Hume's Decns. 244.

³ Stevenson v. Campbell, Feb. 4, 1806, Hume's Decns. 247; Nairn v. Mercer, 1785, M. 5860; Fraser on Husband and Wife, i. 535-8.

⁴ Ersk. iii. 3, 68.

No. 105.
—
Mar. 1, 1892.
Jackson v.
MacDiarmid.

bind her. But for it she would have been liable to the bank on the old bond, but in arranging that liability she obtained the benefit of coming under this less liability. In any view, she could bind the income of her separate estate, which was not alimentary, and the pursuers ought to be allowed to make good the claim out of the income.¹

Argued for the marriage-contract trustees and Mr and Mrs MacDiarmid;—The foundation of the pursuers' claim was not the old debt but a new one. The old bond was discharged; the new one itself, to which alone they had an assignation, said so. If it were a new obligation, and one arising after marriage, the marriage-contract trustees would not be liable under the terms of their conveyance.

Mrs MacDiarmid further argued;—The obligation in the bond of 1885 was not binding on Mrs MacDiarmid as a married woman. No doubt there were exceptions to the rule that a married woman could not bind herself by a personal obligation. These arose (1) if the transaction was *in rem versum* of her, or (2) if it represented an obligation previously existing upon her. But neither exception existed here. The case of *Ewing* quoted by the Lord Ordinary was quite in point.

At advising,—

LORD JUSTICE-CLERK.—The question in this case is, whether the marriage-contract trustees of Mr and Mrs MacDiarmid are, or separately Mrs MacDiarmid as an individual is, liable to pay to two co-obligants in a cash-credit bond for £2500 the proportion for which she is bound in the bond. The history of the case is that Mr Peter Jamieson, a good many years ago, had a cash-credit bond in the bank for £5000, and in 1885 an arrangement was made by which a part of the money—£2500—was paid up. But a new bond was entered into by Mrs MacDiarmid and the two pursuers for £2500, and the question is, in the first place, whether under that cash-credit bond the trustees of Mrs MacDiarmid can be called upon out of the trust-estate in their hands to pay the proportion effeiring to Mrs MacDiarmid.

Now, it is to be noticed that the original bond for £5000, for her proportion of which, as succeeding to Mr Jamieson, Mrs MacDiarmid would have been liable, and which might have been exacted from her share before the estate was handed over to the trustees, if it was sufficient to meet it, or to such extent it was not, was, though not discharged in actual form, delivered up by the creditor, the bank, and the obligation under it was extinguished,—the creditor, the bank, being satisfied that the time had come for giving up the bond. In these circumstances I agree with the Lord Ordinary, in the first place, that there can be no claim against Mrs MacDiarmid's marriage-contract trustees in regard to the new cash-credit bond for £2500.

The pursuers also claim against Mrs MacDiarmid. They say:—"We were called upon to pay up the sum in that bond for £2500; we have done so, and Mrs MacDiarmid must now pay her share." The pursuers' case is that they have been called upon to pay up a certain sum in a cash-credit bond, that they have paid it up, and that Mrs MacDiarmid, whose name is in the bond, must pay up her share. That really comes to the simple question whether, supposing they had not paid up, the bank could have called upon her to pay up.

After considering the matter, I have come to the conclusion that the Lord Ordinary is right in holding that the bank could not—that Mrs MacDiarmid

¹ *Reliance Insurance Co. v. Halket's Factor*, March 4, 1891, 18 R. 615.

was not in a position, being a married woman, to incur this personal obligation. No. 105.

We must, accordingly, I think, adhere to the interlocutor of the Lord Ordinary.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

LORD YOUNG.—Mrs MacDiarmid's share of her father's succession—her father died in 1872—amounted, we are informed upon record—there is no evidence—to about £6000. She married in 1875, and the money being still extant, undiminished, she put it into the hands of her marriage trustees under an antenuptial contract for her and her husband in succession in liferent, and her children in fee. In respect of this succession of hers, and only in respect of it, and within the amount of it, she was liable for a debt of her deceased father from whom she got it. The amount of that debt was £5000, and the creditor therein was the National Bank.

We are informed that in 1885 the debt was brought formally as an existing obligation, of which payment was then required by the bank, before the beneficiaries on Mr Jamieson's (the father's) estate—that is, before Mrs MacDiarmid and her husband, and her two sisters and their husbands. In that year the bank demanded payment of this debt of £5000, and she, and her husband as her curator, were required to consider a proposal whereby, on the one hand, the amount of the debt was to be reduced to £2500, and on the other hand two individuals, or rather one individual and the estate of the other, who were bound as joint obligants along with her, were to be discharged. I shall immediately notice, so far as I think necessary, the details of the proposal, but in the meantime I point out that it regarded a then existing liability attaching to Mrs MacDiarmid in respect, and only in respect, of her separate estate inherited from her father. And the primary, most general, and most interesting question in the case seems to be, whether or not a married woman with a separate estate, and who in respect of it is under a certain liability which is enforceable against it or out of it, can, with the consent of her husband, lawfully enter into a transaction respecting that liability of hers.

That a particular transaction may be impeached as unconscionable or inequitable I assume, but the question which I now propound is only this—whether any transaction whatever with a married woman on such a matter is impossible according to the law of Scotland. That question necessarily implies the existing relation of debtor and creditor between the married woman and the party proposing or willing to transact with her, and I cannot assent to the proposition that the law prohibits a married woman from transacting with her creditor upon any terms, however just and however advantageous to her and to her estate, which she holds subject to that creditor's debt. Nor does it signify, in my opinion, that the transaction proposed involves, whether of necessity or mere convenience in carrying it out, the granting of a new obligation by her to her creditor. Further, I think it is immaterial to the question of her legal ability to transact that her creditor had other debtors bound jointly with her in the same debt, and that they also were parties to the transaction.

Now, it is the Lord Ordinary's opinion, and assented to by all the parties, that in 1885 Mrs MacDiarmid was debtor to the National Bank for £5000 in respect of the cash-credit bond of 1871, to which her father was a party, and that her separate estate was subject to be attached in payment. On the other hand, she was, as matters stood, entitled to demand total relief from each of

No. 105. James Jamieson, her brother, and William Jenkinson junior, relief to the extent of one-half from William Jenkinson senior, or rather from his representatives, for he was dead in 1885, and a rateable proportion from each of her two sisters, who were in exactly the same position as herself.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

Now, with no evidence before us and no averment, I am not in a position to estimate what was the value of that right of relief against the Jenkinsons. It may have been more or less valuable, or altogether worthless. I cannot tell; I have no means of knowing.

Such exactly was her position when the transaction immediately in question was proposed. The proposal was that Jenkinson senior's estate and Jenkinson junior should pay to the creditor £2500, being one-half of the debt, and be discharged from the obligation. Whether they were good for that without aid from others I cannot tell, or whether they were good for more, or whether that claim of relief against them for any part of the other half would have been worth a farthing, I cannot tell. The proposal was that the Jenkinsons should pay £2500, being one-half of the debt, and be discharged of their obligation, and that the remaining half should stand as a debt of James Jamieson and of Mrs MacDiarmid, and her two sisters, or their husbands, who were willing to be bound for their wives.

It is, I think, plainly immaterial with whom the proposal originated, or what were the motives for it. It seems just and reasonable enough on the face of it. It clearly could not be effected without being submitted to the obligants, and intelligently consented to by them, and by every person interested, and primarily by the creditor (the National Bank), who was demanding payment of the whole £5000, and had admittedly a good claim against all the obligants in the bond for the whole. That the proposal was submitted and intelligently assented to by the bank is clear enough. They were willing to take payment of one-half of the debt and to discharge the Jenkinsons, although the Jenkinsons were liable to them for the whole. But they were also willing, as a matter of prudence, to take payment of one-half of the debt and discharge the Jenkinsons, and to take the members of the Jamieson family as the only debtors for the other half.

The creditor in the debt being thus content to assent to the proposal, were the debtors also content and in a position validly to signify that they were. That they did each and all of them in fact signify consent, is undoubted and admitted. Whether or not Mrs MacDiarmid could validly do so is the only question. It may, I think, be assumed that the state of matters as existing when the proposal was submitted could not be changed, whether to her prejudice or benefit, without her consent and that of her husband; but the proposition now urged is that she and her husband were not at liberty to consider the proposal for a change, and must of legal necessity reject any such proposal however beneficial in their opinion and in fact, so that their assent to any change must be set aside as illegal and invalid. That is not according to my view. Confining myself to the question of Mrs MacDiarmid and her husband's power to act in that matter, I am of opinion that they were at liberty to consider any proposal for a modification or change of a subsisting debt upon their own estate, and to assent to it or not as they saw fit. This, however, is subject also to the operation of the rules of law and equity, according to which a married woman may repudiate an obligation into which, even with her husband's consent, she has been misled to her prejudice.

I have said enough to indicate that, in my opinion, differing from that which

your Lordship has expressed, the validity of Mrs MacDiarmid's obligation by No. 105. the bond of 1885 cannot be considered irrespective of the obligation which was clearly and admittedly upon her in the bond of 1871, if, as I have pointed out, that prior and immediately enforceable obligation was what she and her husband were dealing with and arranging when they subscribed the bond of 1885. What they had to consider, and I have no doubt did consider, was whether it was reasonable and for her advantage to substitute the one obligation for the other. To represent the two as unconnected, and to take the last as a voluntary, gratuitous, cautionary obligation by a married woman is, I think, unreasonable, and indeed contrary to the fact.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

In the interest of Mrs MacDiarmid and her sisters it may or may not have been judicious and prudent to consent to the discharge of the Jenkinsons on payment of one-half only of the existing debt in consideration of the consequent restriction of their own liability to the other half. That was the question which they and their husbands, charged with their interests, had to consider and make up their minds upon. They did so, and I venture to ask, what reason have we to affirm that they did not judge and act sensibly and prudently in the matter?

In the account of the bank under the old bond, £5000 stood at the debit of James Jamieson and William Jenkinson. Under the new arrangement, with the new bond substituted for the old, one moiety or £2500 was discharged, while the other moiety was put to the debit of James Jamieson alone, with Mrs MacDiarmid and her sisters and their husbands as cautioners. We are told—I have already observed that we have no evidence in the case at all—but we are told that “the said James Jamieson never made any payments to account of the said £2500 remaining outstanding from the date of the new cash-credit bond in December 1885, nor of the interest accruing thereon. This sum was merely the half of the original credit of £2500 for which Peter Jamieson's estate was liable, transferred to James Jamieson's name on the continued security of the beneficiaries on his father's estate, including Mrs MacDiarmid for her share in that estate. James Jamieson left this £2500 standing overdrawn, as it had always stood, after as before the date of the new bond.”

I think it will appear sufficiently from what I have said that what was proposed, considered, and assented to, was merely the discharge of the Jenkinsons upon payment of one-half of the debt by them. The granting of a new obligation or a new bond had really no effect in the matter. If Mrs MacDiarmid and her husband, and the other sisters and their husbands, had simply signified their assent to the discharge by the bank to the Jenkinsons upon payment of £2500, thereby giving up their claim of relief against them, and accepting the limitation of their own obligation to the other £2500, everything would have happened exactly as it did. The £2500 would have stood undiminished at the debit of the account, and the cautioners would have been liable for it, and could not have pleaded the discharge of the Jenkinsons, to which they had assented, as any ground for relieving them, as without such consent they might, upon the rule of law that a creditor in a debt cannot discharge any of the cautioners without the consent of the others, or if he does he will liberate the others as well as those whom he has consented to discharge. But everything would have been exactly the same without any new bond at all upon the liberation of the Jenkinsons upon paying up one-half of the debt being consented to. The amount of the debt would have been the same—£2500 paid up, the remaining £2500 standing, not one whit of difference being made by its being

No. 105.
Mar. 1, 1892.
Jackson v.
MacDiarmid.

put to the debit of James Jamieson instead of James Jamieson and William Jenkinson.

In the absence of evidence I am unable to say that that arrangement was detrimental to the interests of Mrs MacDiarmid. Her interests and those of her sisters were identical, and in the absence of anything to the contrary I feel constrained to attach importance to the judgment of all the parties at the time, on which they certainly acted. Under the arrangement, assuming its validity, Mrs MacDiarmid's share of the ultimate loss is about £800. Can we affirm judicially that she was misled into it to her injury, and that her loss would have been less or nil had the proposal of 1885, which she and her husband assented to, been rejected? Her liability is measured, as the Lord Ordinary points out, by the amount of what she got from her father. But her liability would remain whatever she did with it—although she spent it. Her liability for the debt of her father by the bond of 1871 is measured by the amount of her succession to him. She put the amount of her succession into the hands of marriage trustees. Now, the question whether or not the pursuers have a direct claim against the capital of the fund in the hands of the marriage trustees is, I think, a subsidiary question, and it may be a question of no interest whatever. I do not know what amount of separate estate Mrs MacDiarmid may have. I have no information. Of course if there are no funds recoverable the pursuers will take nothing by any decree, but if she has estate to meet the claim, irrespective of the funds in the hands of the marriage trustees, that will certainly be liable, and may be attached.

She has been drawing the liferent of this £6000, we are told, for the last seventeen years. I do not know whether that has been accumulating or not. I have no means of knowing, very likely it has, or to a considerable extent. She continues to draw the liferent, that is the income, of this £6000 termly, and will as long as she lives, and her husband thereafter through her, that is to say, through her succession to her father, and through her making a disposition of what she succeeded to, will also enjoy it if he survives her. I should think that if there is separate estate, the protection of the children's interest in these funds in the hands of the marriage trustees ought to have effect.

I said it was a subsidiary question, and possibly one of no interest whatever, whether there is a direct claim upon the capital, for the trustees would be entitled to retain the income for the future until this £800 was made up. It would be a substantial benefit, I assume, to the pursuers to have decree establishing her liability and their liability if there is any separate estate, and that would be quite consistent with the protection of these funds in the hands of the marriage trustees so far as the children are concerned.

Liability of this sort is not to be got quit of by putting the possession of the fund in the hands of marriage trustees, any more than it is got quit of by spending it. It would not have been affected in the least degree, although the remedy might have been diminished, if it had been spent upon her trousseau or spent in any other way. She is still liable to the extent of her succession to her father, and her liability in respect of that is what she arranged by the arrangement and transaction leading to the bond of 1885.

Your Lordship has said—and I entirely agree with it—that the question is the same as if the bank had been demanding payment. The bank has been paid. The other two sisters were married to gentlemen who were too honest and honourable not to stand by the obligation under which they came. Accord-

ingly they have paid the bank. It has been observed that there is a technical No. 105.
 plea open to Mrs MacDiarmid from the form of the obligation, viz., that it is
 by her with her husband's consent, which is not open to them, because they ^{Mar. 1, 1892.}
 came forward directly and undertook the obligation in respect of their wives' ^{Jackson v.}
 succession to their father. But if they (the pursuers) had not paid, the bank ^{MacDiarmid.}
 would have been the claimants; and supposing the bank claimed the £800
 from Mrs MacDiarmid and her husband under the obligation in that bond,
 could they say they never meant to implement it, that they did not mean the
 bank to discharge the Jenkinsons as with their consent and in reliance upon
 the obligation which they expressed in that bond which they handed to the
 bank, and when the bank came to demand payment upon that bond upon which
 they desired the bank to rely, could they say,—“Oh! Mrs MacDiarmid is a
 married woman and is not liable, we never meant to pay, we intended to deceive
 you”; or if that was not their intention at the time, what has occurred to justify
 that contention now?

I think the case would have been all the same, had the bank been making a
 demand upon that bond which was given to them containing her and her hus-
 band's consent to the discharge of the Jenkinsons on the footing that they
 would not be liable for the other half of the debt, notwithstanding there was no
 relief against the Jenkinsons as there was before. I think that defence to an
 action at the bank's instance demanding payment would have been bad.

It only makes the case more heartless that Mrs MacDiarmid and her husband
 are proposing to throw the whole liability upon the other two sisters and their
 husbands. I could not express my opinion of that conduct without using strong
 language.

My opinion is that this bond is enforceable according to its terms, as being
 substituted in modification of a prior and admitted obligation for a larger amount,
 and that the Lord Ordinary's interlocutor ought therefore to be altered.

LORD RUTHERFURD CLARK.—I agree with the Lord Ordinary.

LORD TRAYNER.—If I could distinguish in this case between what is to be
 considered the equity of the pursuers' claim and the legal rules which seem to
 me to determine the rights of the pursuers, I should have a good deal of
 sympathy with the claim the pursuers put forward against the defenders. But
 I do not think I am entitled to proceed upon equity when the rights of parties
 are clearly determined by the strict rules of law. I am therefore of opinion that
 the Lord Ordinary's judgment, which I think is according to law, should be
 affirmed.

THE COURT adhered.

WYLIE, ROBERTSON, & RANKIN, W.S.—R. R. SIMPSON & LAWSON, W.S.—
 JOHN T. MOWBRAY, W.S.—Agents.

JOHN SPROUL, Pursuer (Appellant).—*Younger*.
 JAMES M'CUSKER, Defender (Respondent).—*Chisholm*.

No. 106.

Bankruptcy—Cessio—Debtors Act, 1880 (43 and 44 Vict. c. 34), sec. 9—
Discretion of Sheriff.—A journeyman joiner made an application for cessio. ^{Mar. 1, 1892.*}
 His assets were £3, 5s., his wages 34s. per week, and his liabilities £56, 7s. 3d. ^{Sproul v.}
 His principal creditor, who had received a dividend of 3s. per £1 on his claim ^{M'Cusker.}
 for £27, 10s. 3d. under a trust-deed granted by the petitioner some years before

No. 106.

Mar. 1, 1892.
 Sproul v.
 M'Cusker.

(in respect of which payment the other creditors at that time granted discharges), and who had subsequently received 2s. per £1, objected to his obtaining decree. There were four other creditors, and the applicant stated in his examination that he proposed, when able, to pay them in full, but not to make any arrangement with the objecting creditor, and that it was diligence used by him that had led to the presentation of the application. The Sheriff on this ground, and because there were practically no assets, refused the application. The Court recalled this judgment, and remitted to grant decree of cessio.

2D DIVISION.
 Sheriff of
 Lanarkshire.

JOHN SPROUL, journeyman joiner, 244 Cumberland Street, Glasgow. raised a process of cessio in the Sheriff Court there. He stated that he was notour bankrupt, was unable to pay his debts, and that his inability to pay his debts arose through misfortunes and business losses.

According to the state of affairs Sproul's only assets were worth £3, 5s. The state shewed that there were five creditors, whose debts amounted in all to £56, 7s. 3d. The chief creditor was James M'Cusker, commission-agent, to whom Sproul owed £27, 10s. 3d. He opposed the granting of cessio. One of the others was Sproul's mother-in-law, to whom he owed £11, and his landlord, to whom he owed £13, 10s. The other two were tradesmen.

The state of affairs also shewed that Sproul had previously been in business as a grocer, but in 1889 had been obliged to grant a trust for creditors, under which they received 3s. per £1.

From the examination of Sproul it appeared that M'Cusker, the objecting creditor, was then a creditor for the same debt, and had received the dividend. The debt arose from M'Cusker having signed bills for Sproul to enable him to buy out his partner in the grocery business.

The other creditors under the trust-deed had discharged Sproul on receiving their dividend, but M'Cusker had not. The application for cessio was brought in consequence of arrestments of wages and a pointing used by M'Cusker, whereby he had obtained £1, 18s., or other 2s. per £1 on his debt. The other creditors at the date of the application for cessio were not pressing their claims.

Sproul deponed with regard to the creditors other than M'Cusker,—"I intend to pay them when I am able," further, with regard to M'Cusker—"I have already offered to pay M'Cusker £18, 10s. M'Cusker offered to accept £15 in full of his debt before the presentation of the petition. I do not propose to make any arrangement now."

Sproul's wages, when fully employed, were 34s. a-week, but on an average over the year about 25s. per week. He offered to assign them to the extent of £5 for behoof of his creditors.

The Sheriff-substitute (Birnie), on 17th September 1891, gave decree of cessio.*

* "NOTE.—If the case of *Hairstens*, 13 R. 207, is to be read as meaning that cessio is incompetent in the absence of substantial assets, this cessio is incompetent; but Lord Shand differed in that case, and, as I read the succeeding case of *Reid*, 1890, 17 R. 757, there is no absolute rule. As explained by Lord Shand in both cases, cessio is the equivalent of sequestration in small estates, and is the commencement of discharge; and it is a question of circumstances whether it ought to be granted or not. In the decisions, so far as reported either in the Supreme or the Sheriff Courts, the verdict has generally been against the debtor; but in the present case no improper conduct is averred. The opposing creditor has already obtained more than 5s. per £, and he is the only creditor opposing. It seems to me the debtor ought to be permitted in such circumstances to commence the proceedings necessary for his discharge. When he applies for his discharge, it will then be open to consider if he should give over some portion of his income to the opposing creditor. In some instances

M'Cusker appealed.

The Sheriff (Berry), on 21st November 1891, recalled the interlocutor, and dismissed the petition.*

Sproul appealed.¹

No. 106.

Mar. 1, 1892.
Sproul v.
M'Cusker.

LORD JUSTICE-CLERK.—The appellant has been hardly dealt with in this case. It is necessary to look into the circumstances in which the present respondent appealed to the Sheriff against the interlocutor of the Sheriff-substitute granting cessio. This applicant for the benefit of cessio is a working joiner, earning, when fully employed, 34s. a-week. Unfortunately for him he went into business as a shopkeeper some time ago and was unsuccessful, and since then his circumstances have been bad. At the time of his failure in business he executed a trust-deed for creditors, and under this trust 3s. per £1 were paid to the then existing creditors. Since then this creditor who is now opposing the cessio has got 2s. more per £1 from him, or in all 5s., which would be sufficient dividend for the applicant to have paid if it had been paid to all the creditors, and if the question now were whether he could get a discharge under cessio. He has no other opponent, the other creditors being content to leave him alone.

These being the circumstances, I am of opinion that this applicant is entitled to decree of cessio.

The remaining question is as to the conditions upon which it is to be granted.

debtors have been ordained to do so as a condition of obtaining cessio (*Calderhead*, 1890, 17 R. 1098; *Simpson*, 1888, 16 R. 131), but the present debtor has no sure income, and might fail innocently in any obligation taken by him."

* **NOTE.**—The question whether a petition for cessio should be granted is one of discretion, depending on the circumstances. I give great weight to the opinion of the Sheriff-substitute, who, in the present case, has thought that the circumstances are such as to justify the grant; but after a careful consideration of the debtor's deposition, along with the statement of affairs he has lodged, I have come reluctantly to the conclusion that it ought not to be granted *in hoc statu*. The debtor is a working joiner earning weekly wages, which he states at present at 34s. per week. His liabilities are given at £56, 7s. 3d., and his assets at £3, 5s. The largest creditor is Mr M'Cusker, to whom £27, 10s. 3d. is due, and who opposes the debtor's application. Besides Mr M'Cusker there are only four creditors, one of whom, Mrs Gillies, the debtor's mother-in-law, is not, as he says, pressing him; and the others, including his landlord, Mr Armour, he says that he means to pay in full. It would thus appear that, while paying other creditors in full, he proposes to make no provision for the debt of Mr M'Cusker, his principal creditor. 'I do not,' he says, 'propose to make any arrangement now'—i.e., for Mr M'Cusker. From the existing assets, as set forth in the debtor's statement, it is plain that no means of satisfying any of the debts can be looked for. Even if the £3, 5s., at which his assets are estimated by the debtor, were realised from the articles of household furniture and joiner's tools of which they are said to consist, nothing, after payment of the trustee, would remain for the creditors. There are, in truth, practically no assets for distribution. In refusing the application at present, it is not, I think, necessary to say that a grant of cessio is incompetent where there are no assets; but the fact of there being no assets leads one to look carefully at the position of the debtor before granting his application. Here it is not favourable to the application that the debtor avowedly contemplates making no provision towards the payment of one creditor, while intending to pay other creditors in full. It would, in my opinion, be an abuse of the process of cessio to allow a debtor, who comes forward with a statement that he has in effect no assets, to make it a handle for defying a particular creditor, as the debtor here proposes."

¹ *Ross v. Hairstens*, Nov. 16, 1885, 13 R. 207; *Reid v. M'Bain*, May 16, 1890, 17 R. 757; *Calderhead v. Freer & Dobbie*, July 9, 1890, 17 R. 1098.

No. 106.

Mar. 1, 1892.
 Sproul v.
 M'Caaker.

The cases cited on that point are cases in which the debtor had a salary, and in these cases the applicant was obliged to assign part of it for his creditors' behoof as a condition of obtaining decree of cessio. But this man is not in receipt of such an income. He is a working man with weekly wages. I do not think that the case is appropriate for such a condition, all the more so as it is clear that, when the appellant comes to apply for a discharge, conditions applicable to his circumstances, as then existing, may be introduced into the discharge.

LORD YOUNG.—I am of the same opinion. I am not disposed to agree with the Sheriff that there is good ground for refusing cessio in the fact that the appellant has expressed his intention of paying his creditors in full with the exception of the respondent—I mean the creditors under the trust-deed. His intention to pay in full is a laudable one, and whether he has good grounds for not including this particular creditor within that laudable intention, I have no means of knowing. He has somehow stirred up that creditor—his present opponent—to stand upon his utmost rights, for the latter has done diligence against him by arrestment and pouding, and in this way has recovered somewhat more than 3s. per £1.

It was explained that this cessio, in which all the creditors except this one concur, is prosecuted only to prevent the continuation of these proceedings on the part of the respondent in the future. I think we shall do justice by affirming the judgment of the Sheriff-substitute.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT recalled the Sheriff's interlocutor, and remitted to the Sheriff to grant decree of cessio.

W. B. WILSON, W.S.—SMITH & MARON, S.S.C.—Agents.

No. 107.

Mar. 2, 1892.
 Fleming's
 Trustees v.
 M'Hardy.

JOHN ELLIS AND ANOTHER (John Fleming's Trustees), Pursuers (Reclaimers).—*D.-F. Balfour—M'Lennan.*

DAVID M'HARDY, Defender (Respondent).—*Jameson—Dickson.*

Bankruptcy—Trust for behoof of creditors—Title of trustee to reduce illegal preferences.—The trustee under a voluntary trust-deed for behoof of creditors has no title to sue a reduction of illegal preferences unless he has a title derived from creditors.

1st DIVISION.
 Lord Low.

ON 3d June 1891 John Fleming, shipowner, Aberdeen, granted a trust-deed for behoof of his creditors in favour of John Ellis, coal-merchant at Aberdeen, and John C. Bennet, solicitor there. The trust-disposition was in these terms:—"I, John Fleming, . . . give, grant, assign, and make over to and in favour of" the trustees "All and Sundry my whole estates and effects, heritable and moveable, real and personal, of whatever denomination, and wherever situated, presently belonging or addebted, which shall belong or be addebted to me during the subsistence of the trust, with the writs and evidents and vouchers and instructions of my said estates, and with all right, title, and interest which I have or may claim therein; turning and transferring the premises from me and my heirs and successors for the purposes after specified to and in favour of my trustees, whom I hereby substitute in my full right and place there . . . with power also to my trustees, either in my name or in their own names, to sue and insist in and to defend all actions, and to do any other thing that they shall consider necessary in the execution of the trust . . . in trust for the purposes following . . . (secondly)

for division of the balance of the proceeds of my estate among my whole just and lawful creditors at the date hereof according to their several rights and preferences, and to a scheme of division among my creditors to be prepared by my trustees, providing that my said creditors, including any holding securities over my estate, shall be ranked, and the securities valued in the same manner and to the same extent as if my estates had been sequestrated under the existing Bankruptcy Statutes at the date hereof: Further, if any of my creditors do diligence against my estate, or if my trustees shall under any circumstances think it advisable that sequestration of my estates under the said statutes should be obtained, I hereby grant the following mandate for that purpose—that is to say, I hereby authorise my trustees to apply for sequestration of my estates under the said Bankrupt Statutes," &c.

No. 107.

Mar. 2, 1892.
Fleming's
Trustees v.
M'Hardy.

On 6th August the trustees brought an action against David M'Hardy, a creditor who had not acceded to the trust-disposition, concluding for reduction of certain preferences which were alleged to be illegal at common law and under the Act 1696, cap. 5. The pursuers, as their title, founded on the trust-deed only.

The defender pleaded;—(1) No title to sue.

On 16th February 1892 the Lord Ordinary (Low) pronounced an interlocutor by which, *inter alia*, the defender's first plea in law was repelled.*

The interlocutor being adverse to the pursuers on other points (not now reported), they reclaimed.

Argued for the pursuers on the question of title to sue;—The Lord Ordinary had rightly sustained the title to sue. The trustee under a trust-deed for behoof of creditors had a title to challenge illegal preferences although the deed did not confer power expressly. The fair inference from the deed, particularly the clause declaring that the ranking and preferences should be according to the Bankruptcy Acts, was that a title to reduce illegal preferences was intended to be conferred on the trustees; and the acceding creditors must by accession be held to have validated that. The acceding creditors, by the fact of accession, surrendered their right to take separate proceedings, but it was not to be supposed that their right to challenge illegal preferences was thereby lost. Rather it must be held that the trustees, either as the assignees or the mandataries of the acceding creditors, had the title to sue.

Argued for the defender;—The pursuers had no title to sue. They were the assignees of the debtor, not of the acceding creditors, and he could not give them a title to challenge his own deeds. A trust might be created which should give the trustee a title to reduce illegal preferences, but the title must proceed from creditors, and there was nothing here to shew that the trustees had got such a title from creditors.¹

LORD M'LAREN.—If any important pecuniary interest had been involved, I should have preferred to take time to consider this question, but it appears to me that no pecuniary interests beyond the expenses of the present action are

* "OPINION.— . . . The first point which I have to consider is the defender's plea of no title to sue. He contended that a trustee for behoof of creditors under a voluntary trust-deed has no title to sue a reduction of a fraudulent preference either at common law or under the statutes. The defender was unable to cite any authority in support of his contention, and in my opinion it cannot be sustained. It seems to be consistent with principle that a trustee for creditors should have a title to challenge illegal alienations or preferences, and all the authorities, including Mr Bell, appear to assume that such a right exists."

¹ 2 Bell's Comm. (7th edn.) 194; 1 Burton on Bankruptcy, 207.

No. 107. affected by the decision on the question of title to sue, and I understand that
Mar. 2, 1892. all your Lordships are agreed that the practice is in accordance with the explanatory statement of Professor Bell, and that the mere granting of a voluntary trust-deed for behoof of creditors, without a clause giving express power to reduce illegal preferences, does not give the trustee a title to reduce such preferences. The argument which we heard to the contrary resolved itself into this, that it was expedient that the trustee ought to have this power. But there may be cases in which the debtor has no desire or intention that his trustee should be put in position to reduce preferences where he knows that the first hint of such action on the part of the trustee would result in his sequestration. If such be the debtor's wish, why should he not be allowed to act in accordance with it, and ultimately to extricate himself from his difficulties without putting his creditors at arm's length to one another? Of course no creditor need accede unless he pleases, but the debtor may think that the trust may reasonably be administered without raising questions as to existing preferences. If, on the other hand, it is desired to give the trustee all the powers of a trustee in a sequestration, and only to avoid the stigma of notour bankruptcy, it is easy to insert a clause arming the trustee with the power to cut down preferences. On these grounds I am of opinion that we should sustain the first plea in law and dismiss the action.

LORD KINNEAR.—I am of the same opinion. The Act of 1696 gives a creditors of a particular character the right to sue for the reduction of preferences falling within the scope of the Act, and it gives the right to nobody else. It therefore follows that nobody can sue under it unless he can set forth a title giving him right to sue as a prior creditor or as the representative of a prior creditor.

Now, the pursuer sets forth no such title. He is neither the assignee of the general body of creditors nor of particular creditors. He sets forth as his title to sue that he is trustee for creditors, but the averment in fact on which the title is supported is, that the insolvent granted a general conveyance in favour of his whole estate in order that it might be divided among his creditors. It is very clear that under such a conveyance the trustee is not the assignee of the creditors, and is nothing but the assignee of the insolvent debtor. It is from the insolvent debtor alone that he derives his whole right and title. The sanction of the creditors may enable the trust created by the debtor to be carried into practical effect, because, by acceding the creditors have given an undertaking that they will not take separate action for their own interest, but it adds nothing at all to the title of the trustee, nor does it add to or enlarge the rights which the insolvent has conveyed to him. The question must always be, whether the right which a trustee under a deed of this kind is seeking to enforce is included in the aggregate of the rights assigned to him by the insolvent debtor. The right which the trustee is here seeking to enforce is clearly not so included. The insolvent himself could not set aside his own deed; and he cannot give to another a right which was not vested in himself. I agree that it is possible to put the trustee under a private deed in the same position as a trustee in bankruptcy, as regards his right to reduce illegal preferences, provided his right is derived from creditors who had themselves a good title to reduce. But there is nothing in the conveyance in question which can be construed into such assignation by creditors.

I agree, therefore, that the defender's first plea should be sustained.

No. 107.

LORD ADAM concurred.

Mar. 2, 1892.
Fleming's
Trustees v.
M'Hardy.

LORD M'LAREN.—I quite agree that the right to reduce preferences flows from the particular creditors who have acceded. If the deed contains such a power they by their accession are held to have conferred it on the trustee, but if the deed contains no such power, then their accession does not imply their assent to anything beyond what is contained in the deed.

The LORD PRESIDENT was absent.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defender, and dismissed the action.

MACPHERSON & MACKAY, W.S.—HENRY & SCOTT, W.S.—Agents.

UMPHRAY HENRY, Pursuer (Respondent).—*Salvesen—Greenlees.*

No. 108.

ROBERT THOMAS CHARLES SCOTT, Defender (Appellant).—*Comrie Thomson—Sym.*

Mar. 2, 1892.
Henry v.
Scott.

Adoption—Homologation—Minor—Adoption of liability.—The proprietor of an estate in Shetland, which had been formerly liferented by his father, was applied to shortly after reaching majority by A, one of a number of his father's tenants, who, in accordance with a custom in Shetland, had deposited money at interest with their landlord, for payment of his deposit. The proprietor wrote in reply that he would "attend to your request as soon as possible," but that his affairs had been left in a "muddle," and it would take some time to get them into order. "It would be better perhaps to have chosen some other time to have drawn your money, as, of course, you are aware these have on the whole been bad years for getting moneys."

Shortly thereafter the proprietor was sequestrated. In the course of an application to get the sequestration recalled, his agent sent a circular to A, along with other depositors who were claimants in the sequestration, requesting him to assist him in this object, and enclosing a mandate in these terms:—"I, the undersigned, one of the depositors with the estate of Melby, being satisfied that Mr Scott's affairs can by good management and care be retrieved, hereby consent to the recall of his sequestration, and am willing that he should have time to pay his deposits."

A did not accede to this request.

In an action by A against the proprietor, who did not represent his father and who was not liable for his debts, for payment of the deposit, *held* that these letters did not import that the defender had after coming of age accepted liability for the deposit.

The late Dr R. T. C. Scott was liferenter of the estate of Melby in Shetland from 1852 till his death on 6th January 1875. On his death his son, R. T. C. Scott, entered into possession of the estate as fiar. He was then ten years of age.

2D DIVISION.
Sheriff of
Caithness,
Orkney, and
Shetland.

In 1888 Umphray Henry, formerly a small tenant on the estate, raised an action in the Sheriff Court at Lerwick against Mr Scott, who had attained majority on 16th July 1885, for payment of £83, 10s.

The pursuer stated that in 1854 he lodged £14 on deposit with Dr R. T. C. Scott, the defender's father, that this sum was gradually increased by small payments at the periodical rent settlements till it reached £90 in January 1875, "when the account was taken over by James Garriock, factor for the curators of the defender, and that £10 had been drawn on 7th January 1882, but since then nothing had been drawn or

No. 108.
 Mar. 3, 1892.
 Henry v.
 Scott.

added." The pursuer further stated that the defender's predecessors, and afterwards the defender, had regularly paid interest at $2\frac{1}{4}$ per cent till January 1887, since which time no interest had been paid, and £3, 10s. of interest was due.

The pursuer further stated,—“On 26th September 1887 pursuer wrote defender asking for payment of his deposit. The defender replied on 8th October stating that it was inconvenient for him to do so at present, and that pursuer might have chosen a better time, as ‘these have been on the whole bad years for getting moneys.’”

The pursuer pleaded;—(1) The sum sued for being due and payable by the said defender to the said pursuer, decree ought to be granted as craved. (2) The defender having homologated the debt since coming of age, is barred from disputing it at this stage. (3) The defender having written the pursuer admitting the debt since coming of age, is barred, *personali exceptione*, from defending this action.

The defender stated that Garriock had no power in any capacity to borrow money for him or take over obligations on his behalf without authority of the Court or his constituent; that his father, Dr Scott, was merely a liferenter; that the deposit was not a burden on the estate; and that he (defender) took no benefit from his father's estate.

The defender pleaded;—(1) The obligation for the sum here sued for not having been granted by the defender, or those for whom he is responsible, he should be assoilzied from the conclusions of the action.

A proof was taken, the result of which and of certain documentary evidence subsequently before the Court by admission of parties to the appeal, was as follows:—

Dr Scott was merely a liferenter of the estate. During Dr Scott's life-rent he had received certain deposits from tenants at interest, according to a frequent custom in Shetland. The pursuer was then a tenant of Melby.

Dr Scott on his death on 6th January 1875 was survived by his wife and by two children, the defender, then ten years of age, and a daughter. He left a settlement whereby the defender was excluded from his succession in consequence of his being, under the settlement of the estate, a fiar of Melby.

Some evidence was led to shew that a transaction had taken place between the defender's curators and his father's representatives by which the former acquired for the defender an estate which had belonged to his father at the price of £1800; and that part of the price was to be paid by the curators taking over the liabilities of the father's estate to his depositors. The Court, however, held that such a transaction had not been proved.

The evidence in regard to the defender's adopting his father's obligation after majority was as follows:—

The defender came of age on 16th July 1885. During his pupillage Mr Garriock had been his factor loco tutoris. During his minority he had held a factory and commission from him with consent of the curators. After his majority the defender granted a new factory and commission in his favour. This was recalled in July 1887. It was admitted that Garriock paid interest as stated until the factory was recalled. On 26th September 1887 the pursuer applied to the defender with regard to the deposit, and, on 8th October 1887, received this reply:—“Dear Sir,—I should have replied to yours of 26th Sept., but I have been busy. I shall attend to your request as soon as possible, but my affairs have been left in such a ‘muddle,’ and it will take some time to get into working order again. It would be better perhaps

have chosen some other time to have drawn your money, as of course No. 108.
you are aware these have, on the whole, been bad years for getting
money^s”

Mar. 8, 1892.
Henry v.
Scott.

In October 1887 the defender obtained sequestration of his estates, but shortly afterwards, having changed his agents, and recalled the factory and commission held by Mr Garriock, he applied for recall of the sequestration. The pursuer was one of the claimants in the sequestration, and on 9th November 1887 the defender's agent, for the purpose of receiving his assistance in obtaining the recall, sent this circular to the claimants:—“If you are favourable to the sequestration of Mr Scott being recalled, and his continuing to conduct the estate of Melby himself, I would be obliged by your signing the enclosed form and returning it to me. I enclose a stamp for the purpose. I may mention that the following depositors, viz. (three depositors were here mentioned), have all signed it, they being of opinion that their money is quite secure in Mr Scott's hands, and that affairs will be better managed by him.” The form enclosed consisted of a mandate as follows,—“I, the undersigned, one of the depositors with the estate of Melby, being satisfied that Mr Scott's affairs can, by good management and care, be retrieved, hereby consent to the recall of his sequestration, and am willing that he should have time to pay his deposits.” The pursuer did not sign it.

On 14th January 1888 the sequestration was recalled in consequence of an informality in the proceedings.

On 19th February 1889 the Sheriff-substitute (Mackenzie), on the ground that by the defender's actings since he came of age he had accepted liability for the deposit, decerned against the defender for £83, 10s.*

On 28th March 1889 the Sheriff (Thoms), after findings in fact, of new decerned against the defender for the sum sued for.†

The defender appealed to the Court of Session, and argued;—The defender did not represent his father, and took nothing from his estate. Unless, therefore, he had adopted liability for his father's debt or had barred himself from maintaining that he had not done so, he must be absolved. But his letter of 26th September 1887 did not acknowledge the debt. It assumed the truth of the letter to which it was a reply, and promised attention to that letter. Nor was the circular of October any acknowledgment that the claims of the creditors to whom it was sent were just. It was merely a request to them to give their aid as claimants in judicial proceedings. Neither document contained anything sufficient to bar him from maintaining his legal rights as to the deposits. The pursuer's position had not been altered in consequence of them.

Argued for the pursuer;—The letter of October plainly by its terms admitted that the pursuer was entitled to be repaid by the defender.

* “NOTE.— That there has been homologation and admitted liability on the part of the defender does not admit of doubt. He says himself that on coming of age he had no idea of repudiating these deposits. The letter which he wrote to the defender also is clearly to the effect that he considered the sum in question due.—(*Robertson v. Robertson*, 2d July 1831, 9 S. 865, 3 Scot. Jur. p. 571; *Forrest v. Campbell*, 4th Nov. 1853, 16 D. 16, 26 Scot. Jur. p. 22; *Gall v. Bird*, 3d July 1855, 17 D. 1027, 27 Scot. Jur. p. 231.)”

† “NOTE.— The defender, on 8th October 1887, wrote the letter acknowledging his liability personally to the pursuer. This is followed up by another acknowledgment in the appeal which the defender made to the pursuer to come to his aid as a friendly creditor, in order to get the sequestration of his estates recalled. On these grounds the Sheriff is glad to arrive at the same result as the Sheriff-substitute.”

No. 105. put to the debit of James Jamieson instead of James Jamieson and William Jenkinson.

Mar. 1, 1892.
Jackson v.
MacDiarmid.

In the absence of evidence I am unable to say that that arrangement was detrimental to the interests of Mrs MacDiarmid. Her interests and those of her sisters were identical, and in the absence of anything to the contrary I feel constrained to attach importance to the judgment of all the parties at the time, on which they certainly acted. Under the arrangement, assuming its validity, Mrs MacDiarmid's share of the ultimate loss is about £800. Can we affirm judicially that she was misled into it to her injury, and that her loss would have been less or nil had the proposal of 1885, which she and her husband assented to, been rejected? Her liability is measured, as the Lord Ordinary points out, by the amount of what she got from her father. But her liability would remain whatever she did with it—although she spent it. Her liability for the debt of her father by the bond of 1871 is measured by the amount of her succession to him. She put the amount of her succession into the hands of marriage trustees. Now, the question whether or not the pursuers have a direct claim against the capital of the fund in the hands of the marriage trustees is, I think, a subsidiary question, and it may be a question of no interest whatever. I do not know what amount of separate estate Mrs MacDiarmid may have. I have no information. Of course if there are no funds recoverable the pursuers will take nothing by any decree, but if she has estate to meet the claim, irrespective of the funds in the hands of the marriage trustees, that will certainly be liable and may be attached.

She has been drawing the liferent of this £6000, we are told, for the last seventeen years. I do not know whether that has been accumulating or not. I have no means of knowing, very likely it has, or to a considerable extent. She continues to draw the liferent, that is the income, of this £6000 termly, and will as long as she lives, and her husband thereafter through her, that is to say, through her succession to her father, and through her making a disposition of what she succeeded to, will also enjoy it if he survives her. I should think that if there is separate estate, the protection of the children's interest in these funds in the hands of the marriage trustees ought to have effect.

I said it was a subsidiary question, and possibly one of no interest whatever, whether there is a direct claim upon the capital, for the trustees would be entitled to retain the income for the future until this £800 was made up. It would be a substantial benefit, I assume, to the pursuers to have decree establishing her liability and their liability if there is any separate estate, and that would be quite consistent with the protection of these funds in the hands of the marriage trustees so far as the children are concerned.

Liability of this sort is not to be got quit of by putting the possession of the fund in the hands of marriage trustees, any more than it is got quit of by spending it. It would not have been affected in the least degree, although the remedy might have been diminished, if it had been spent upon her trousseau or spent in any other way. She is still liable to the extent of her succession to her father, and her liability in respect of that is what she arranged by the arrangement and transaction leading to the bond of 1885.

Your Lordship has said—and I entirely agree with it—that the question is the same as if the bank had been demanding payment. The bank has been paid. The other two sisters were married to gentlemen who were too honest and honourable not to stand by the obligation under which they came. Accord-

from that, there was no liability. I think it is not an acknowledgment of debt at all, and still less an undertaking of liability admittedly not previously existing. No. 108.

Mar. 3, 1892.
Henry v.
Scott.

A case of this kind was attempted to be made out, that the curators of the defender here, during his minority, agreed to purchase the father's separate estate, not that which he liferented and to which the son succeeded in fee through his grandfather, but a separate estate,—I think it was explained,—lying into the other, and therefore desirable and likely to be coveted by the proprietor of the other; that the curators agreed to purchase that for the sum of £1840; and it is said that accompanying that there was an undertaking to pay something for ameliorations on the one side, and an agreement upon the other that the liability for the deposits with the father, for which the trustees were responsible to the extent of any estate which they had, should be taken over by the pupil son, the agreed-on price of the land, about £1800, being abated to that extent, or held to be paid to that extent. I think there is no evidence of that upon which we can proceed. I think there is no evidence upon which we can proceed that the curators in the discharge of their legal duty and within their legal powers, or that they, with the consent of the minor after he attained minority, agreed to take over the liability for these sums at all. I think there is no evidence of any agreement that the taking over of a liability, not previously existing, for the amount of the deposits, should be held as payment *in tanto* of £1800, the agreed-on price of the lands which belonged to Dr Scott in fee-simple. If such a case had been made out it might have been sufficient, but there is no such case made out.

Therefore, upon the whole matter, I am of opinion that there was no original liability upon the son when he succeeded his grandfather or when his father died, and that no such liability was subsequently put upon him either by his guardian during pupillarity, or by his curators, with his consent, after he emerged from pupillarity into the condition which we term minority, when a minor may, if there is no lesion to him, come under obligation with the consent of his curators.

That disposes of the whole case. It is an action against him as under liability, either original or subsequently assumed, or put upon him, to this possessor for £80. I think there was no such original liability, and that the liability was never subsequently put upon him or assumed by him.

My opinion therefore is, that upon findings to that effect we should alter the judgment of the Sheriff, and sustain the defences to the present action.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT pronounced this interlocutor:—"The Lords . . . Find that the sum of £80 sued for consists of sums deposited with the liferenter of the lands of Melby, the defender's father, between the year 1854 and the year 1875: Find that the defender's said father died in 1875, at which date the defender was a pupil: Find that thereupon the defender, the fiar of said lands, came into possession thereof: Find that the defender did not succeed to any estate through his father, and does not represent him: Find that the pursuer, after the defender attained minority, obtained from James Garriock, factor for the curators, the receipt for £90, contained in the document No. 2 of process: Find that the de-

No. 108.

Mar. 3, 1892.
Henry v.
Scott.

fender, after attaining majority, wrote to the pursuer the letter No. 3 of process, dated 8th October 1887: Find that his agent sent to the pursuer and other creditors claiming in the defender's sequestration the circular dated 9th November 1887, No. 15 of process: Find that the pursuer did not accede to the request contained in said circular: Find in law that the defender was not liable at the time of coming into possession of said lands for payment of said deposited sums; that liability therefor was not validly undertaken by his curators; that the said letter and circular do not import an adoption by the defender of liability for said sum sued for: Therefore sustain the appeal; recall the interlocutors of the Sheriff and Sheriff-substitute appealed against: assoilzie the defender from the conclusions of the summons, and decern," &c.

THOMAS M. HORSBURGH, S.S.C.—A. P. PURVES & AITKEN, W.S.—Agents.

No. 109. R. C. MILLAR AND J. ROMANES (Liquidators of Edinburgh Employers' Liability and General Assurance Company, Limited), Petitioners (Respondents).—*Asher—Johnston—Dickson.*

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

ELIZABETH GRIFFITHS AND OTHERS, Respondents (Reclaimers).—*D.-F. Balfour—Sym.*

LEONARD H. WEST, Respondent (Reclaimer).—*D.-F. Balfour—Sym.*

REV. W. DUKE, Respondent (Reclaimer).—*D.-F. Balfour—Sym.*

Company—Contract—Rescission of voidable contract to take shares—Offer of acceptance.—A company offered at a premium, and succeeded in allotting, and issue of shares. Some months afterwards the directors issued to the new shareholders a circular informing them that they had discovered that the prospectus for new shares contained material misrepresentations, and that the true state of the company at the date of the prospectus had been that the paid-up capital and "premium reserve" fund had been lost, and that dividends in past years had been paid out of capital. This circular, which was dated 12th May 1891, further stated that the directors were advised that they ought, under section 1 of the Companies Act, 1862, to present a petition to the Court for authority to remove from the register of members the names of the new shareholders, and to return their money, and that they were about to present a petition for that purpose which would be served upon them.

W. and D., two of the new shareholders, replied to the circular, the one on the 14th and the other on the 20th, intimating that they should be glad to have their names removed, and to have their money returned.

On 18th May the directors called a meeting of the company to consider resolutions for a voluntary winding-up.

On 20th May the directors presented a petition for authority to remove the names of the new shareholders from the register, and to repay their money.

On 26th May certain of the original shareholders presented a petition for a winding-up order. A winding-up order having eventually been obtained on that petition, 26th May became the date of the liquidation.

No answers were lodged to the petition of 20th May.

In the liquidation a number of the new shareholders objected to being put on the list of contributories, maintaining that their contract to take shares, which was voidable for misrepresentation, had been rescinded by the circular of 12th May, and, in any view, by the petition of 20th May prior to the winding-up.

The Court, holding that the circular of 12th May was an offer to rescind the contract, which required to be expressly accepted, and that the presentation of the petition of 20th May could not avail shareholders who had not expressly become parties thereto prior to the 26th May, and might therefore have claimed

to retain their shares, *settled* the new shareholders on the list, excepting W. and D., but *removed* the names of W. and D. who had, prior to liquidation, expressly agreed to the rescission of their contract. No. 109.

THE EDINBURGH EMPLOYERS LIABILITY AND GENERAL ASSURANCE COMPANY was incorporated under the Companies Acts, 1862 to 1886, on 18th February 1887. It subsequently carried on employers' assurance, accident assurance, and kindred business. Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

The shares were £1 shares, of which 5s. was paid up per share. The number of shares issued up to December 1890, which are hereafter called "old" shares, was 27,063. 1st DIVISION.
Ld. Stormonth
Darling.

In December 1890 a prospectus was issued offering a further issue of shares at a premium of 1s. 3d. per share.

The prospectus represented, *inter alia*, that the company was prosperous and doing a large business; that "a six per cent dividend had been earned and paid since the commencement of the company," and that the company had a sum of £4200 of "premium reserve," which was shewn in its balance-sheet for the previous year, of date 28th February (when the company's financial year ended).

In January and February 1891 6108 of these shares were taken up by about sixty-five persons. These shares are hereafter called the "new" shares.

On 12th May 1891 there was issued to the new shareholders (a copy being sent to the old shareholders at the same time) by the company a circular in the following terms, signed by the chairman and the managing director,—“The financial year of this company expired on 28th February last. The directors have since had a thorough investigation made into the affairs of the company, and they regret to inform you that their investigation discloses some startling results. When the prospectus for the issue of new shares was published in December last, the directors, proceeding upon the previous balance-sheet, and the business which was subsequently placed before them, were of opinion that the company was in a satisfactory condition. The investigation, however, has brought to light the fact that claims to a large amount had been intimated to the late manager, Mr James M'Cankie, before the balance-sheet for 1889-1890 was adjusted, and many of them before the financial year expired, which he omitted to disclose to the board or to the auditor, and of which no account is taken in that balance-sheet. The directors had no means of knowing of these claims except through the manager. The result is that the directors are now satisfied that no profit was earned for the previous year, and, on the contrary, that the sum treated as a premium reserve was more than exhausted by claims actually intimated before the balance-sheet was issued. As at 28th February last, therefore, the paid-up capital of the company has been practically lost, though it has a large uncalled capital. A good business has, however, been built up, and the directors are negotiating for the amalgamation of the company with another, so that the full benefit of the value of the business may be obtained for the shareholders. The directors feel that in the above circumstances a grave injustice has been done to those shareholders who applied for shares on the prospectus issued in December, and had shares allotted to them. They have taken legal advice on the subject, and specially whether they have, or can get, the power to enable them to remove the names of the new shareholders from the register, and to repay them the money paid on their shares, together with the premium thereon. They have been advised that under section 35 of the Companies Act of 1862 this can legally be done with the authority of the Court, and they propose immediately to present a petition to the Court setting forth the whole circumstances, and craving

No. 109. the necessary authority. We think it right to inform you of this at once. so that your mind may be set at rest in regard to your position as a new shareholder. A copy of the petition to the Court will afterwards be served upon you. In the meantime, any of your friends will be perfectly safe to insure with the company, or to renew insurances already existing, and we trust you will use your influence to prevent the business being prejudiced while the negotiations are in progress."

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

On 18th May 1891 the company sent out notices of an extraordinary general meeting, to be held on 26th May 1891, "to consider, and if resolved, to pass" extraordinary resolutions that a provisional agreement between the company and another, with which it was proposed to amalgamate, be confirmed, and "(2) That, in respect of said agreement, and also in respect of the company having suffered such losses that it is inexpedient to carry on the business, the meeting declare the company to be dissolved, except for the winding-up of the same. (3) That the Edinburgh Employers Liability and General Assurance Company, Limited, be wound up voluntarily."

Along with the notice was sent a circular on behalf of the directors explaining the proposed agreement and requesting proxies for the meeting.

On 20th May 1891 the company presented to the Court the petition under section 35 of the Companies Act, 1862,* of which intimation was given in the circular of 12th May above quoted. The petition stated that the names of the "new" shareholders had been entered on the register without sufficient cause; and craved service upon them, and that the Court should "rectify the register of shareholders or members of the company by deleting or removing therefrom the names of the said shareholders."

This petition stated with regard to the prospectus of December 1890:—"It has now come to the knowledge of the directors that certain statements of a material character contained in said prospectus were altogether misleading. . . . Had the manager laid before the directors a full statement of the information in his possession they would have been parties to the issue of the said prospectus or the allotment of new shares and they are advised that the new shareholders have good and sufficient grounds for rescission of the contract to take shares, and repayment of the moneys already paid up in payment thereof. In particular, reference may be made to the statement in the prospectus as to the '6 per cent dividend earned and paid since the commencement of the company.' This representation has been discovered by the directors to be inconsistent with fact. The actual state of matters is as follows":—(The petition then compared with the statements in the balance-sheet the true state of the claims which had been intimated and should have appeared there, and stated that these amounted to at least £4900, of which the directors were in ignorance.) "Had they known of their existence, they would have insisted upon their being entered in the balance-sheet, and . . .

* The Companies Act, 1862, enacts (section 35),—"If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this Act, . . . the person or member aggrieved, or any member of the company, or the company itself, may . . . apply for an order of the Court that the register may be rectified, and the Court may either refuse such application . . . or it may, if satisfied of the justice of the case, make an order for the rectification of the register, . . . and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

result would have been (1) that the premium reserved to meet unexpired risks, viz., £4200, would have been entirely swept away in payment of said intimated claims; and (2) that the foresaid dividend of 6 per cent would not have been declared. It now appears, in fact, that instead of said dividend having, as stated in said prospectus, been earned and paid, it had not been earned, but had been paid out of capital. In these circumstances, the directors have felt that a grave injustice has been done to the shareholders who took shares on the faith of the prospectus as issued, and, as stated, they are advised that rescission and repayment can be obtained by the new shareholders."

No. 109.
Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

The petition was served upon the new shareholders. No answers were lodged, the explanation given by such of them as appeared in the subsequent proceedings being that "having learned from the said circular and petition the intention of the company to admit the wrong done to them and to restore them against it, the respondents approved of the said petition, and lodged no answers thereto."

The meeting of the company of 26th May, of which notice was given by the circular of 18th May, was held, but the resolutions for voluntary liquidation and amalgamation were lost.

Upon 26th May 1891, while the order for answers to the company's petition was still current, Charles Morton and others, certain of the old shareholders, presented a petition to the Court for a winding-up of the company, narrating the facts above stated, and averring that the company was being carried on at a loss. They alleged further that the directors were devising a scheme for putting the company into liquidation, and had resolved upon liquidation, and transferring the business to another company in a manner contrary to the shareholders' interest; and further, that it was incompetent to have the names of the new shareholders removed from the register. They submitted that it was just and equitable that the company be wound up by the Court.

The company, on 2d June, lodged answers to the petition of Morton and others. The answers stated that the company was solvent, and that winding-up by the Court would be unjust and inequitable, and with regard to the "new" shareholders, stated that their names had been registered "without sufficient cause," and that the petition was an "attempt to defeat the petition of 20th May to have their names taken off, and to procure the retention by the company of moneys improperly obtained, which should not be sanctioned by the Court."

Before discussion upon the petition of Charles Morton and others of 26th May and the answers thereto, an arrangement between the petitioners and the company was arrived at, and, in terms of a joint minute, the Court, on 24th June 1891, pronounced the order for the winding-up of the company by the Court.* The date of the winding-up was accordingly 26th May, the date of the presentation of the petition for that order.

Mr R. C. Millar, C.A., and Mr James Romanes, C.A., were appointed official liquidators.

The liquidation was remitted to Lord Stormonth Darling.

* Certain of the new shareholders, having heard of the proposed arrangement, boxed a note to the Court, which appeared in Single Bills on the same day, 24th June, craving to be allowed to compare and support the petition of 20th May. On 7th and 8th July counsel were heard on this minute. The First Division pronounced this order:—"Having resumed consideration of the petition, . . . the minute of compareance for Elizabeth Griffiths and others, and heard counsel for the parties, sist process."

No. 109.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

The questions now reported arose in the proceedings under a note by the liquidators for settlement of the list of contributories.

In this note it was proposed to settle on the list of contributories, *inter alia*, the new shareholders.

Elizabeth Griffiths and others, being twenty-eight of these, lodged answers, objecting to their names being settled on the list. They held 4134 out of the 6108 new shares.

Rev. J. A. Smith, Rev. W. Duke, and two other persons, who had failed to lodge answers timeously, and had accordingly been settled on the list, subsequently applied by petition to have their names struck off the register of the company.

A record consisting of a condescendence for the objectors Griffiths and others, and answers thereto for the liquidators, was made up.

From correspondence produced it appeared that, on 24th March 1891, one of the respondents, Mr Shand, who had heard certain reports unfavourable to the company, wrote to the secretary acknowledging the certificate of new shares sent him on the 11th, and adding,—“In the circumstances I consider that the company was not entitled to issue the additional shares which they recently issued, and I have therefore to intimate to you that I require my name to be removed from the register, and repayment of the £125 which I paid to the company on 17th December last.” In a subsequent letter to each director of 19th May Mr Shand said, referring to the circular of 12th May,—“After such an assurance, I naturally concluded that I did not require to attend further to the matter, and I am the more willing to take no active steps as I was unwilling to cause additional expense to the company. The circular of 18th inst., however, informs me that steps are to be taken to put the company into liquidation. Liquidation may have the effect of prejudicing the rights of ‘new’ shareholders.”

In these circumstances, the respondents Griffiths and others pleaded, *inter alia*;—1. The respondents are not liable to be placed on the list of contributories, in respect that they were induced to take the said new shares by material misrepresentation, and their names were entered on the register of members without sufficient cause; *et separatim*, because their right to be relieved and to have the contract rescinded was intimated to them, and judicially admitted by the company prior to the commencement of the winding-up. 4. The respondents are entitled to have the register of the company rectified by the removal of their names, in respect of the Companies Act, 1862, sec. 35.

The liquidators pleaded, *inter alia*;—1. The respondents’ averments are irrelevant. 4. The respondents’ objections should be repelled, in respect (1) that the petition of 20th May was incompetent, irrelevant, and *ultra vires*, and was truly presented, not in the interests of the company, but in the interest of the directors, and after liquidation had been resolved on, and was not authorised by the company; (2) that the liquidation order of the Court precludes the Court from now sustaining the respondents’ objections.

The Lord Ordinary, on 5th January 1892, repelled the pleas in law for the respondents, and settled their “names on the list of contributories.” *

* “OPINION.—The question here is, whether the respondents Mrs Griffiths and others are to be placed on the list of contributories of this company as holders of shares allotted to them in or about December 1890.

“The company was formed in 1887, with a nominal capital of £150,000 divided into 150,000 shares of £1 each, of which 5s. per share were paid up.

In the petition for the Rev. J. A. Smith and others, the Lord Ordinary No. 109. refused the petition.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

Down to December 1890 only 27,063 of these shares were subscribed for. In that month the company issued a prospectus offering a new issue of shares, and the result was that 6108 additional shares were accepted at a premium of 1s. 3d. per share in addition to the 5s. paid up. The present respondents, who are twenty-eight in number, hold 4134 of these new shares. Four other persons, representing 800 shares, have taken separate proceedings in the liquidation, objecting to their names being placed on the list of contributories. The remaining 1174 new shares are held by thirty-three persons, who have down to this time taken no steps to repudiate liability. Only two of these thirty-three are holders of old shares as well.

"The prospectus issued by the directors, on which the new shares were taken, represented the company as in a flourishing condition. In particular, it asserted that a 6 per cent dividend had been earned and paid since the commencement of the company, and that the company possessed a sum of £4200 of 'premium reserve.' Both of these statements turned out to be false, the premium reserve being entirely absorbed by claims which had been intimated before the date of the prospectus, and the dividend of 6 per cent having been paid out of capital. I shall assume therefore that the 'new' shareholders were induced to take their shares by misrepresentation of material facts, and that, while the company was a going concern, they would have been entitled, if they chose, to have their contracts rescinded and their names removed from the register.

"It by no means follows that this right remains, now that the company has gone into liquidation. And here it is necessary to attend very closely to certain material dates. The financial year of the company expired on 28th February 1891. On 12th May the directors addressed a circular to all the new shareholders (sending at the same time a copy of it to the old shareholders), in which they acknowledged with great frankness the misleading character of the prospectus, which they ascribed to the suppression of certain facts by the manager, and intimated that they proposed immediately to present a petition to the Court under section 35 of the Companies Act of 1862, setting forth the whole circumstances, and craving the necessary authority to remove the names of the new shareholders from the register, and to repay them the money paid on their shares, together with the premium thereon. On 18th May they issued a notice for an extraordinary general meeting of the company, to be held on 26th May, for the purpose of passing resolutions to confirm a provisional agreement for transference of the business to another company, and for voluntary winding-up. Under section 129 (3) of the Act of 1862 an extraordinary (as distinguished from a special) resolution to wind up must bear that it has been proved to the company's satisfaction that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up the company. The notice in this case did not contain these very words, but it bore that the company had suffered such losses that it was inexpedient to carry on the business, and I take it that these words must, in the circumstances, be read as meaning the same thing. On 20th May the directors presented a petition in terms of the intimation in their circular, to have the register rectified by removal of the names of the new shareholders, and for authority to repay to them, out of the funds of the company, the sums paid by them on their shares, including the premium thereon. This petition was ordered to be intimated to the new shareholders, and no answers were lodged; but before the *induciae* had expired, viz., on 26th May, a petition was presented by some of the old shareholders (in which certain creditors appeared) to have the company wound up by the Court, and as an order for judicial liquidation was on 24th June pronounced on this petition, the 26th of May must be taken as the commencement of the winding-up. On 20th June a number of the present respondents boxed to the Court a minute of co-appearance in the directors' petition of 20th May, but this minute did not appear in the rolls until after the order for liquidation had been pronounced, and accordingly their Lordships of the First Division held that they could not deal

No. 109.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

The respondents reclaimed. In the Inner-House the record was amended, and certain facts which were not known to both parties when the case was in the Outer-House were agreed upon by joint minute.

with it except by sisting process, leaving all questions to be decided in the liquidation proceedings.

"In order to appreciate the importance of these dates, it is necessary to consider the case-law (chiefly English) as to the right of a shareholder to have his name removed from the register on the ground that he has been induced to take his shares by fraud imputable to the company.

"In the first place, it is clear that such a contract is not void but only voidable. In the second place, the general rule is that, after the company has gone into liquidation, the demand of the shareholder comes too late—*Oakes v. Turquand*, L. R., 2 Eng. and Ir. App. 325. But to this there is the exception that if the shareholder, before the commencement of the winding-up, has taken legal proceedings to have his name removed, that will be enough—*Reese River Co. v. Smith*, L. R., 4 Eng. and Ir. App. 64. Mere repudiation, without legal proceedings being taken, will not do—*Hare's case*, L. R., 4 Ch. 503. But the legal proceedings need not be at the instance of the repudiating shareholder himself, provided there be an agreement between him and the company that they shall stand or fall by the result of legal proceedings taken by other shareholders in the same position—*Pawle's case*, L. R., 4 Ch. 497, and *M'Neil's case*, L. R., 10 Eq. 503. The mere fact of legal proceedings being taken by other shareholders will not be enough, unless there is a positive agreement to abide by the result of them—*In re Scottish Petroleum Co.*, 23 Ch. Div. 413. The general rule that, after winding-up has commenced, the demand of the shareholder comes too late, has not been further relaxed, and the relaxations which have been allowed all present the feature of active steps being taken before the liquidation, either by the repudiating shareholder himself, or by someone else representing him by agreement with the company. Nor is the commencement of the winding-up in all cases the earliest point of time at which the right of a shareholder to get rid of his shares is lost. The case of *Tennant v. City of Glasgow Bank*, 6 R. 554, affd. 4 App. Cas. 615, establishes that a declaration of insolvency will have the same effect, for in that case it was held, in the words of Lord Cairns (p. 623 of App. Cas.), that 'it became impossible, after the advertisement of the 5th of October, for the body of shareholders in the company, whose agents the directors were, to make any alteration in their status, whether by a transfer or by a repudiation of shares, which would affect the rights of creditors in the company.' Now, the advertisement of 5th October in that case was a notice convening an extraordinary general meeting for the purpose of winding-up, similar to the notice which was issued in this case on 18th May.

"Such being the law, as established by decisions, the first question is, whether the presentation of the directors' petition for rectification of the register on 20th May (six days before the commencement of the winding-up) was equivalent to a taking of legal proceedings by the respondents themselves. It is plausibly urged that this step on the part of the directors as representing the company was a concession of the respondents' right to have their names removed, and made it unnecessary for them to take proceedings of their own. But I am of opinion that it cannot be regarded as a proper equivalent—(1) Because there was no concurrence on the part of the respondents, and nothing to prevent them from afterwards objecting to the removal of their names from the register; and (2) because it was impossible, after the circular of 18th May, either on the application of the directors or of the respondents themselves, to make any alteration in the status of the body of shareholders. It is said by the respondents (condescendence 12), that the liquidation is not a creditors' but a shareholders' liquidation, and that the uncalled capital on the old shares will be sufficient to meet all the liabilities; but this is denied by the liquidators, who assert (statement 1) that the entire uncalled capital, on both old and new shares, falls short of the claims which have been lodged. I cannot, therefore,

It was admitted, *inter alia*;—(1) “That the prospectus of new shares issued by the company in December 1890 contained material misrepresentations which would entitle the subscribers for said shares, including the respondents, to have their names removed from the register, and the

No. 109.
Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

assume that the interests of creditors would not be prejudiced by the release of the respondents; and even if that were so, the case of *Burgess*, 15 Ch. Div. 507, is an authority for holding that the interests of contributories are to be regarded as well as those of creditors, on the ground that by section 38 of the Act of 1862 the winding-up order imposes new liabilities on members (including past members), and entirely alters the position of parties.

“It was urged by the liquidators that the petition of 20th May was *ultra vires* of the directors, at all events without the consent of the company, as being practically a reduction of capital. I cannot adopt that view, for the directors had power under the articles to compromise any liability in respect of an agreement to take shares, and I think if the company had been a solvent and going concern, it would have been their duty to consent to the names of the respondents being removed from the register on a demand to that effect being made. If so, I cannot see that there would have been in that case anything improper in their proposing to get the authority of the Court themselves. I do not go into the question whether they were actuated by any motive for avoiding personal liability under the Directors’ Liability Act of 1890. For I think that either of the two grounds which I have mentioned above is sufficient to deprive their petition of any efficacy as an equivalent for a legal proceeding taken by the respondents in proper time.

“There remains the question whether the directors’ circular of 12th May, though not of course a legal proceeding, had the effect of operating, by agreement, a rescission of the respondents’ contract to take shares. It certainly was couched in very strong terms, and was well calculated in its own words to set the minds of its recipients ‘at rest in regard to their position as new shareholders,’ so completely as to stay their hands from taking any personal action. It is not said that down to that time any of the respondents, except Mr D. L. Shand, had asked that his name should be removed from the register. Waiving the question whether, in the knowledge which the directors must then have possessed of the company’s insolvency, they had any right to take the initiative in rescinding the respondents’ contracts, I am unable to see that their circular constituted anything like an agreement for rescission. Every one of the persons who received it (with perhaps the exception of Mr Shand) might have refused to allow his name to be taken off; and it is admitted not only that thirty-three of the sixty-five new shareholders have allowed their names to be settled on the list of contributories without objection, but that four of the respondents granted proxies for the meeting of 26th May, and that a fifth attended the meeting, which of course was conduct altogether inconsistent with the idea that they had ceased to be shareholders. I think it is impossible to hold that the mere fact of the respondents not objecting to the course which the directors proposed inferred on their part a consent to the rescission of their contracts; and if the circular had the effect (as very likely it had) of lulling them to sleep, I am afraid they must take the consequences of not themselves adopting those legal proceedings which alone are effectual, where liquidation ensues, to vindicate a shareholder’s right to have his name removed on the ground of fraud.

“With regard to Mr Shand, he had certainly repudiated as early as 24th March, but I am afraid he is open to the objection that he failed timeously to take active steps to have his name removed. For if he knew on 24th March that his contract to take shares was voidable on the ground of fraud, and intended to avoid it, I think he was bound to take immediate steps for that purpose in justice to all concerned.

“In the view which I take there is no distinction between those of the respondents who appeared and those who did not appear in the directors’ petition of 20th May. All of them must, I think, be settled on the list of contributories.”

No. 109.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

money paid in respect of said shares repaid, provided steps for obtaining removal and repayment were timeously taken." It was also admitted that several of the respondents had granted proxies in favour of the directors for the meeting of 26th May.

With regard to one of the respondents, Leonard Henry West, it was admitted that on 14th May 1891 he sent to the managing director of the company the following letter relative to the circular of 12th May:—"I am in receipt of your circular herein, and am surprised to learn the position of affairs. I, however, note that you are going to present a petition for rectification at once, and I therefore rely upon that, and shall be glad to receive repayment in due course." Further, that on receipt of the circular of 18th May West wrote as follows to the managing director:—"I am in receipt of your circular of the 18th, but see no reference to petition for rectification and for repayment of the money to those to whom shares were allotted on recent issue; and as one of such allottees, I must be assured that proceedings are being taken in accordance with your circular of 12th inst. Please let me have an immediate reply." Further, that on 2d June in answer to a notice of call issued by the company on 29th May, he wrote as follows:—"Dear Sir,—I have your notice of call on my return from London to-day, but am surprised that you should send such a circular to any shareholder. What is being done with reference to the petition for rectification? Section 38 was enacted for the express object of meeting such cases of injustice as would be caused by a call upon the allottees of December last, and the petition must be pushed on and repayment made in accordance with your circular of the 12th ult."

The following new plea was stated for West with regard to this correspondence,—“In any view the respondent West is not liable as a contributory in respect that by the company's circular of 12th May, and his letters relative thereto, his agreement to take shares was rescinded prior to the winding-up.”

With regard to the Rev. W. Duke, one of the parties to the petition of Rev. J. A. Smith and others, for rectification of the register, it was admitted that in answer to the circular of 12th May, he wrote on 20th May “ . . . I need not say I shall be glad to have my name removed from the register, and be repaid the money advanced as proposed.”

With regard to certain others of the new shareholders, it appeared from the letters admitted by the parties that none of them had prior to 26th May, the date of the liquidation, written in answer to the circular of 12th May unequivocally expressing agreement to have their name removed from the register.

The liquidators amended their record by adding the following statement:—"The said circular of 12th May 1891 was issued, and said petition of 20th May 1891 was presented, at a time when the company had failed to meet, and was unable to meet, its due debts, and when it was to the knowledge of the directors insolvent. They were issued and presented respectively by the directors, not in the *bona fide* performance of their duty to the company, but in pursuance of a fraudulent scheme which they had devised for avoiding the personal liability which they knew they had incurred to the new shareholders. They were so issued and presented after the directors were aware that liquidation was inevitable, and after they had determined on winding up the company. The result of the removal of the new shareholders from the register, thereby proposed at said dates, would have been to defraud both the remaining shareholders and creditors of the company. The said petition of 20th May was presented without the authority of the respondents and other new shareholders, and was not adopted by them prior to liquidation. The res-

dents and other new shareholders continued to be treated and acted as shareholders of the company after the issue of said circular, and the presentation of said petition at said respective dates.”

They amended their fourth plea above quoted, as follows:—“4. The respondents’ objections should be repelled in respect,—(1) That the petition of 20th May was incompetent, irrelevant, and *ultra vires*, and was truly presented, not in the interests of the company, but fraudulently in the interests of the directors themselves, and after liquidation had been resolved on, and was not authorised by the company; (2) that the company was, as the directors knew, insolvent, and unable to carry on business at and prior to 12th May 1891, and the directors had in consequence before said 12th May resolved that the company must go into liquidation; and (3) that the liquidation order of the Court precludes the Court from now sustaining the respondents’ objections.”

Argued for the respondents (reclaimers);—The respondents could not be held to their contract to take shares. That contract had been abrogated, and the claim to hold them to it yielded up by the other party—the company—while the company was a going concern. The circular of 12th May shewed a going business, a statement not of insolvency but the contrary, and admitted that the names had been entered without sufficient cause. It had been followed by the judicial statement to the same effect on 20th May. The interest of the new shareholders was to assent to the course intimated in the circular. The proper construction of their not rejecting it, or answering the petition of 20th May, was that they were presumed to assent to it. They would not have been heard to say after such silence that they intended to hold on to this company which intimated to them that they were free. It was said that there must be rescission before winding-up. That was quite true. But the fallacy of the liquidators seemed to be that they confounded legal proceedings with rescission. The distinction was that rescission was constituted by a giving up of the contract by that party who had the interest to keep the other bound.¹ Legal proceedings were the usual evidence of that, because the ordinary case was that that party would not let the other go. But rescission itself was neither the seeking the aid of a Court nor the act of a Court, but the act of the contracting parties themselves, and here the act was complete. The company had voluntarily done all that a suit could do. The petition of 20th May was either itself a rescission, or a ministerial act following thereon for the new shareholders’ safety—a judicial statement that the contract was already rescinded. Where a company removed a shareholder’s name for a good reason, even if he did not know of that, and had asked removal on another ground, the rescission was complete.² It was quite true, as the Lord Ordinary (quoting *Hare’s* case) stated, that mere repudiation without anything else was not enough. But the answer was that here there had been the undertaking to remove the name which Hare, the repudiating shareholder, had not been able to get from the company. If when Hare had repudiated the company had agreed to remove his name, surely that would have sufficed. The cases of *Pavle*, *M’Neill*, and the *Scottish Petroleum Company*, quoted by the Lord Ordinary, shewed just what the reclaimers contended, that it was perfectly lawful for a company to agree with a shareholder to remove his name without the necessity for any proceedings at all. Of course the *modus operandi* there was a test case. The contention of the reclaimers here seemed to

No. 109.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

¹ *Smith v. Reese River Co.*, 4 H. L., E. and I. Ap. 64, Lord Hatherley’s opinion.

² *Martin’s case*, 1865, 2 H. & M. 669; *Wright’s case*, 1871, L. R., 7 Ch. 55.

No. 109. have been practically conceded in the argument in that case. The petition for liquidation of the 26th May was just an attempt by the old shareholders whose officers had admittedly deceived the new shareholders, and then confessed the deception and endeavoured to release them, to get behind the rescission of the contract by the device of putting the company into liquidation. Thus they were to get in the liquidation the advantage of a wrong imputable to themselves. The petition of 26th May, though not presented by the respondents, was presented for them by a person (the company) having a title to act for them, and the benefit of it (which they by not opposing it plainly intended to take) ought not to be lost to them.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers,
&c. Co. v.
Griffiths.

II. It was said to be too late to rescind, not only after 26th May, but after 18th May, when the notice to wind up and amalgamate was given, and the case of *Tennant*¹ was quoted in which it was held that a mere public declaration of insolvency was equally with winding-up a point of time after which the contract to take shares could not be rescinded. Thence, it was argued that the directors' petition of 20th May, being after the circular of 18th, was too late as a rescission. The first answer was that the rescission arose from the circular of 12th, not repudiated in course of post (and indeed in the case of West and Duke replied to by letters expressing desire to be taken off the list). But, further, the circular of 18th May was not a declaration of insolvency. It intimated a winding-up but in the words of Lord Hatherley in *Wright's* case, *supra*, it was "a winding-up for the purpose of going on." It was a transference of the business to another company, which formally required a winding-up. The circular stated that the company had "suffered such losses that it was inexpedient to carry on the business," but that must be taken with the rest of the circular, and it would be going far beyond the principle of *Tennant* to adopt the liquidators' argument.

III. In any view West and Duke were free by their closing with the very terms of the circular of 12th May. To a shareholder such as Mr. Shand, who had before the 12th May complained of what had been done and demanded relief (though not in Court), the circular of 12th May came as an answer to his demand and settled his right.

IV. The averments of the liquidators in their amended record were irrelevant. Mere insolvency, known or unknown to the directors, was not enough. Nothing short of a public declaration of insolvency would bring the case up to one in which it was too late to rescind. At 26th May there had certainly not been that, but the contrary.

Argued for the liquidators;—The case of the new shareholders was based upon the circular of 12th May. Passing by for the moment the liquidators' averment that that was issued in pursuance of an attempt on the directors' part to escape liability, what was the effect of that circular? The attempt on the other side was to give it, even where never answered, the force of an agreement to rescind the contract to take shares. It was said it might be presumed to be acceded to by any shareholder, and that if he did not answer it in course of post he must be held to have acceded to it. But could a man by his mere receipt of such a circular, and not answering it be held bound to give up his shares if he chose to hold them? The test of rescission for this case was, could such a shareholder be held to have elected to give up the shares? Expressions in *Smith v. Eddowes* and *River Company* had been appealed to on the subject of rescission. But these, so far as going beyond the actual judgment, were *obiter*, and were

¹ *Tennant v. Liquidators of City of Glasgow Bank*, Jan. 27, 1879, 6 R. & W. aff. May 20, 1879, 6 R. (H. L.) 69.

not consistent with other decisions,¹ and in the case itself Lord Cairns and Lord Westbury did not go so far. The cases of the *Scottish Petroleum Company* and *Hare* were in point, and the respondents' case failed entirely when the test put in *Hare's* case was applied to it. It must be admitted that on this point the cases of West and Duke were more favourable.

No. 109.
Mar. 4, 1892.
Liquidators of
Edinburgh
Employers
&c. Co. v.
Griffiths.

But II. If recourse were had to the petition of 20th May that came too late. The circular of 18th May was a declaration that in consequence of losses the company as such was to come to an end. It mattered not that its business was to be taken up by another company. The release of the new shareholders would violate the canon laid down by the Lord President in *Tennant's* case,² that the option to void the contract is barred where innocent third parties have in reliance on the fraudulent contract acquired rights which would be defeated by its rescission. It was always a question of equity whether a voidable contract should be avoided. But, further, the petition of 20th May was not answered. The respondents did not close with the offer which it made. Apart from that, that petition was incompetent. It was a proposal to write down the capital wholesale. But that was incompetent.³

At advising,—

LORD PRESIDENT.—Since this case came into the Inner-House a minute of admissions has been lodged and the record has been amended. The parties are agreed that the questions raised are thus in a position for final judgment, unless we should be of opinion that certain statements of the liquidators are relevant and ought to be remitted to probation. My opinion is that they are not relevant, and accordingly that we are able now to dispose of the whole case. My reasons for considering the averments to be irrelevant may more conveniently be explained after I have stated my views on the case as it stands.

The Lord Ordinary has collected the facts with clearness and accuracy. On 20th May the Edinburgh Employers Liability and General Assurance Company presented a petition praying the Court that the register be rectified by the removal of the names of certain persons, these persons forming a whole class of shareholders. The usual order was made that the petition should be served on all the persons so named, allowing them to lodge answers within eight days. While this period was current, namely, on 26th May, a petition for judicial liquidation was presented, and on 24th June an order for winding-up was pronounced. The company thus went into liquidation on 26th May.

The reclaimers are certain of the persons whose names were sought to be removed from the register under the petition of the company. Their names being on the register at the date of the liquidation, they *prima facie* must be contributories, but they seek to shew that judicial proceedings having been taken before the liquidation for their removal from the register, they are now entitled to relief. They found themselves upon what is now formally admitted in the first article of the minute of admissions, namely, that material representations had been made in the prospectus of the shares allotted to them, which would entitle them to have their names removed, provided steps for obtaining such removal were timeously taken, and they say that the petition for the removal of their names having, in these circumstances, been presented by the directors after notice had been given to them, in terms of a circular of 12th

¹ Oakes v. Turquand, 1867, L. R., 2 E. and I. 325, Lord Chancellor, at 345-6; *Scottish Petroleum Co.*, *supra*.

² 6 R., at p. 558.

³ Trevor v. Whitworth, 1887, L. R., 12 App. Ca. 409.

No. 109. May, and no dissent having been expressed by them, they are entitled now to claim the relief which they might, before the liquidation, have claimed for themselves, and which the directors had petitioned for before the commencement of the winding-up. It appears to me that the question whether any shareholder can successfully claim the benefit of the company's petition depends upon whether he did or did not, prior to the liquidation, close with the offer of the directors made in the circular of 12th May, that he should cease to be a shareholder. That circular of 12th May was, I think, an open offer to any shareholder, but then it was an offer requiring acceptance.

Mar. 4, 1892.
Liquidators of
Edinburgh
Employers
&c. Co. v.
Griffiths.

The contract under which each of the defrauded shareholders became a shareholder was voidable, but only at the instance and in the option of each shareholder. The mere fact that each shareholder was apprised of his having this option in nowise implied, either in law or in fact, that he would choose to exercise it. All or any of these persons might prefer to keep their shares, and unless and until they intimated their choice, they had the right to remain, and did remain, shareholders. The case of Mr West, who, in my opinion, is entitled to the relief he seeks, very well illustrates, by contrast, the general case of the reclaimers. In answer to the circular he wrote as follows (his Lordship quoted Mr West's letter). Now that letter, following the circular and followed by the petition, entitles Mr West to say that the petition is his petition, for it was presented in pursuance of an agreement between him and the directors that they should petition for the removal of his name. Mr West is thus entitled to plead the law of the *Reese River Company v. Smith*, L. R., 4 E. and I. App. 64; and his case is, I think, *a fortiori* of *Paulle's case*, L. R., 4 Ch. 497, and *M'Nally's case*, L. R., 10 Eq. 503. The case of the Rev. Mr Duke is undistinguishable from Mr West's, and he is, in my opinion, entitled to the same relief. I regret that I am unable to assimilate any other cases to those of these two gentlemen. Those cases were singled out and developed since the case came into the Inner House, and accordingly they are not dealt with by the Lord Ordinary.

What is wanting in the case of all the others is any closing with the proposal of the directors that they should go off the register. It appears to me that one of them deprived himself of the right to hold to his shares, which unquestionably belonged to him, in spite of the directors' petition to remove the names. Apart from some renunciation of this right, any one of them might have lodged answers to the petition and opposed it; and I find it impossible to hold that mere silence or abstaining from announcing resistance to the directors' proposal amounts to such renunciation. The proper criterion is, I think, stated by Lord Justice Selwyn in *Hare's case* (L. R., 4 Ch. at p. 511), in which is directly applicable to the present case:—"There is nothing, in my judgment, to shew that Mr Hare had deprived himself of the power which he possessed of acting for himself, and of exercising his own judgment or option, either to retain the shares or to have his name removed." Mr West and Mr Duke satisfy this test; all the others fail to satisfy it.

This leads me to consider the parts of the liquidators' record which admitted furnish their only answer to the claim of the two gentlemen I have named.

The liquidators contended that, even on the admitted facts, the petition for the removal of the shareholders' names was incompetent and *ultra vires*, inasmuch as it was presented after liquidation had been resolved on. Now, it is scarcely accurate to speak of liquidation as having been resolved on, for at 20th May the company had not resolved upon anything, and the directors

announced, and could only announce, their intention to propose a liquidation at the meeting of shareholders which they were calling. Nor does the circular of 18th May announce or imply either insolvency or inability to carry on business, for it does no more than state that while the paid-up capital amounting to 5s. of the £1 shares had been lost, a good business had been built up, and the directors were negotiating for the amalgamation of the company with another. These are the statements made as to the position of the company, and the provisional agreement for amalgamation which was recommended by the directors in their circular of 18th May is in harmony with these statements.

No. 109.
Mar. 4, 1892.
Liquidators of
Edinburgh
Employers
&c. Co. v.
Griffiths.

In these circumstances, I do not think that the admitted facts support this contention of the liquidators. *De facto* the company at 20th May was a going concern. Neither to the public nor to the shareholders had any announcement been made of insolvency or inability to go on, or of a resolution *cedere foro*.

The liquidators, however, point to certain averments of theirs which are not covered by the minute of admissions. These averments resolve into two propositions,—(1) It is said that, at the date of the circulars and the petition, the company was in the knowledge of the directors insolvent, and that the directors had resolved that the company must go into liquidation. Even if the company was *ex post facto* proved to have been insolvent in the knowledge of the directors, this would not, in my opinion, avail to cut down the validity of the actings of the directors in relation to this petition, these facts being latent. The statement that the directors knew that the company must go into liquidation is a mere amplification of the principal averment, and does not add to its value.

(2) It is averred that the petition to rectify the register was not truly presented in the interests of the company, but fraudulently in the interests of the directors themselves. Taken by itself, this proposition does not vitiate the petition, for the shareholders proposed to be relieved were on the admitted facts entitled to this remedy, if timeously applied for, and a sinister motive on the part of the directors in tendering to them the justice to which they were entitled could not prejudice their right to obtain it. Nor does this averment of fraud impart to the averment of insolvency any additional weight against the objections to its relevancy which I have already considered.

My opinion is therefore that we should adhere to the Lord Ordinary's interlocutor, with this variation, that we remit to his Lordship to direct that the names of Leonard H. West and William Duke be removed from the register of shareholders.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT remitted to the Lord Ordinary to direct that the names of West and Duke should be removed from the list of contributors, and, with this variation, adhered to the Lord Ordinary's interlocutor.

MORTON, SMART, & MACDONALD, W.S.—PRINGLE, DALLAS, & Co., W.S.—Agents.

WILLIAM CAMPBELL, Petitioner (Appellant)—*Salvesen*.
ALEXANDER BILSLAND FALCONER, Petitioner (Respondent)—*Jameson*.

No. 110.

Executor—Appointment—Right of surviving husband.—A surviving husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next of kin.

Mar. 5, 1892.
Campbell v.
Falconer.

Kerr v. Stewart, March 19, 1890, 17 R. 707, followed.

No. 110.

Mar. 5, 1892.
Campbell v.
Falconer.

1ST DIVISION.
Sheriff of
Lanarkshire.

IN January 1892 William Campbell, chemist, Glasgow, presented a petition in the Sheriff Court at Glasgow, praying to be decerned executorial, *qua* husband, to his deceased wife, who had died intestate and without issue on 10th January 1892. Thereafter Alexander Bilsland Falconer, a brother of the deceased, presented a competing petition, praying to be decerned *qua* one of her next of kin.

On 29th January the Sheriff-substitute (Balfour) dismissed the husband's petition, and decerned the brother executor as craved.

The husband appealed, and argued;—The case could not be distinguished from *Stewart v. Kerr*,¹ in which the other Division had decided against the husband. But the soundness of *Stewart v. Kerr* had been much doubted, especially when, as there and here, there was no issue, for then, under the Married Women's Property Act 1881,² the husband's interest in his wife's estate was equal to that of the whole next of kin. The question was one of general importance, and might be sent to the whole Court, or might be reconsidered by the other Division in consultation with their Lordships.

The respondent was not called on.

LORD PRESIDENT.—Mr Salvesen frankly confessed that the decision in the case of *Stewart v. Kerr* was exactly in point, and that case was decided as recently as March 19, 1890. It would only be in the most exceptional circumstances that we should be justified in doing anything else than follow a fully considered decision, as that was. I have heard nothing to shew that there are such exceptional circumstances here, and consequently I think we must follow the case of *Stewart*.

LORD ADAM.—I agree. I see no reason to doubt the case of *Stewart*.

LORD M'LAREN.—I also concur. Even if I thought a decision on a point of practice doubtful in principle, I should, generally speaking, be disposed to follow it, for in such cases the important matter is usually to have a rule of some sort authoritatively settled. But in the present instance I am very far from thinking that the case of *Stewart*, which we have been asked to reconsider, depends on principles which I should regard as questionable. On the contrary, the reasoning of Lord Rutherford Clark, in his opinion, appears to me unanswerable.

LORD KINNEAR.—I am of opinion that the question has been decided by judgment binding upon us, which we must follow.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—JAMES SKINNER, S.S.C.—Agents.

No. 111.

Mar. 8, 1892.
Fraser v.
Cameron.

JAMES FRASER, Complainer (Reclaiming).—*Rhind—Barter.*

REV. DONALD CAMERON, Respondent.—*Johnston.*

Expenses—Dominus litis—Action by daughter with consent of father—Conjunct and several liability.—A girl of nineteen, with consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister of the congregation to which they belonged. The Sheriff assolvied the defender, finding that the statements alleged to have been made by him were true, and had been made by him in the discharge of his duty as minister; and further, found the girl and her father, her curator and administrator-in-law, liable, conjunctly and severally.

¹ *Stewart v. Kerr*, March 19, 1890, 17 R. 707.

² 44 and 45 Vict. cap. 21, sec. 6.

expenses." The Sheriff proceeded upon the ground that the father had not *only* as her curator and administrator-in-law, but personally, taken a prominent and leading part in the litigation. No. 111.

Held that the Sheriff was entitled, in his discretion, to award the expenses against the father. Mar. 8, 1892.
Fraser v.
Cameron.

In January 1892 James Fraser, mason, Rothies, Banffshire, presented a 2^d Division note of suspension to the Court of a charge at the instance of the Rev. Donald Cameron, Free Church minister, Rothies, for payment of sums of £100, 4s. 6d. and £18, 17s. 10d. Lord Low.

The complainer averred that in February 1891 his daughter Annie Fraser, aged nineteen, with his consent and concurrence as her curator and administrator-in-law, had instituted proceedings against the respondent for defamation of character; that on 2d September the Sheriff-substitute (Rampini), after a proof, had found that the respondent had uttered libellous and actionable statements against the complainer's daughter's character, but that the respondent was privileged in uttering them, and assolizied the respondent from the conclusions of the action, and found him entitled to expenses; that on appeal the Sheriff (Ivory) had recalled his Substitute's interlocutor, and found that the statements made by the defender were true, and that he acted throughout in the discharge of his duty as a minister of the congregation and moderator of the kirk-session to which the parties belonged, and assolizied the respondent, and found the complainer's daughter and the complainer, her curator and administrator-in-law, liable, conjunctly and severally, to the respondent in expenses, which amounted to £100;* and that subsequently the Sheriff-substitute had given decree for £18, 17s. 10d., the expenses of the appeal, "against the pursuer and the complainer in the same terms"; that the complainer was charged in his individual capacity to pay these expenses, and that as curator and administrator-in-law for his daughter he had no funds belonging to her in his possession.

The complainer pleaded, *inter alia*;—(1) It was *ultra vires* of the Sheriff to pronounce any decree against the complainer as an individual in respect of his having acted in the cause as curator and administrator-at-law of his said daughter, and the charge, in so far as it seeks to enforce payment of the foresaid decrees against the complainer as an individual, should be suspended. (2) It was incompetent for the Sheriff-substitute to decern against the complainer as curator and administrator-at-law of his said daughter, or as an individual, for the expenses incurred in the appeal against the judgment of the Sheriff-substitute.

The respondent pleaded;—(1) The complainer's averments are irrelevant. (2) The whole proceeding complained of having been competent and regular the note should be refused, with expenses.

On 20th February 1892 the Lord Ordinary (Low), "in respect the complainer does not offer caution," refused the note.

The complainer reclaimed.

During the discussion the respondent intimated that he was willing that caution should be dispensed with in order that the question as to the father's liability for expenses should be decided. The parties thereupon lodged a minute agreeing that the case should be treated as on a passed note.

Argued for the complainer;—It was incompetent for the Sheriff to find him personally liable for the expenses here. He was liable as his daughter's

* In his note the Sheriff stated:—"The pursuer's father, though not a pursuer in this action, has not only as her curator and administrator-in-law, but personally, taken a prominent and leading part in it, and the Sheriff has accordingly found him liable personally in expenses as well as the pursuer."

No. 111.

Mar. 8, 1892.
Fraser v.
Cameron.

curator and administrator-in-law, but no further. He was not the *dominus litis*, for if the Sheriff had awarded damages the whole sum found due would have gone to his ward. Further, a father was not bound to concur with his daughter in an action, and if he declined to do so it was *pars judicis* to consider whether a curator ad litem should be appointed to her. But it was settled that such an officer could not be made liable in expenses individually. [LORD TRAYNER.—That is because he is an officer of Court.] It was equally settled that a judicial factor¹ and a curator bonis² could not be personally liable.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK.—I do not regard this case as one attended with any difficulty.

The female pursuer and her father conducted against the defender, who is the Free Church minister of the parish in which they reside, a litigation in which, upon the face of the case made, it is undoubtedly disclosed that the defender was privileged and in the execution of his duty in making the statements complained of.

The defender successfully defended himself, and now the question is, whether the father can in law be made to pay the expenses of process in which the Sheriff has found him liable.

Now, the father took upon himself the responsibility of the litigation. There was no obligation upon him to do so, or to give his consent to it. Having failed, it appears to me that he is just in the position of a litigant who has raised an action unsuccessfully, and that he is liable to pay the expenses of the action. I am therefore of opinion that the judgment of the Sheriff is right.

LORD YOUNG.—I am of the same opinion. I must say I have felt considerable sympathy with the suspender here, who, as the father of his daughter whose character has been assailed, has desired to try and vindicate her reputation.

I must hold, however, that the result of the action of damages shewed that the minister was acting in the discharge of what he honestly believed to be his duty, and without any malicious feeling towards the girl, and that the judgment of the Sheriff is well founded.

Then the question arises, whether it is within the Sheriff's competency, and that is the only point before us, to find not only the girl but her father liable in expenses to the defender.

I have no doubt that it is quite within his competency, and I may say, though the matter is not before us, that I see no reason to doubt that the Sheriff has exercised a wise discretion in finding both father and daughter liable, and that without trespassing upon the question of the liability of an administrator or curator giving his consent to an action. If he consents merely to make an action formally competent there may be just grounds for not subjecting him to liability for expenses, but here the matter is different.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT interposed authority to the joint minute for the part found and found the charge and whole grounds and warrants ordered proceeded with.

WILLIAM OFFICER, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

¹ Ferguson v. Murray, Dec. 20, 1853, 16 D. 260, 26 Scot. Jur. 116.

² Forbes v. Morrison, June 10, 1845, 7 D. 853, 17 Scot. Jur. 443.

MRS JANE CHISHOLM SCOTT OR HALL AND OTHERS (Hall's Trustees),
 Pursuers and Real Raisers (Reclaimers).—*Asher—Walton.* No. 112.
 ANDREW HALL MACDONALD AND ANOTHER, Claimants (Respondents).—*Mar. 8, 1892.*
D.-F. Balfour—Dickson. Hall's Trustees v. Macdonald.
 MRS JANE CHISHOLM SCOTT OR HALL, Claimant (Reclaimer).—*Asher—Walton.*

JOHN SCOTT AND OTHERS, Claimants (Reclaimers).—*Asher—Walton.*

Marriage-contract—Contractual or testamentary provision to issue of children of marriage.—A conveyance by the husband in an antenuptial marriage-contract in favour of the children of the marriage, and the issue of such children, is purely testamentary and revocable as regards the issue of the children, unless the terms of the contract as a whole shew that it was *pars contractus* between the spouses that the husband should not have power to alter the provision to the issue of the children gratuitously.

Terms of an antenuptial marriage-contract which were *held* not to impose such an obligation on the husband.

Process—Multiplepoinding.—When trustees under a testamentary deed bring an action of multiplepoinding to have a question which has been raised as to its validity determined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration.

MR ANDREW HALL, of Calrossie, Ross-shire, died on 19th February 1891, survived by his wife, Mrs Jane Chisholm Scott or Hall, and by one grandchild, Andrew Hall Macdonald, the son of the only child of the marriage, Mrs Isabella Janet Hall or Macdonald, who predeceased her father. 1ST DIVISION.
Lord Kin-
cairney.

Mr Hall left a trust-disposition and settlement, dated 4th March 1885, and codicil thereto, dated 27th January 1891, under which he conveyed his whole estates, heritable and moveable, to his wife and to John Scott and three other persons, as trustees. By this trust-disposition and settlement his wife was to have the liferent of his whole estate, and on her death a legacy of £5000 was to be paid to his grandson, Andrew Hall Macdonald; legacies of £500 each were to be paid to the trustees other than his wife, and the residue was to be divided among his own and his wife's nephews and nieces, share and share alike.

There was also found in Mr Hall's repositories after his death an antenuptial contract of marriage between him and Miss Scott, dated in 1849, and entered into in anticipation of their then intended marriage. The material terms of this marriage-contract are given below.*

* "It is contracted, agreed, and matrimonially ended between the parties following, viz," the intended spouses, "in manner following,—That is to say, the said parties have accepted of each other and hereby accept of each other for lawful spouses, and promise to solemnise the bond of marriage with all convenient speed agreeably to the rules of the church. In contemplation of which marriage the said Andrew Hall hereby assigns, disposes, and makes over to and in favour of the said Jane Chisholm Scott, his promised spouse, in liferent for her liferent ~~the~~ ^{she} ~~all~~ ^{sole} ~~entirely~~ ^{entirely}, subject to the restriction in the events after mentioned, and to the child or children of the said intended marriage and the issue of the bodies of such children, whom failing, to the said Andrew Hall's own heirs and assignees whomsoever in fee, All and Sundry lands and heritages, goods and gear, debts and sums of money, household furniture of every description, and in general the whole estate and effects, heritable and moveable, at present belonging or which may happen to pertain and belong to him at the time of his death in any manner of way, with the whole writs and evidents of the said estate, grounds, vouchers, and instructions of the said debts themselves, and all that has followed or may be competent to follow thereon: But declaring always that the said Jane Chisholm Scott shall be bound and obliged out of said liferent to maintain, educate, and

No. 112.

Mar. 8, 1892.
Hall's Trus-
tees v. Mac-
donald.

On 11th April 1891 the trustees under the trust-disposition and settlement brought an action of multiplepoinding for distribution of Mr Hall's estates, the main question raised being whether the estate fell to be distributed in terms of the trust-disposition and settlement, or in terms of the antenuptial contract.

The grandson, Andrew Hall Macdonald, and his father as his admini-

support the children of the said intended marriage till they respectively attain the age of majority or be married; declaring, however, that in case the said Jane Chisholm Scott shall enter into a second marriage during the existence of the children of said marriage, or the issue of the bodies of such children, then, and in that event, the said liferent hereby provided to her shall cease and determine: And farther, declaring that in case there be no children procreated of the said intended marriage, or if there shall be no living child or children at the dissolution of the said intended marriage, then the said liferent provision of the estate and effects of the said Andrew Hall in favour of the said Jane Chisholm Scott shall be restricted, and the same is hereby restricted to a free yearly annuity of £150 sterling; and which free yearly annuity of £150 the said Andrew Hall hereby binds and obliges himself and his heirs, executors, and successors whomsoever to pay to the said Jane Chisholm Scott, . . . but with and under this condition and provision always, as it is hereby expressly provided and declared, that in case the said Jane Chisholm Scott shall enter into a second marriage, then, and in that event, the said annuity of £150, hereby provided, shall be, and the same is hereby restricted to the sum of £50 sterling yearly, payable at the terms, and with interest and penalty as aforesaid; and which provisions above written, conceived in favour of the said Jane Chisholm Scott, under the conditions above expressed, she hereby accepts of in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relicte*, or otherwise, could ask, claim, or crave of the said Andrew Hall, or his heirs, executors, and representatives, by and through his death, in case she shall survive him, or that her nearest of kin could ask or demand of him through her death, in case he should happen to survive her: And it is further declared that in case there shall be more than one child of the said intended marriage, it shall be lawful to and in the power of the said Andrew Hall, at any time of his life, and even on deathbed, by any deed or writing under his hand, to divide and proportion, as he shall think proper, among the said children the above-written provisions in their favour, and failing of such division, the said provisions shall belong to, and be divided among, the said children equally, share and share alike, and to the issue of such of them as may predecease before the said provisions become payable; and also it shall be in the power of the said Andrew Hall, by any deed or writing under his hand, to appoint and provide such sum or sums as he may think proper to be advanced and paid out of the said means and estate to any of the said children, at such times and in such manner as he may appoint, in which case the liferent provision in favour of the said Jane Chisholm Scott shall suffer restriction corresponding to the amount of the sums so advanced. For which causes, and on the other part, the said Jane Chisholm Scott hereby assigns, disposes, and makes over to the said Andrew Hall, and his heirs and assignees, All and Sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole estate and effects now belonging or that shall pertain and belong to her during the subsistence of the said marriage, other than the provisions before specified, with all that has followed or that may be competent to follow thereon: And it is hereby agreed on by the said parties, that although the said marriage should happen to be dissolved within year and day after the solemnisation thereof, without a living child having been born of the same, yet this present contract and whole clauses therein contained in favour of either party shall subsist and continue in full force, any law or practice to the contrary notwithstanding: And it is also hereby agreed that all manner of action and execution shall pass upon this contract for implement thereof in favour of the said Jane Chisholm Scott, and the children of the marriage, at the instance of all or any one of the persons after mentioned, viz. . . ."

strator-in-law, claimed to be ranked and preferred to the whole fund *in No. 112. medio*, subject to the annuity or life interest to which the pursuer, Mrs Jane Chisholm Scott or Hall, had right under the said marriage-contract; ^{Mar. 8, 1892.} and pleaded (1) In respect of the terms of said marriage-contract, these ^{Hall's Trustees v. Macdonald.} claimants are entitled to be ranked and preferred in terms of their claim. (2) In respect of the terms of the said marriage-contract, the trust-disposition and codicil were *ultra vires*, and ought not to receive effect, and the claims founded thereon ought to be repelled.

Mrs Hall, the widow, stated (what was not disputed) that the value of Mr Hall's estate at the date of the marriage was about £6000, and that at his death it amounted to £56,000 or thereby, and she claimed to be ranked and preferred to the liferent use of the whole fund, pleading,—On a sound construction of the antenuptial contract and trust-disposition and settlement, and in the circumstances as condescended on, the claimant is entitled to be ranked and preferred in terms of her claim.

The trustees, other than the widow, as individuals, lodged a claim for their legacies under the trust-disposition, but the trustees, as such, lodged no claim to the whole estates to be administered by them in terms of the trust-disposition. As pursuers and real raisers they pleaded;—(1) The pursuers, as trustees foresaid, are liable in only once and single payment of the trust-estate held by them. (2) The pursuers are entitled to hold and administer the trust-estate for behoof of the party or parties who may be found to have just right thereto, or, *alternative*, on payment and conveyance of the estate to such persons and in such proportions as shall be determined herein, they are entitled to decree of exoneration and discharge, as concluded for.

On 19th November 1891 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that on the dissolution of the marriage between the late Andrew Hall and the claimant Mrs Jane Chisholm Scott or Hall by the death of the said Andrew Hall, there was no living child of the marriage; (2) that the claimant Andrew Hall Macdonald is the sole heir of the said marriage; (3) that the whole estate of the said Andrew Hall vested in the said Andrew Hall Macdonald under the antenuptial contract of marriage between the said Andrew Hall and the said Jane Chisholm Scott or Hall, subject to the provision therein in favour of the said Jane Chisholm Scott or Hall; (4) that it was provided by the said marriage-contract that in the event of the dissolution of the marriage without a child of the marriage then living, which event occurred, the provision of the liferent of the estate to the widow should be restricted to an annuity of £150; (5) that the said restriction of the widow's liferent has not been effectually removed by the trust-disposition and settlement of the said Andrew Hall, and that the provision to her of a liferent of said estate is ineffectual, as being in breach of the said marriage-contract; (6) that the legacies to the claimants John Scott and Norman Reid were beyond the power of the testator, and are ineffectual: Therefore repels the claims of the claimants Mrs Jane Chisholm Scott or Hall and of John Scott and Norman Reid, and decerns: Finds that the claimant Andrew Hall Macdonald is entitled to the whole fund *in medio*, subject to the right of the said Mrs Jane Chisholm Scott or Hall to an annuity of £150, and to that effect sustains the claim of the said Andrew Hall Macdonald, and ranks and prefers him on the fund *in medio* accordingly."*

* "OPINION.—(After summarising the provisions of the marriage-contract)—It is thus provided that if there shall be no child alive at the dissolution of the marriage the widow's liferent shall be restricted to an annuity, and the first question is whether that provision applies when at the dissolution of the marriage no child of the marriage survives but a grandchild does, and that depends

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

The widow and the trustees reclaimed, and argued ;—1. The provision by Mr Hall to the issue of the children of the marriage was purely testa-

on whether the word 'child' in this clause can be construed as including a grandchild.

"I was impressed with the argument in favour of that construction, but on full consideration I have come reluctantly to the conclusion that I cannot adopt it. I consider, indeed, that the word 'child' is flexible, and is capable of being read as comprehending a grandchild, but that interpretation cannot be readily adopted. According to its primary and natural signification the word certainly denotes only issue in the first degree, and in order to warrant the inclusion of grandchildren some clear and decided indication to that effect must be found in the rest of the deed.

"The words 'child' or 'children' occur in the deed several times, and in three instances are used in collocation with the issue of the children. In these three instances the meaning of the words is of necessity confined to issue of the first degree, and cannot, by any possibility, include grandchildren. Now, the meaning of the term in these instances being absolutely fixed, it is maintained that it falls to be construed in the same way in other parts of the deed. That is always a strong, and sometimes a conclusive, consideration ; and in the case of *Edwards v. Hughes*, 19th December 1890, 18 R. 319, was regarded as absolutely conclusive. I doubt whether it is absolutely conclusive in this case, for it seems difficult to hold that in at least one passage the word 'children' was not intended to extend to other issue. I allude to the clause of apportionment where the power is to apportion among the children with the declaration that, failing apportionment, the estate should be divided equally among the children and the issue of such of them as might have died. Reference was also made to the clause providing for action and execution on the contract, and it was maintained that it could not be supposed that the granter intended by this clause to protect the rights of his widow and children and not of his grandchildren. This argument, however, appears hardly conclusive, for the granter might have thought it right to leave the interests of grandchildren to be protected by their surviving parent or by trustees under their parents' marriage-contract.

"Further, when it is found that the granter takes pains to mention issue in particular instances, it is reasonable to infer that when he mentions children only he had not their issue in contemplation.

"It is quite true that some anomalous consequences follow from construing the word 'children' in the clause in question as not including grandchildren. For it would appear that under the first part of the deed the widow, if she married while a grandchild lived, would forfeit her whole life-ent, while under the second part so construed she would, if she married while a grandchild lived, have an annuity of £50. That is so, apparently, but then the deed is ill framed and ill conceived throughout. There is a similar difference between the provisions of the first part of the deed and those of the second applicable to the case of the widow marrying when no issue of the marriage survived. In the one case she would retain her whole life-ent, and if the latter part of the deed applied her provision would be restricted to £50. In a deed like this it does not, I think, go for much to point out an anomalous or unreasonable consequence as resulting from what is otherwise the natural construction of the deed. On the whole, I cannot find sufficient grounds for departing from the primary meaning of the words used, and for extending the meaning of the word 'child' in the particular clause in question so as to include a grandchild.

"If, therefore, this question falls to be determined by the marriage-contract, I think it must be held that the event has occurred in which the widow's life-ent was to be restricted to an annuity. I cannot say that I fully appreciate the object of this restriction or its reasonableness. But what I have to consider is not the propriety of the provision but merely the construction of the words.

"I think that the grandchild's provisions are protected by the marriage-contract, and were contractual and not testamentary—*Mackie v. Gloag's Trustees*, 6th March 1884, 11 R. (H. L.) 10—and that he is therefore in a position to

mentary and revocable. The contrary view might be put on one or other of two grounds. It might be said that provision by a father in his marriage-contract to the issue of children of the marriage was presumably obligatory in the same way that provisions to the children themselves were presumably obligatory,—that was to say, that the father could not gratuitously revoke the provision; or it might be said that it was *pars contractus* in the particular case that the father should not be at liberty gratuitously to revoke his provisions to remoter issue of the marriage, just as it might be *pars contractus* that he should not so revoke provisions to strangers.¹ As regarded the first of these grounds, it had never been held that grandchildren were in this matter in the same position as children; the fair result of the authorities was that they were not.² The position of the immediate issue of a marriage was essentially different from that of remoter issue. A father was under a natural obligation to provide for his own immediate issue, and consequently a provision by him to them in his marriage-contract was presumed to be made in fulfilment of this natural obligation and so to be obligatory; but he was under no such natural obligation to his remoter issue, who had their own father to look to, and therefore provisions to them were presumably testamentary only. Then there was nothing in the deed here to lead to the conclusion that the provision to the issue of children was binding on Mr Hall as being *pars contractus*, while the clause giving him power of apportionment, and the clause of execution, neither of which mentioned the issue of children, were inconsistent with such a conclusion. But even if Mr Hall was not entitled at his own hand to revoke the provision to the issue of children, he could do so if Mrs Hall consented, for where the obligatory character of the provision depended on contract merely, and not also on natural obligation, it was within the power of the contracting parties jointly to determine the obligation, and Mrs Hall, although she had not expressed her consent during her husband's lifetime, must be held to have done so by lodging her claim in this action. It might be different where there was a trust which could be said to have divested the spouses for the benefit of third parties, as in *Mackie v. Gloag*.³ Here there was no trust, and no delivery to or for behoof of third parties. 2. In any view, Mrs Hall was not restricted to an annuity of £150, but was entitled to a liferent of the whole of her husband's estates. The sound construction of the clause of restriction was that the existence of grandchildren prevented the restriction from taking effect. If the word "child"

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

plead that he has a *jus crediti* under the marriage-contract to the whole estate, burdened only by the annuity to the widow, and that Mr Hall was at his death under obligation, by the words of the marriage-contract, to provide to him the estate, subject to that burden.

"The next question is whether Mr Hall has, by his trust-deed, effectually removed the restriction on his widow's liferent to the detriment of the rights provided to the heir of the marriage. I have, with hesitation, and difficulty, and reluctance, also come to the conclusion that there is no sufficient authority for sustaining such a departure from the obligations in the marriage-contract."—[His Lordship then proceeded to consider this question, but as the Inner-House held the marriage-contract to be revocable *quoad* grandchildren, it is not necessary to refer further to the question.]

¹ *Kinsman v. Scot*, Dec. 1687, M. 12,980; *Yorkston v. Simpson*, Dec. 20, 1693, M. 12,981; *Clark v. Wright*, 1861, 6 Hurl. and Norm. 849; *Lang v. Brown*, May 24, 1867, 5 Macph. 789, 39 Scot. Jur. 407.

² *Ensk. iii.* 8, 39; *Bankt. i.* 5, 15; *Pretty v. Newbigging*, March 1, 1854, 16 D. 667, 26 Scot. Jur. 338; *Edwards v. Hughes*, Dec. 19, 1890, 18 R. 319, per Lord Kinnear at p. 332.

³ *Mackie v. Gloag's Trustees*, March 6, 1884, 11 R. (H. L.) 10.

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

in the clause were held to be confined to immediate issue only, the result was to produce a contradiction between one part of the deed and another, as, indeed, the Lord Ordinary had pointed out.

Argued for Andrew Hall Macdonald ;—1. The provisions to the issue of children were contractual, not testamentary. There was a strong presumption that a man intended to provide for all his descendants, however remote, failing their own immediate parents ; and the terms of the gift here shewed that the issue of children were intended to come in the room of their predeceasing parents. It was admitted that had the grandchildren been left to come in under the destination to heirs, the provision *quoad* them would have been purely testamentary, but they were called specially, and that not by words of proper substitution, such as "whom failing," but as being in the same class as their parents, and the only object of so calling them which could be suggested was to give them a right different in kind from what they would have taken *qua* heirs, and identical with that of the children. The destination to the issue of the children, therefore, was not a mere substitution, but was part of the contractual provisions of the deed. 2. The widow's liferent was restricted to an annuity of £150, for the word "child" in the restrictive provision was to be read as confined to immediate issue only, which was its natural meaning.¹ The expression was children "procreated" of the marriage, which naturally suggested the actual issue of the marriage ; and then in other clauses issue were called *per expressum*, from which the reasonable inference was that when the parties meant to include remoter issue they said so.

At advising,—

LORD KINNEAR.—The main question which is raised on this record is whether the trust-disposition and settlement of the late Andrew Hall of Crossie, who died on the 19th of February 1891, is valid and effectual to give to his widow the liferent of his heritable and moveable estate, or whether he was precluded by the terms of an antenuptial contract of marriage from giving her more than an annuity of £150. There were no children of the marriage surviving at the date of its dissolution by the death of the husband, and it was maintained by the only grandchild that the marriage-contract has provided for this event by a stipulation binding on the spouses under which he is entitled to the whole estate, subject only to an annuity of £150 in favour of his grandmother.

The contract is in a very common form.—(His Lordship then narrated the substance of the deed.)

The question is, whether the destination in favour of the issue of the children of the marriage creates a right in the grandchildren of the spouses, which the husband could not defeat either by enlarging the annuity to his widow by bequeathing the fee of the estate as he might think fit. The Lord Ordinary has answered this question in the affirmative. He has held "that the grandchildren's provisions are protected by the marriage-contract, and were contractual and not testamentary, and that he is therefore in a position to plead that he has a *jus cretiti* under the marriage-contract to the whole estate, burdened only with the annuity to the widow, and that Mr Hall was at his death under obligation by the words of the marriage-contract, to provide to him the estate, subject to that burden." Now, I do not understand his Lordship to use the term.

¹ Jarman on Wills, 4th ed. ii. 147

crediti in this definition of the grandson's right in its stricter sense as implying a right to compete with other creditors. It is settled law that where marriage-contract provisions in favour of children are so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be taken in his lifetime, there is no *jus crediti* vested in the children, who have nothing more than a *spes successionis*. But then that is a hope of succession which is protected by the father's obligations, which he cannot gratuitously defeat, and which therefore gives the children the right of creditors against him and his heirs, although they are themselves no more than heirs, in a question with his onerous creditors. It is therefore against the father and his legatees that the Lord Ordinary has held that the grandson in this case has exactly the same right, as a creditor under the marriage-contract, as the children of the marriage would have had if they had survived their father.

No. 112.
Mar. 8, 1892.
Hall's Trustees v. Macdonald.

I am unable to agree with his Lordship.

The general rule which is applicable to marriage-contracts is, that when the husband settles his property or any part of it upon his wife and the children of the marriage, with a destination to other persons on the failure of children, there is no *jus crediti* given to anyone as against him and his heirs except to the wife and to the children of the marriage, and any clauses of eventual destination to strangers or to remoter heirs must be regarded as mere gratuitous destinations which create no obligation against the granter or his heirs, and which he may therefore defeat at his pleasure. The law is so laid down by Erskine and Bankton, and it has received effect in a series of decisions to which I think it quite unnecessary to refer in detail, both because they are very familiar and because the principle is stated nowhere more clearly than by Lord Watson in the recent case of *Mackie v. Gloag's Trustees*, 11 R. (H. L.) 10. The House of Lords held in that case that an attempt had been made to bring within the scope of the principle a case which did not fall to be ruled by it, but Lord Watson recognises the principle as being perfectly sound and well established, and quotes with approval the statement of the general rule which is made by Mr Erskine,—“A father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution.” That is the general rule of law as quite clearly established by our institutional writers and by the series of decisions to which I have referred. The learned Lord goes on to explain its origin historically, as arising from the practice of Scottish conveyancers to introduce into dispositions of land made in contemplation of marriage, and afterwards into marriage settlements in the modern form, ulterior destinations which were merely incidental to the true purpose of the deed, and which in no way partook of its onerous character. The ground of distinction between the right of the children on the one hand, and the substitutes who may be called failing children on the other is very obvious, because the provisions in favour of children are onerous in the highest degree, whereas the ulterior destination in favour of strangers or remoter heirs for whom there is no antecedent obligation on the contracting parties to provide by an antenuptial settlement is purely gratuitous, and may therefore be revoked when the husband is set free by the failure of children to dispose of his estate by will. That the issue of the children of the marriage are in this respect in the same position as any other gratuitous substitutes is settled by the judgment in *Pretty v. Newbigging*, 16 D.

No. 112. 667, and by the precedents on which it was decided. Various questions were involved in that case which have no bearing on the present, but the fundamental ground of judgment is to be found in the distinction which was taken by the majority of the Court between the indefeasible right which arises to the children of the marriage from the obligation of their parents, and the mere hope of succession which may be given, failing children, to their issue.

Mar. 8, 1892.
Hall's Trustees v. MacDonald.

It is, no doubt, perfectly competent for the spouses, contracting with each other before marriage, to stipulate for benefits to other persons or classes of persons besides themselves and their children, and if a destination to the heirs or to other relatives of one of the spouses is the counterpart of an obligation in favour of the other, it will be just as onerous and irrevocable as the mutual provisions in favour of the spouses themselves. That is perfectly clear. But I am unable to find any indication of onerosity or mutuality in the deed which is here in question, except in so far as it provides for the wife and the immediate children of the marriage. Even as regards their interests, the settlement by the husband is in form testamentary. He remains the undivested owner of his whole estate during his life, with full and unrestricted power of control and disposal, because the condition that the estate which is to be carried by his conveyance shall belong to him at his death is applicable to *acquisita* as well as to *acquiritur* when as in the present case the former are included in the same general words of conveyance as the latter. This was decided in the case of *Somerville* in May 18. 1819, F. C. That decision was followed in *Fernie v. Colquhoun*, 1854, 17 D. 232, and I apprehend there can be no doubt that that is now the legal construction of such a conveyance. Now, that is just the kind of settlement in which an ultimate destination, which is purely testamentary in substance as well as in form, is most naturally to be expected. And accordingly it is not disputed that there is such a destination in the present contract, because the ultimate donees are the heirs whomsoever of the husband. But then it is said that the grandchildren are not in the same position as the husband's heirs, because they would not have been specially mentioned at all, since they would naturally have been the heirs if there were no children of the marriage surviving, unless the intention of the contracting parties had been to raise them to the same level as the immediate children of the marriage, and to give them the same rights. I think the observation upon which that argument is founded is not altogether accurate, because the grandchildren—if there had been more than one—taking as heirs by operation of law, would not have taken the whole mixed estate equally among themselves as directed by this settlement, but would have taken their several interests in the heritable and moveable estate as heirs and next of kin respectively. But the question is not whether the settlor intended at the date of this contract to give the same benefit in the contingency for which he was providing to his grandchildren as he had given to his children if they should survive him, but whether the intention so expressed rests upon contract and is embodied in words of obligation, or whether it is a mere expression of goodwill, and is therefore testamentary and revocable. Now, that is a question of intention which is to be gathered from the words of gift alone, because as I have said these are in form testamentary words. The form of the settlement is that of a *mortis causa* settlement, and therefore in order to determine whether any particular gift is onerous or not, we must look elsewhere than to the mere words of gift. We must consider whether there is any antecedent obligation irrespective of particular stipulations in the contract itself, or if not, whether there is an

express or implied stipulation which makes the provision binding upon the husband. No. 112.

Now, as to the first point there is, as I have said, no antecedent obligation to provide for grandchildren so as to create any presumption of onerosity from the mere character of the legatees, or from their relation to the settlor. And therefore we must look to the remaining clauses of the deed in order to see whether we can discover any stipulation made by the wife that the husband shall leave all his estate to their grandchildren in the event which has happened. The only provision in the contract which seems to suggest any argument to that effect is the clause by which the wife gives everything belonging to her to her husband and his heirs. But the ultimate destination of the husband's property also is to his own heirs, and not to the heirs of his wife. And therefore, while the settlement by the wife is certainly made in consideration of the provisions by the husband for her and her children, there would seem to be very slender ground for holding that the substitution, on the failure of children, was also a material consideration for the wife's settlement.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

But there are other clauses which have a very important bearing on the question; and it appears to me that the clause immediately following the destination by the husband is altogether inconsistent with the notion that the substitution of grandchildren is matter of stipulation, and is quite consistent with the notion that the husband intended a testamentary benefit for his grandchildren and nothing more. I agree with the Lord Ordinary in the construction which he puts upon the words of this clause, in so far as regards the condition upon which it is stipulated that the wife's liferent interest shall be restricted to an annuity of £150. The condition is that in case there be no children procreated of the marriage, or if there shall be no living child or children at the dissolution of the marriage, then the liferent provision to the wife shall be restricted as I have said. I quite agree with the Lord Ordinary that children in that clause cannot mean grandchildren, and therefore that the restriction is to take effect if there be no children alive at the husband's death, even although there be grandchildren alive. But, then, what is the inference from that construction of the clause? It appears to me to be perfectly clear that that is a stipulation in favour of the husband, and not against him. The husband undertakes to give his wife a liferent of his whole estate if there are children alive, to whom the whole estate is to go in fee. But then he stipulates that if there are no children, and therefore no absolute disposal of the fee of the estate, her interest is to be restricted to an annuity of £150 a-year. That is to say, he does not bind himself to give her more, but he certainly does not bind himself not to give her more if he thinks fit. It is a stipulation in his favour. The suggestion that it is a stipulation by the wife as against the husband, that if there be no children but only grandchildren alive at his death, he shall not be allowed to give her more than £150 a-year, however large his estate may be, appears to me to be very hard to maintain. And therefore I am unable to find in that clause any indication of mutuality or onerosity which should prevent the husband from disposing of his whole estate as he may think fit; and I find the strongest possible evidence that there was no such mutuality. The inference which I draw from the construction of that clause is very strongly confirmed by two subsequent clauses of the deed. In the first place, the husband reserves to himself a power of apportionment and division among the children of the marriage, and no such power of apportionment or division

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

among grandchildren. Now, if he had been bound by obligation to give the same interest to his grandchildren as to his children, one does not see why he should not have made the same reservation of a power of apportionment in the one case as in the other, whereas if his gift to his grandchildren was testamentary, and the gift to the children alone obligatory, one can quite understand the reason why he should think it necessary to reserve a power in the one case which reserved itself in the other. But the following clause appears to me to be still more conclusive in favour of the view which I am disposed to take, because I think the contract itself very clearly distinguishes between those provisions which according to the intention of the contract were to be obligatory and those provisions which according to its intention were to be testamentary only. For the final clause is that execution shall pass upon the contract for implement thereof in favour of the wife and of the children of the marriage, at the instance of certain trustees who are named. Now, I agree again with the Lord Ordinary that when the words "children of the marriage" are to be found alone in any clause of this deed they mean what they say; they mean children, and they do not mean grandchildren. And therefore the parties stipulate that the provisions in favour of children and of the wife are to be enforceable at the instance of trustees for their behoof; and they make no provision for the enforcement of ulterior destinations either in favour of grandchildren or in favour of heirs. That appears to me to afford a very clear indication of an intention on the part of the parties to this contract to distinguish between those provisions which were intended to be testamentary and revocable because they were in their own nature gratuitous, and those provisions which were intended to be obligatory and enforceable by action at law. If that view be taken of the deed, it appears to me that all its provisions are perfectly consistent, and stand together in a perfectly logical and intelligible way. On the other view maintained by the respondent, I think we are involved—as indeed the Lord Ordinary finds himself involved—in serious difficulties of construction. The conclusion therefore at which I arrive upon this main question of construction is, that the deed is onerous in so far as regards the interests of the spouses and of the children of the marriage, and purely testamentary in so far as regards ulterior interests beyond theirs, including among those ulterior interests the destination in favour of grandchildren as well as the destination in favour of the husband's heirs.

But if one could find in the deed a stipulation by the wife that in a certain event the husband's property should be given to their grandchildren, although that would undoubtedly be onerous, and therefore binding as between the contracting parties, I am not persuaded that it would be binding upon both of them, so as to make it impossible for both to recall it, because it must be kept in view in considering the legal effect of this deed that while it is irrevocable and requires no delivery as a contract between the parties themselves, it is not delivered to anybody on behalf of any third persons to whom interests under it may have been given. It remained latent, and under the control of the spouses or of the husband. Now, if married persons agree together that they will leave property, or that one of them will leave his property to relations or strangers in whom they may happen to be interested, but towards whom they have no antecedent obligation whatever, and if having so agreed, their contract is retained in their own power and under their own control one does not see why they should not be allowed to alter and revoke it at pleasure so long as it

is not delivered. Now, we are exactly in the same position in considering the effect of the husband's deed as if the wife had formally and expressly agreed to it, because she claims to take benefit under her husband's will, which is said to be inconsistent with their marriage settlement. And therefore we have both spouses concurring in discharging the formal obligation, if any such obligation were to be found in the marriage-contract, to give the property to the grandchildren in the case that has occurred.

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

The only case which was cited and commented upon in support of the Lord Ordinary's interlocutor to which I think it necessary to refer is the case of *Mackie v. Gloag's Trustees*, and it appears to me to be no precedent for the decision of the present case. I think it a very valuable authority, because the principle upon which this case ought, in my opinion, to be decided was there clearly recognised, and is illustrated by contrast. But the decision itself is in no way in point. The marriage-contract in that case did not convey the estate which should belong to the granter, Mrs Gloag, at her death, nor was its effect suspended till that event should occur. On the contrary, it was a *de presenti* conveyance of certain specified estate in favour of the existing children of the granter and of the children to be born of the marriage. The granter was entirely divested of that estate by the delivery of the trust-deed to trustees for behoof of beneficiaries therein named, and so soon as it was ascertained that the granter was so divested, the only question for consideration was a question of construction as to whether the purposes for which the trustees were to hold and to include the original owner included a benefit to the existing children of the granter of the deed, or whether they were confined to the benefit of the future children of the marriage only. Upon that question of construction it was held in the House of Lords that the children of both marriages stood exactly in the same position, but the ground of judgment of the House of Lords and the ground on which Lord Rutherford Clark dissented in this Court was, that this, being an immediate *de presenti* conveyance divesting the granter, could not be brought within the scope of the principle which was recognised by all the Judges as the proper principle for the construction of marriage-contracts containing provisions for children and ulterior destinations. In the present case it appears to me that the question we have to determine is, whether the provisions in favour of the grandchildren are testamentary or contractual and obligatory? There is no question of construction as to the meaning of the destination. The interest which is given to each series of heirs in succession is identical. The only question is, whether the gift beyond the children of the marriage stands on obligation or whether it is testamentary? and for the reasons I have stated I am of opinion that it is testamentary only.

The result must be, in my opinion, that the Lord Ordinary's interlocutor must be recalled, that the claim of the widow must be sustained, and that the claim of the grandchild must be repelled.

If I am right in the views I have expressed, it follows that the claim for the trustees is well founded in substance, but I am not satisfied that we can sustain it as it stands. The trustees are entitled under the trust-disposition to a legacy of £500 each in favour of the acceptor or acceptors and survivor or survivors of them for their trouble in connection with the trust. Now, it appears to me that the proper position for these trustees to take in this competition was to claim the fund *in medio* to be administered in terms of their trust, and if that claim had been sustained, then it would follow as a consequence that if the

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

legacy to them is a good legacy they would pay it to themselves and get the benefit of it. But they make no claim to administer the trust. They put in a separate substantive claim for a legacy as if it were a mere bequest in their favour, irrespective of their acceptance of the trust, and they ask to be preferred in the fund *in medio* to the extent of £500 each without saying anything as to what is to become of the rest of the fund. It does not appear to me that we can sustain that claim as it stands, but, if your Lordships agree with me, there can be no great difficulty in the trustees amending their claim.

LORD ADAM.—It appears from the marriage-contract here that in contemplation of his marriage Mr Hall disposed in favour of his promised spouse, in life-rent for her life-rent use alienably, subject to certain restrictions named in the contract, and to the child or children of the intended marriage and the issue of the bodies of such children, whom failing, to his own heirs and assignees whomsoever, all and sundry his estate, heritable and moveable, as at the time of his death. The question is, whether that destination to the issue of the bodies of such children gave the issue a *jus crediti* under the marriage-contract, or whether that was a testamentary provision only. As regards the children of the marriage, it is of course settled law that the provisions in their favour in a marriage-contract are contractual in the highest degree, and that the contracting parties, the husband and wife, cannot defeat the rights secured to the children by the marriage-contract. There is no doubt about the law on that subject. What the reason of the law may be is of very little consequence, although it probably originated in the claims which *ex jure naturali* children have against their parents. But the children of such children are in an entirely different position. They have no claim which the law recognises in the same sense as children. They have their own father and mother, and their own father and mother's marriage-contract with reference to any claims they may have, and so far as I recollect there is no case establishing that under such a destination as this grandchildren have a *jus crediti*. No such case was quoted to us, and the only case which the Lord Ordinary refers to is the case of *Mackie v. Glog*. I agree with Lord Kinnear in thinking that that case is not an authority for any such proposition. I am far from saying that a provision in a marriage-contract calling persons after the children of the marriage may not be contractual, but the question would depend on the construction of the whole settlement. If it appears, construing the whole settlement, that it was the intention of the contracting parties that a benefit should be secured to such persons, that will be given effect to. But it must arise upon a consideration of the whole clauses of the contract. The old case of *Kinsman v. Scot*, in the Dictionary, 12,980, was an example of that. There the destination of the husband's property after the children of the marriage was to the heirs of the wife, and the Court, considering the whole contract, came to the conclusion that the provision was contractual and not testamentary, and accordingly they preferred the heirs of the wife. In the case of *Mackie*, again, it was held, upon a construction of the whole contract, that the provision in favour of the children already procreated of a previous marriage was meant to be contractual, and numerous cases of the kind might be instanced where the decision proceeded upon a construction of the whole contract. But there is nothing in this contract that I can find to suggest that it was the intention of the contracting parties here to give to the grandchildren a contractual right. There are clauses in the contract which I think

point exactly the other way, and particularly those to which Lord Kinnear No. 112. referred.

If that be so, and if the destination in this contract to children is a pure destination to children and nothing else, then the result is, that the objects of the trust having failed, the estate of the husband returns to him unaffected by anything unless in so far as he is restricted from dealing with it by the terms of the contract of marriage itself. If that destination is purely testamentary, the result must be that the husband acquires uncontrolled right to the estate except so far as he has restricted himself by the marriage-contract, for there is no other deed existing that I know of which restricts his power to any extent or effect. Now, by the clause in question he did restrict himself, because he left a liferent of his whole estate to his widow to be restricted in certain events, and in the event of no living child of the marriage being in existence at the dissolution of the marriage the widow was only to receive £150 a-year. If that event had not occurred, it is clear that as between the husband and wife he could not have defeated the right given to the wife. But that event has occurred, and the widow's right is now restricted to £150 a-year. But I do not see why the husband should not dispense with that restriction, for that is really all he has done in this case. He has simply dispensed with the restriction imposed in his own favour, and being unlimited proprietor of the estate, I cannot see why he might not do so. It was entirely a matter between him and his widow, no third parties being concerned in the matter. The grandchild has no *jus crediti* under the marriage-contract, and I cannot see what title he has to interfere. If he has no such *jus crediti*, what right has he to say to his grandfather and grandmother together, or to the grandfather alone, that he shall not dispose of his own estate without consulting him? Now, I think that is the whole case, and holding the proper construction of the marriage-contract to be as I have stated, I think the husband was quite entitled to dispense with the restriction of the annuity to £150, and that he had the right to dispose of his own estate. I therefore concur with Lord Kinnear.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

LORD McLAREN.—I concur in the opinion of Lord Kinnear. I would just say in a sentence that it appears to me that the cases in which a grantee under a marriage settlement can claim an indefeasible right may be referred to the three categories which Lord Kinnear has fully examined in his opinion. The indefeasible right must arise from the relation in which the grantee stands towards the parties to the contract, or it must arise from express obligation, or again from the circumstance that one of the parties at the time of the execution of the contract, or at some time during their joint lives, has put property into the hands of third parties, trustees for the benefit of the claimant amongst others. Now, the present case appears to me not to fall under any of those heads. A provision to grandchildren is not presumed to be obligatory in respect of relationship because the parents are not at least in the first instance bound to provide for their grandchildren. The primary duty of providing for them lies upon their own parents. Then I find in the clauses which have been examined by your Lordships no evidence of any obligation, and there is not even that inferential obligation which is sometimes held to exist where one spouse promises to do something for the heir or relative of the other spouse. Then again the case is distinguished from *Mackie v. Gloag's Trustees* by the absence of any deed of present gift delivered by the parties. The case there-

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

fore appears to me to fail entirely, and the result is that the spouses, subject to the right given to one another and to the immediate issue of the marriage, were in my opinion entirely unfettered in the disposal of their respective estates.

LORD PRESIDENT.—I concur. We shall allow the claim of the trustees to be amended to the effect of claiming the whole estate to be administered according to the trust, and then we shall rank them in terms thereof.

An amendment of the claim for John Scott and others, to the effect of making it a claim for them and Mrs Hall to be ranked and preferred to the fund that they might administer it as trustees, was then put in.

THE COURT pronounced the following interlocutor :—"Recall the said interlocutor: Repel the claim for Andrew Hall Macdonald and the Rev. Colin Macdonald, his administrator: Sustain the claim for the said Mrs Jane Chisholm Scott or Hall, and rank and prefer her on the fund *in medio* in terms thereof: Allow the condescendence and claim for John Scott, Hugh Ross, and Norman Reid to be amended at the bar, and sustain the said claim as amended, and rank and prefer the said claimants on the fund *in medio* in terms thereof, and decern."

THOMAS WHITE, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 113.

Mar. 8, 1892.
Crabb v. Fraser.

MRS MARY CRABB, Pursuer (Appellant).—*Guy*.

GEORGE FRASER, Defender (Respondent).—*Kennedy*.

Process—Appeal—Proof or jury trial—Judicature Act, 1825 (6 Geo. IV cap. 120), sec. 40.—In an action of damages for assault which had been appealed for jury trial under the 40th section of the Judicature Act, the defender moved the Court to send the case back to the Sheriff Court, on the ground that it was of such a trifling character as not to be suitable for jury trial. The Court, on the ground that if the cause had originated in the Court of Session it would have been sent to a jury, *refused* the defender's motion, and approved of issues.

1ST DIVISION.
Sheriff of Forfarshire.

MRS CRABB, Lilybank Road, Dundee, as curator and administrator-in-law of her pupil son, William Crabb, raised an action in the Sheriff Court at Dundee against George Fraser, fruiterer, Craigiebank, Dundee, for payment of £150 as damages for an assault alleged to have been committed by the defender on her son.

The pursuer averred that her son having taken a turnip from a field on the defender's farm, the defender had set his dog upon him; that the dog had bitten him; that defender had struck him, and had threatened him with liquid manure.

The defender denied the more material of these averments, and stated that the whole affair was of the most trifling description, intended merely to frighten the lad from trespassing on the defender's farm.

The Sheriff-substitute (Campbell Smith) allowed a proof.

The pursuer appealed for jury trial, and having lodged issues, moved the Court to approve thereof.

The defender opposed and moved the Court to send the case back to the Sheriff, arguing that the Court had a discretion, in appeals under the 40th section of the Judicature Act, either to send the case to a jury or to remit it to the Sheriff. Here the case was of the most trivial character which it would be absurd to send to a jury. The appropriated causes were not necessarily sent to a jury.¹

Argued for the pursuer;—The present case was in the class of cases appropriated for jury trial, which if the case had originated in the Court

¹ White v. Dixon, July 9, 1875, 2 R. 904.

of Session would have been sent to a jury as of course, unless the parties consented to a proof. The circumstance that the case had come up under the 40th section of the Judicature Act made no difference, for it was now settled that such cases were to be treated in all respects as if they had originated in the Court of Session.¹

No. 113.

Mar. 8, 1892.

Crabb v.

Fraser.

At advising,—

LORD PRESIDENT.—*Prima facie*, the proposal of the defender and respondent, that this action should be tried in the Sheriff Court, cannot be said to be unfit or unreasonable. But we must determine upon it with a due regard to the 40th section of the Judicature Act, and so as to give fair play to the system thereby established. This action is now in the Court of Session, and the pursuer, who has taken the appeal for the purpose of jury trial, claims to have her case so disposed of. Now, while the power of the Court to send back for trial in the Sheriff Court cases appealed under this section cannot be disputed, this power has been exercised in view of the category to which the case under consideration belonged. This is an action of damages for assault, and, if it had originated in the Court of Session, it would for that reason unquestionably have gone to a jury. As it is now here, under this statutory power of appeal, I think we must proceed upon this same criterion of what is to be the mode of trial. We could only adopt the opposite course if we were to form some conjecture as to the substantiality of the pursuer's case in each action of damages for assault, and send back for trial before the Sheriff those cases which *prima facie* did not look well.

There is an obvious inconvenience in such a selection having to be made by the Court which might ultimately have to review the merits of the remitted cases; and it appears to me that the sound rule, and that most conformable to the statute as well as to the decisions, is to send for jury trial those cases which by the legal quality of their ground of action would be designated for jury trial if they had originated in the Court of Session. In all cases, of course, the rule is subject to the statutory condition if special cause be not shewn. But the class of assault is one in which this qualification requires to be stated rather as matter of theory than as of appreciable practical importance.

The pursuer and appellant having moved us to approve the issues proposed by her, I think our proper course is, on her motion, to do so.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved of the issues proposed by the pursuer, and remitted the case to a Lord Ordinary for trial by jury.

WISHART & MACNAUGHTON, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

JAMES ALEXANDER MOLLESON, Pursuer (Reclaimer).—*Asher—Ure*. No. 114.
ROBERT HUTCHISON, Defender (Respondent).—*D.-F. Balfour—Dundas*.

Mar. 9, 1892.

Molleson v.;

Hutchison.

Cautioner.—*Septennial limitation of cautionary obligations—Act 1695, c. 5.*
—A bond for borrowed money dated in November 1881 contained an obligation by the borrower to repay the principal sum at Whitsunday 1882, and an obligation by the borrower, and by certain persons as cautioners, to pay at said term the interest then due and interest half-yearly thereafter during the non-payment of the principal sum. Interest was duly paid on the bond until March 1890.

¹ *Cochrane v. Ewing*, July 20, 1883, 10 R. 1279; *M'Avoy v. Young's Paraffin Co.*, Nov. 5, 1881, 9 R. 100; *Trotter v. Happer*, Nov. 24, 1888, 16 R. 141; *Hume v. Young, Trotter, & Co.*, Jan. 19, 1875, 2 R. 338.

No. 114.

Mar. 9, 1892.
Molleson v.
Hutchison.

In an action against one of the cautioners for payment of his share of the interest from Martinmas 1890 the defender pleaded that the cautionary obligation had been extinguished by the Act 1695, c. 5.

Held by a majority of seven Judges (the Lord President, Lord Young, Lord Rutherford Clark, and Lord M'Laren) (*rev. judgment of Lord Stormonth Darling*) that as the interest sued for was not due till after the lapse of seven years from the date of the bond, the cautionary obligation to pay that interest was not affected by the Act.

Diss. the Lord Justice-Clerk, Lord Adam, and Lord Trayner, who were of opinion that as payment of the principal sum and interest might have been enforced at any time within seven years from the date of the bond, after which no interest would have been due, the cautionary obligation was extinguished by the lapse of that time.

2D DIVISION,
with three
consulted
Judges.
Ld. Stormonth
Darling.

IN November 1881 the Craiglockhart Hydropathic Company, Limited, granted a bond and disposition in security to Ralph E. Scott and others, trustees of the English and Scottish Law Life Assurance Association, for a loan of £25,000, which the company bound itself to repay at Whitsunday 1882. The bond contained the following obligation as to interest:—"We, the said" company, "and we Robert Hutchison, Esquire of Canlowrie . . ." (and six other persons) "hereby bind ourselves, jointly and severally, and our respective heirs, executors, and representative whomsoever, as cautioners and sureties for and with the said Craiglockhart Hydropathic Company, Limited, to pay to the said Ralph Erskine Scott, &c., as trustees foresaid, and their foresaids, the interest of the said principal sum, at the rate of 5 per centum per annum, from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not payment of the principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the said term of Whitsunday next to come for the interest due preceding that date, and the next term's payment thereof at Martinmas following and so forth half-yearly, termly, and proportionally thereafter during the not payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof."

In May 1884 the bond was assigned to James Alexander Molleson, C.

In July 1884 the Court pronounced an order for winding up the company.

The subjects conveyed in security were sold for £13,800, on 12th March 1890, by Mr Molleson. After deducting that price from £25,000, there remained a balance of principal of £11,200.

On 16th December 1890 Molleson raised against Robert Hutchison an action, concluding for £1600, with interest at 5 per cent from Whitsunday 1890, or otherwise,—“(First) The defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £40, with interest on said sum of £40 at the rate of 5 per centum per annum from the date of citation to follow hereon until payment; and (second) the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer, and his executors and assignees, (1) of the interest of the said principal sum of £1600, at the rate of £5 per centum per annum, from and after the term of Martinmas 1890, and in all time coming, and that half-yearly, termly, and proportionally during the not payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest, *viz.* the sum of £40, at the term of Whitsunday 1891, for the interest due preceding that date, and the next term's payment thereof, being the 12

sum of £40, at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the not payment of the said principal sum; the same terms of payment respectively being always first come and bygone, with the interest of each of the said sums at the rate of 5 per centum per annum from the time when the same falls due until payment; or otherwise (2) of the sum of £40 at each term of Whitsunday and Martinmas in all time coming, beginning the first payment at Whitsunday 1891, with interest on each term's payment at 5 per centum per annum from each term when the same becomes due till paid."

No. 114.

Mar. 9, 1892.
Molleson v.
Hutchison.

The pursuer stated that "the rateable proportion" of the sum of £11,200 remaining due to him, "for which the defender is liable under the obligation in the said bond to the pursuer as now in right of the said bond, is one-seventh, viz., £1600, with interest thereon at 5 per cent from the term of Whitsunday 1890 till payment, or failing such liability he is liable under the said obligation for interest since said term in perpetuity on the said amount. As the defender has failed to pay the said £1600, and arrears of interest due, the present action has been rendered necessary."

The pursuer pleaded;—(1) The pursuer is entitled to decree against the defender, in respect of the obligation undertaken by the latter in the said bond and disposition in security, for the proportion due by him and still remaining unpaid of the balance of the principal sum therein contained, with interest thereon as concluded for, with expenses. (2) Or otherwise, the pursuer is entitled to decree in terms of the alternative conclusions of the summons, with expenses.

The defender pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (2) The obligation of the defender under the said bond and disposition in security having been extinguished by the operation of the Statute 1695, cap. 5,* the defender should be assoilzied.

The pursuer did not insist on his conclusion for payment of the principal.

The Lord Ordinary (Stormonth Darling), on 2d June 1891, sustained the defender's second plea in law, and assoilzied him.†

* The Act 1695, c. 5, enacts that "considering the great hurt and prejudice that hath befallen many persons and families, and oftentimes to their utter ruine and undoing, by men's facility to engage as cautioners for others, who afterwards failing have left a growing burden on their cautioners without relief, therefore and for remeied thereof . . . no man binding and ingaging for hereafter for and with another, conjunctly and severally, in any bond or contract for sums of money shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be eo ipso free of his caution; and that whoever is bound for another, either as express cautioner or as principal or as co-principal, shall be understood to be a cautioner, to have the benefite of this Act; provided that he have either clause of relief in the bond, or a bond of relief apart, intimat personally to the creditor at his receiving of the bond, without prejudice always to the true principals being bound in the whole contents of the bond or contract; also of the said cautioners being still bound, conform to the terms of the bond, within the said seven years as before the passing of this Act, . . ."—(Here followed a clause saving diligence done within the seven years.)

† "OPINION.—This case raises an important question on the septennial prescription of cautionary obligations. . . .

"It is plain that the defender cannot be liable for the principal, or any part of it, except as an indirect consequence of his liability for the interest. If he is liable for the interest in perpetuity, he might desire to pay up the principal in order to escape from an interminable burden, but he cannot be compelled to do so. The important question is whether the statute applies to the obligation

No. 114.

The pursuer reclaimed.

Mar. 9, 1892.
Molleson v.
Hutchison.

In the course of the debate the pursuer proposed to add this plea;—

for interest. I am of opinion that it does, and that the defender is entitled to absolvitor.

"The statute, after narrating 'the great hurt and prejudice that hath befallen many persons and families, and oftentimes to their utter ruine and undoing, by men's facility to engage as cautioners for others,' ordains, in words which Lord Brougham described as more strong than he remembered to have seen in any statute, Scotch or English, with respect to anything in the nature of limitation or prescription (*Scott v. Yuille*, 5 W. & S. 436), 'that no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution.'

"Then follow some words defining more precisely the cautioners who are to have the benefit of the Act, including anyone who is bound for another 'as express cautioner.'

"Now, the defender here is an express cautioner, described as such in a bond for borrowed money, and therefore I think there can be no doubt that, if he had been bound for the principal, the Act would have entirely extinguished his obligation at the end of seven years from the date of the bond, that is to say, on 16th November 1888. For the Act is so peremptory in its terms that the practical effect of it is simply to write into every bond or contract to which it applies a declaration that the obligation of the cautioner shall endure for seven years from its date, and no longer.

"Can the case of the cautioner be worse when he undertakes liability, not for the principal, but for something which is accessory to the principal, viz, the interest? It would be a strange result if this were so, and certainly there is nothing on the face of the Act to lead to it, for it speaks of 'sums of money,' without distinction. It is a drastic Act in any view, but there is nothing more drastic in saying 'a man shall not be liable for interest for more than seven years,' than in saying the same of a capital sum.

"But the pursuer appeals to three cases which establish, in his view, the proposition that the Act has no application to any sum the term of payment of which is beyond the seven years. These cases are *Balraird* (1709), M. 11,100; *Borthwick* (1715), M. 11,008, and *Miller* (1762), M. 11,027. *Balraird* was the case of a cautioner for payment of a widow's jointure, and it was held that the Act did not apply, on the ground that no diligence could be used so long as the annuity was punctually paid, which was done during all the seven years; but the Court expressly distinguished this from a bond for borrowed money under which the creditor might call up his money within the *septennium*. *Borthwick* was the case of a bond payable after the death of the creditor's wife, who survived the seven years; and *Miller* was the case of a bond in which the principal was not to be paid till a fixed term—eight years after the date of the bond. In both the ground of judgment was that no sums fell due for which diligence could have been used within the seven years. In all three it may be that some violence was done to the express words of the statute. But at all events there was this justification for all of them, that the creditor was helpless as regards either calling up the money or doing diligence, whereas in the present case he had his remedy in his own hands, and it was only by his neglect in allowing the principal to lie that any sum of interest was due after the seven years had expired. I cannot therefore recognise in these cases any justification for refusing to give effect to the express words of the statute.

"If the pursuer's argument is sound, it follows that the Act can never be of any use to a cautioner for interest alone. There is certainly no good reason why the same should not apply to a man who is cautioner both for interest and principal. Yet the cases shew that where a charge was given within the seven years, and action was not raised till long afterwards, the cautioner was liable, not for interest during the whole period of the not payment, but

The defender's obligation under the said bond has not been extinguished by the operation of the Statute 1695, c. 5, in respect the sums sued for were not due or payable till after the lapse of seven years from the date of the bond.

No. 114.

Mar. 9, 1892.
Molleson v.
Hutchison.

The Second Division, after hearing argument, appointed the cause to be heard before seven Judges.

Argued for the pursuer;—The specialty of the case was that the defender was bound for the interest only and not the principal. The interest sued for all became due after seven years from the date of the bond. The question was whether that interest fell within the septennial limitation (which, it must be observed, was not a mere limitation of action, but affected the constitution of the contract itself).¹ It did not, for this reason, that the creditor could not sue for it till the seven years had expired. The Act implied that the creditor could recover in the seven years if he used due diligence. It did not therefore apply to a case where he could not sue during the seven years. The cases of *Balvaird*, *Borthwick*, and *Miller*, cited by the Lord Ordinary, shewed that. Upon them Erskine² founded his statement,—“Neither do obligations fall under this Act where the condition is not purified, nor the term of payment come within the seven years after the date of the obligation, because no diligence can be used upon these.” The same was Bell's doctrine in his *Principles*.³ The proviso at the end of the Act saving diligences done within the seven years shewed that that was its intention. It was clear that no action could be raised till a debt was actually due.⁴ The rule was recognised in *Kerr v. Bremner*⁵ (a case no doubt somewhat remote from the present, because it pertained to the bond of caution for a factor), and in *Alexander's case*,⁶ in

for the principal and seven years' interest—(*Reid v. Maxwell* (1780), M. 11,043). So in *Scott v. Yuille*, cited above, where interest had been paid after the seven years, and this circumstance was pleaded as barring the cautioner from founding on the statute, it was held that there was no bar, because he was not bound to pay the interest (Lord Chancellor's opinion, 444). This can only have been on the ground that the interest was a mere accessory of the principal.

“It is right to add that I was referred to a passage in Bell's *Comm.* (i. 365), in which the learned author deals with obligations to pay interest on the sum in a bond, and says that while they look like obligations for interest only, they seem to ‘result in an obligation for the principal sum,’ and ‘must be ruled by the same principles which regulate annuities.’ He is not at the moment speaking of the septennial limitation, but it is difficult to account for his language, unless he thought that an obligation to pay interest was a perpetual obligation to which the Act did not apply. The passage, however, is too incidental to be invested with much authority; and if it involves the proposition that an obligation to pay interest alone carries with it a heavier liability than an obligation to pay principal alone, or principal and interest combined, I cannot assent to it.

“It may be that all parties intended and expected the money to lie for an indefinite time, and that the creditor's case is not without hardship. But there are no averments on record that the cautioner solicited delay, or prevented action being taken, or in any way barred himself from pleading prescription. The result might have been obviated, either at first by the creditor taking the bond in such a way as to exclude the Act (which is not difficult) or afterwards by his calling up the money within the *septennium*.”

¹ *Alexander v. Badenoch*, Dec. 23, 1843, 6 D. 322, 16 Scot. Jur. 171.

² *Ersk. Inst.* iii. 7, 23.

³ Bell's *Pr.* 602; *cf.* 1 Bell's *Comm.* 7th ed. 375, 5th ed. 357.

⁴ *Crear v. Morrison*, June 2, 1882, 9 R. 890.

⁵ March 5, 1839, 1 D. 618, 11 Scot. Jur. 387.

⁶ D. 322.

No. 114.

Mar. 9, 1892.
 Molleson v.
 Hutchison.

which opinions were given that the statute did not apply to cash-credit bonds. The Lord Ordinary said that if the defender had been bound for the principal he would have escaped this claim, and asked, "Can the case of the cautioner be worse when he undertakes liability, not for the principal, but for something which is accessory to the principal, the interest?" But he failed to observe that the pursuer had no hold upon the defender during the seven years. His Lordship justified the case of *Balvaird*, because "the creditor was helpless as regards either calling up the money or doing diligence." That was the very reason the present pursuer should also succeed. If the defender had been bound for the principal he would have been sued for it within the seven years. The interest was damages for non-payment of the principal. It was not borrowed money, and in some of the cases it was thought the Act applied only to borrowed money. The interest here formed an annuity to the pursuer, and to any case of annuity or obligation *ad factum præstandum* the Act did not apply.

Argued for the defender;—It was not disputed that the Act was a limitation of the obligation, not merely of the remedy. It in effect read into the cautionary obligation, "but this obligation shall only endure for seven years." The case fell within its words. It would have been a clear case if the defender had been bound for the principal. The interest was an accessory of the principal. This was a bond for borrowed money. That borrowed money became due in six months. The interest ran from the date of that bond. These features distinguished the case from *Balvaird*: case, where the only debt was each term's annuity as it fell due. The test was not that the creditor was *non valens agere*, but if it were, inability to sue did not exist. The money obligation was expending itself from day to day from the date of the bond. That distinguished the case from cases of bonds for the performance of an office. The pursuer and his authors had six and a-half years in which to enforce the claim against the principal. [LORD M'LAREN.—Suppose he had tried, and the debtor and the security were worthless?] If the principal were worthless, that was the misfortune of the creditor. The class of cases like *Balvaird*, which Professor Bell¹ said had construed the Act "too strictly," might be sound, but such exceptions from the Act ought not to be extended.

At advising,—

LORD PRESIDENT.—The liability sought to be established against the defender is for a sum of money due at Martinmas 1890. It is admitted that, apart from the operation of the Act 1695, c. 5, the obligation to pay this money was validly undertaken by the defender in a bond dated in November 1881. The bond was primarily for a principal sum of £25,000 advanced to the Craiglockhart Hydro-pathic Company, Limited, and for this sum—the term of payment of which was Whitsunday 1882—the defender was not bound. The defender's obligation, which was, and was expressed to be, that of a cautioner, was to pay the interest of the principal sum at the rate of five per cent from the date of the bond to the said term of payment, and half-yearly, termly, and proportionally thereafter during the non-payment of the principal sum at Whitsunday and Martinmas.

The defender has pleaded that his obligation under the bond has been extinguished by the operation of the Statute 1695, c. 5, while the pursuer's answer is thus stated in what he has proposed to add as his third plea,—“The defender's obligation under the said bond has not been extinguished by the operation of the Statute 1695, c. 5, in respect the sums sued for were not due and pay-

¹ Bell's Comm. i. 375.

able till after the lapse of seven years from the date of the bond." My opinion No. 114
is that the latter plea is well founded in the law as now authoritatively
settled.

Mar. 9, 1892.
Molleson v.
Hutchison.

If the terms of the statute be looked at, apart from all authority, there is much to be said for the view that it means that all cautionary obligations for the payment of money, no matter when prestable, last for seven years, and no longer. But then all this was said and was rejected by the Court within fifteen years after the passing of the statute, and the rule was laid down that the statute only extinguishes obligations prestable within the *septennium*. The case of *Balvaird*, which was decided in 1709, seems to me completely to cover the present question, the only difference being that the liability there was to pay an annual sum in name of annuity, and here it is to pay an annual sum in name of interest. There, as here, there was a liability to pay such annual sums within the *septennium* as well as beyond it. There, as here, the liability sought to be established was for annual payments due after the *septennium* had expired. The principle expressly laid down by the Court in *Balvaird*, that every year *nata erat nova obligatio*, supplies a rule which applies equally to this case as to that. The statute, according to *Balvaird*, does not cut down a liability to pay money in 1890 undertaken by a cautionary bond in 1881. The decision, therefore, definitely negatives the interpretation of the statute which, with much apparent plausibility, would make the date of performance immaterial; and the subsequent cases of *Borthwick* and *Miller*, the former decided in 1715 and the latter in 1762, directly follow, and confirm the rule thus established. In the former case the obligation of the cautioner was prestable at an uncertain date, in the latter at a fixed date outside the *septennium*, but both decisions are irreconcilable with what the defender holds to be the sound construction of the statute.

The law so laid down has been regarded as settled ever since. Erskine (iii. 7, 23) says,—“Neither do obligations fall under this Act where the condition is not purified nor the term of payment come within the seven years after the date of the obligation, because no diligence can be used upon these.” And he cites the case of *Borthwick*. Mr Bell, in his Principles, sec. 602, says,—“To give the benefit of the statute the obligation must be for a sum of money to be paid within the seven years,” and he cites the three cases of *Balvaird*, *Borthwick*, and *Miller*.

In *Alexander v. Badenoch*, 6 D. 322, the various decided questions as to the application of the statute are gone over, and this among others is treated as settled.

I have already indicated that, to my thinking, the question as to which interpretation of the statute is the better,—the narrower adopted by the Court in *Balvaird* or the more comprehensive preferred by the Lord Ordinary,—would be, apart from authority, entirely debateable. But both interpretations are tenable, and one, as I have shewn, has been deliberately adopted and adhered to from very near the time of the statute itself down to the present day. Indeed in stating the law of the septennial prescription,—among others the point now under consideration,—Erskine begins by observing that the Act “hath received a most limited interpretation,” and a parenthetical remark of Mr Bell in his Commentaries shews that he also was somewhat critically alive to this characteristic of the decisions which he proceeds to rehearse. But not the less significant is the fact that they treat the law as settled. The interval between Mr Bell's day and the present has passed without any challenge of what he

No. 112.
Mar. 8, 1892.
Hall's Trustees v. Macdonald.

legacy to them is a good legacy they would pay it to themselves and get the benefit of it. But they make no claim to administer the trust. They put in a separate substantive claim for a legacy as if it were a mere bequest in their favour, irrespective of their acceptance of the trust, and they ask to be preferred in the fund *in medio* to the extent of £500 each without saying anything as to what is to become of the rest of the fund. It does not appear to me that we can sustain that claim as it stands, but, if your Lordships agree with me, there can be no great difficulty in the trustees amending their claim.

LORD ADAM.—It appears from the marriage-contract here that in contemplation of his marriage Mr Hall disposed in favour of his promised spouse, in life-rent for her life-rent use alienably, subject to certain restrictions named in the contract, and to the child or children of the intended marriage and the issue of the bodies of such children, whom failing, to his own heirs and assignees whomsoever, all and sundry his estate, heritable and moveable, as at the time of his death. The question is, whether that destination to the issue of the bodies of such children gave the issue a *jus crediti* under the marriage-contract, or whether that was a testamentary provision only. As regards the children of the marriage, it is of course settled law that the provisions in their favour in a marriage-contract are contractual in the highest degree, and that the contracting parties, the husband and wife, cannot defeat the rights secured to the children by the marriage-contract. There is no doubt about the law on that subject. What the reason of the law may be is of very little consequence, although it probably originated in the claims which *ex jure naturali* children have against their parents. But the children of such children are in an entirely different position. They have no claim which the law recognises in the same sense as children. They have their own father and mother, and their own father and mother's marriage-contract with reference to any claims they may have, and as far as I recollect there is no case establishing that under such a destination this grandchildren have a *jus crediti*. No such case was quoted to us, and the only case which the Lord Ordinary refers to is the case of *Mackie v. Glasgow*. I agree with Lord Kinnear in thinking that that case is not an authority for such proposition. I am far from saying that a provision in a marriage-contract calling persons after the children of the marriage may not be contractual. If the question would depend on the construction of the whole settlement. It appears, construing the whole settlement, that it was the intention of the contracting parties that a benefit should be secured to such persons, that will be given effect to. But it must arise upon a consideration of the whole clause of the contract. The old case of *Kinsman v. Scot*, in the Dictionary, 12,984, is an example of that. There the destination of the husband's property after the children of the marriage was to the heirs of the wife, and the Court, considering the whole contract, came to the conclusion that the provision was contractual and not testamentary, and accordingly they preferred the heirs of the wife. In the case of *Mackie*, again, it was held, upon a construction of the whole contract, that the provision in favour of the children already procreated of a party to the marriage was meant to be contractual, and numerous cases of the kind may be instanced where the decision proceeded upon a construction of the whole contract. But there is nothing in this contract that I can find to show that it was the intention of the contracting parties here to give to the grandchildren a contractual right. There are clauses in the contract which I

point exactly the other way, and particularly those to which Lord Kinnear No. 112. referred.

If that be so, and if the destination in this contract to children is a pure destination to children and nothing else, then the result is, that the objects of the trust having failed, the estate of the husband returns to him unaffected by anything unless in so far as he is restricted from dealing with it by the terms of the contract of marriage itself. If that destination is purely testamentary, the result must be that the husband acquires uncontrolled right to the estate except so far as he has restricted himself by the marriage-contract, for there is no other deed existing that I know of which restricts his power to any extent or effect. Now, by the clause in question he did restrict himself, because he left a liferent of his whole estate to his widow to be restricted in certain events, and in the event of no living child of the marriage being in existence at the dissolution of the marriage the widow was only to receive £150 a-year. If that event had not occurred, it is clear that as between the husband and wife he could not have defeated the right given to the wife. But that event has occurred, and the widow's right is now restricted to £150 a-year. But I do not see why the husband should not dispense with that restriction, for that is really all he has done in this case. He has simply dispensed with the restriction imposed in his own favour, and being unlimited proprietor of the estate, I cannot see why he might not do so. It was entirely a matter between him and his widow, no third parties being concerned in the matter. The grandchild has no *jus crediti* under the marriage-contract, and I cannot see what title he has to interfere. If he has no such *jus crediti*, what right has he to say to his grandfather and grandmother together, or to the grandfather alone, that he shall not dispose of his own estate without consulting him? Now, I think that is the whole case, and holding the proper construction of the marriage-contract to be as I have stated, I think the husband was quite entitled to dispense with the restriction of the annuity to £150, and that he had the right to dispose of his own estate. I therefore concur with Lord Kinnear.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

LORD M'LAREN.—I concur in the opinion of Lord Kinnear. I would just say in a sentence that it appears to me that the cases in which a grantee under a marriage settlement can claim an indefeasible right may be referred to the three categories which Lord Kinnear has fully examined in his opinion. The indefeasible right must arise from the relation in which the grantee stands towards the parties to the contract, or it must arise from express obligation, or again from the circumstance that one of the parties at the time of the execution of the contract, or at some time during their joint lives, has put property into the hands of third parties, trustees for the benefit of the claimant amongst others. Now, the present case appears to me not to fall under any of those heads. A provision to grandchildren is not presumed to be obligatory in respect of relationship because the parents are not at least in the first instance bound to provide for their grandchildren. The primary duty of providing for them lies upon their own parents. Then I find in the clauses which have been examined by your Lordships no evidence of any obligation, and there is not even that inferential obligation which is sometimes held to exist where one spouse promises to do something for the heir or relative of the other spouse. Then again the case is distinguished from *Mackie v. Gloag's Trustees* by the absence of any deed of present gift delivered by the parties. The case there-

No. 112.

Mar. 8, 1892.
Hall's Trustees v. Macdonald.

fore appears to me to fail entirely, and the result is that the spouses, subject to the right given to one another and to the immediate issue of the marriage, were in my opinion entirely unfettered in the disposal of their respective estates.

LORD PRESIDENT.—I concur. We shall allow the claim of the trustees to be amended to the effect of claiming the whole estate to be administered according to the trust, and then we shall rank them in terms thereof.

An amendment of the claim for John Scott and others, to the effect of making it a claim for them and Mrs Hall to be ranked and preferred to the fund that they might administer it as trustees, was then put in.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor: Repel the claim for Andrew Hall Macdonald and the Rev. Colin Macdonald, his administrator: Sustain the claim for the said Mrs Jane Chisholm Scott or Hall, and rank and prefer her on the fund *in medio* in terms thereof: Allow the condescendence and claim for John Scott, Hugh Ross, and Norman Reid to be amended at the bar, and sustain the said claim as amended, and rank and prefer the said claimants on the fund *in medio* in terms thereof, and decern."

THOMAS WHITE, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 113.

Mar. 8, 1892.
Crabb v. Fraser.

MRS MARY CRABB, Pursuer (Appellant).—*Guy*.

GEORGE FRASER, Defender (Respondent).—*Kennedy*.

Process—Appeal—Proof or jury trial—Judicature Act, 1825 (6 Geo. IV cap. 120), sec. 40.—In an action of damages for assault which had been appealed for jury trial under the 40th section of the Judicature Act, the defender moved the Court to send the case back to the Sheriff Court, on the ground that it was of such a trifling character as not to be suitable for jury trial. The Court, on the ground that if the cause had originated in the Court of Session it would have been sent to a jury, *refused* the defender's motion, and approved of issues.

1st Division.
Sheriff of Forfarshire.

MRS CRABB, Lilybank Road, Dundee, as curator and administrator-in-law of her pupil son, William Crabb, raised an action in the Sheriff Court at Dundee against George Fraser, fruiterer, Craigiebank, Dundee, for payment of £150 as damages for an assault alleged to have been committed by the defender on her son.

The pursuer averred that her son having taken a turnip from a field on the defender's farm, the defender had set his dog upon him; that the dog had bitten him; that defender had struck him, and had drenched him with liquid manure.

The defender denied the more material of these averments, and stated that the whole affair was of the most trifling description, intended merely to frighten the lad from trespassing on the defender's farm.

The Sheriff-substitute (Campbell Smith) allowed a proof.

The pursuer appealed for jury trial, and having lodged issues, moved the Court to approve thereof.

The defender opposed and moved the Court to send the case back to the Sheriff, arguing that the Court had a discretion, in appeals under the 40th section of the Judicature Act, either to send the case to a jury or to remit it to the Sheriff. Here the case was of the most trivial character, which it would be absurd to send to a jury. The appropriated causes were not necessarily sent to a jury.¹

Argued for the pursuer;—The present case was in the class of cases appropriated for jury trial, which if the case had originated in the Court

¹ White v. Dixon, July 9, 1875, 2 R. 904.

of Session would have been sent to a jury as of course, unless the parties consented to a proof. The circumstance that the case had come up under the 40th section of the Judicature Act made no difference, for it was now settled that such cases were to be treated in all respects as if they had originated in the Court of Session.¹

No. 113.

Mar. 8, 1892.

Crabb v.

Fraser.

At advising,—

LORD PRESIDENT.—*Prima facie*, the proposal of the defender and respondent, that this action should be tried in the Sheriff Court, cannot be said to be unfit or unreasonable. But we must determine upon it with a due regard to the 40th section of the Judicature Act, and so as to give fair play to the system thereby established. This action is now in the Court of Session, and the pursuer, who has taken the appeal for the purpose of jury trial, claims to have her case so disposed of. Now, while the power of the Court to send back for trial in the Sheriff Court cases appealed under this section cannot be disputed, this power has been exercised in view of the category to which the case under consideration belonged. This is an action of damages for assault, and, if it had originated in the Court of Session, it would for that reason unquestionably have gone to a jury. As it is now here, under this statutory power of appeal, I think we must proceed upon this same criterion of what is to be the mode of trial. We could only adopt the opposite course if we were to form some conjecture as to the substantiality of the pursuer's case in each action of damages for assault, and send back for trial before the Sheriff those cases which *prima facie* did not look well.

There is an obvious inconvenience in such a selection having to be made by the Court which might ultimately have to review the merits of the remitted cases; and it appears to me that the sound rule, and that most conformable to the statute as well as to the decisions, is to send for jury trial those cases which by the legal quality of their ground of action would be designated for jury trial if they had originated in the Court of Session. In all cases, of course, the rule is subject to the statutory condition if special cause be not shewn. But the class of assault is one in which this qualification requires to be stated rather as matter of theory than as of appreciable practical importance.

The pursuer and appellant having moved us to approve the issues proposed by her, I think our proper course is, on her motion, to do so.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT approved of the issues proposed by the pursuer, and remitted the case to a Lord Ordinary for trial by jury.

WISHART & MACNAUGHTON, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

JAMES ALEXANDER MOLLESON, Pursuer (Reclaimer).—*Asher—Ure*. No. 114.

ROBERT HUTCHISON, Defender (Respondent).—*D.-F. Balfour—Dundas*.

Mar. 9, 1892.

Molleson v.;

Hutchison.

Cautioner—*Septennial limitation of cautionary obligations—Act 1695, c. 5*.—A bond for borrowed money dated in November 1881 contained an obligation by the borrower to repay the principal sum at Whitsunday 1882, and an obligation by the borrower, and by certain persons as cautioners, to pay at said term the interest then due and interest half-yearly thereafter during the non-payment of the principal sum. Interest was duly paid on the bond until March 1890.

¹ *Cochrane v. Ewing*, July 20, 1883, 10 R. 1279; *M'Avoy v. Young's Paraffin Co.*, Nov. 5, 1881, 9 R. 100; *Trotter v. Happer*, Nov. 24, 1888, 16 R. 141; *Hume v. Young, Trotter, & Co.*, Jan. 19, 1875, 2 R. 338.

No. 114.

Mar. 9, 1892.
Molleson v.
Hutchison.

In an action against one of the cautioners for payment of his share of the interest from Martinmas 1890 the defender pleaded that the cautionary obligation had been extinguished by the Act 1695, c. 5.

Held by a majority of seven Judges (the Lord President, Lord Young, Lord Rutherford Clark, and Lord McLaren) (*rev. judgment of Lord Stormonth Darling*) that as the interest sued for was not due till after the lapse of seven years from the date of the bond, the cautionary obligation to pay that interest was not affected by the Act.

Diss. the Lord Justice-Clerk, Lord Adam, and Lord Trayner, who were of opinion that as payment of the principal sum and interest might have been enforced at any time within seven years from the date of the bond, after which no interest would have been due, the cautionary obligation was extinguished by the lapse of that time.

2D DIVISION,
with three
consulted
Judges.
Ld. Stormonth
Darling.

IN November 1881 the Craiglockhart Hydropathic Company, Limited, granted a bond and disposition in security to Ralph E. Scott and others, trustees of the English and Scottish Law Life Assurance Association, for a loan of £25,000, which the company bound itself to repay at Whitsunday 1882. The bond contained the following obligation as to interest:—"We, the said" company, "and we Robert Hutchison, Esquire of Carlisle . . ." (and six other persons) "hereby bind ourselves, jointly and severally, and our respective heirs, executors, and representatives whomsoever, as cautioners and sureties for and with the said Craiglockhart Hydropathic Company, Limited, to pay to the said Ralph Erskine Scott, &c., as trustees foresaid, and their foresaids, the interest of the said principal sum, at the rate of 5 per centum per annum, from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not payment of the principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the said term of Whitsunday next to come for the interest due preceding that date, and the next term's payment thereof at Martinmas following and so forth half-yearly, termly, and proportionally thereafter during the not payment of the principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof."

In May 1884 the bond was assigned to James Alexander Molleson, C.

In July 1884 the Court pronounced an order for winding up the company.

The subjects conveyed in security were sold for £13,800, on 12th March 1890, by Mr Molleson. After deducting that price from £25,000, there remained a balance of principal of £11,200.

On 16th December 1890 Molleson raised against Robert Hutchison an action, concluding for £1600, with interest at 5 per cent from Whitsunday 1890, or otherwise,—“(First) The defender ought and should be decreed and ordained, by decree foresaid, to make payment to the pursuer of the sum of £40, with interest on said sum of £40 at the rate of 5 per centum per annum from the date of citation to follow hereon until payment; and (second) the defender ought and should be decreed and ordained, by decree foresaid, to make payment to the pursuer, and his executors and assignees, (1) of the interest of the said principal sum of £1600, at the rate of 5 per centum per annum, from and after the term of Martinmas 1890, and in all time coming, and that half-yearly, termly, and proportionally during the not payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest, at the sum of £40, at the term of Whitsunday 1891, for the interest due preceding that date, and the next term's payment thereof, being the

sum of £40, at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the not payment of the said principal sum; the same terms of payment respectively being always first come and bygone, with the interest of each of the said sums at the rate of 5 per centum per annum from the time when the same falls due until payment; or otherwise (2) of the sum of £40 at each term of Whitsunday and Martinmas in all time coming, beginning the first payment at Whitsunday 1891, with interest on each term's payment at 5 per centum per annum from each term when the same becomes due till paid."

No. 114.

Mar. 9, 1892.
Molleson v.
Hutchison.

The pursuer stated that "the rateable proportion" of the sum of £11,200 remaining due to him, "for which the defender is liable under the obligation in the said bond to the pursuer as now in right of the said bond, is one-seventh, viz., £1600, with interest thereon at 5 per cent from the term of Whitsunday 1890 till payment, or failing such liability he is liable under the said obligation for interest since said term in perpetuity on the said amount. As the defender has failed to pay the said £1600, and arrears of interest due, the present action has been rendered necessary."

The pursuer pleaded;—(1) The pursuer is entitled to decree against the defender, in respect of the obligation undertaken by the latter in the said bond and disposition in security, for the proportion due by him and still remaining unpaid of the balance of the principal sum therein contained, with interest thereon as concluded for, with expenses. (2) Or otherwise, the pursuer is entitled to decree in terms of the alternative conclusions of the summons, with expenses.

The defender pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (2) The obligation of the defender under the said bond and disposition in security having been extinguished by the operation of the Statute 1695, cap. 5,* the defender should be assolizied.

The pursuer did not insist on his conclusion for payment of the principal. The Lord Ordinary (Stormonth Darling), on 2d June 1891, sustained the defender's second plea in law, and assolizied him.†

* The Act 1695, c. 5, enacts that "considering the great hurt and prejudice that hath befallen many persons and families, and oftentimes to their utter ruine and undoing, by men's facility to engage as cautioners for others, who afterwards failing have left a growing burden on their cautioners without relief, therefore and for remeied thereof . . . no man binding and ingaging for hereafter for and with another, conjunctly and severally, in any bond or contract for sums of money shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution; and that whoever is bound for another, either as express cautioner or as principal or as co-principal, shall be understood to be a cautioner, to have the benefite of this Act; provided that he have either clause of relief in the bond, or a bond of relief apart, intimat personally to the creditor at his receiving of the bond, without prejudice always to the true principals being bound in the whole contents of the bond or contract; and also of the said cautioners being still bound, conform to the terms of the bond, within the said seven years as before the passing of this Act, . . ."—(Here followed a clause saving diligence done within the seven years.)

† "OPINION.—This case raises an important question on the septennial prescription of cautionary obligations. . . .

"It is plain that the defender cannot be liable for the principal, or any part of it, except as an indirect consequence of his liability for the interest. If he be liable for the interest in perpetuity, he might desire to pay up the principal in order to escape from an interminable burden, but he cannot be compelled to do so. The important question is whether the statute applies to the obligation

No. 114. Ordinary, I am of opinion that the interlocutor reclaimed against should be affirmed.

Mar. 9, 1892.
Molleson v.
Hutchison.

THIS interlocutor was pronounced in Second Division :—"The Lords . . . in terms of the opinion of a majority of the Judges present at the hearing, recall the said interlocutor; repel the second plea in law for the defender; decern and ordain the defender to make payment to the pursuer of the sum of £40 sterling, with interest at the rate of 5 per centum per annum from the date of citation on the summons until payment: Find that the defender is liable to the pursuer in interest at the rate of 5 per centum per annum on the principal sum of £1600 mentioned in the summons from and after the term of Martinmas 1890, and that half-yearly, termly, and proportionally during the not payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of Whitsunday 1891 for the interest due preceding that date, and the next term's payment at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the not payment of the said principal sum, the said term of payment respectively being always first come and bygone with the interest of such of the said sums at the rate of 5 per cent per annum from the time when the same falls due until payment," &c.

DAVIDSON & SYME, W.S.—WADDELL & M'INTOSH, W.S.—Agents.

No. 115. ARCHIBALD DUNCAN AND OTHERS, Pursuers (Respondents).—*Asher—A. S. D. Thomson.*

Mar. 10, 1892.
Duncan v.
Crighton.

JOHN CRIGHTON AND OTHERS, Defenders (Reclaimers).—*D.-F. Balfour—Dundas.*

School—School Board—Election—Scotch Education Department—35 and 36 Vict. c. 62, and 41 and 42 Vict. c. 78 (Education Acts 1872 and 1878)—Tid to sue.—Sec. 13 of the Education Act, 1872, provides with regard to the election of school boards, "should any election not take place as required by this Act the Scotch Education Department may" (1) issue an order for an election. (2) may allow the existing school board to continue in office; or (3) may nominate a school board.

Sec. 15 provides, that "in case the election of any person or persons shall be declared to be invalid, and the full number of members shall not without such person or persons have been validly elected, the school board, if a quorum exists, shall make the appointments necessary to fill up the vacancy, "and if a quorum do not exist, or if the school board fail for three weeks to make such nomination and appointment as aforesaid, the Board of Education may order a new election of as many members of the school board as shall be necessary to make up the full number of members."

Schedule B, rule 4, as amended in the schedule to the Act of 1878, provides that an election shall be held "in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe." and the Department "may by order appoint . . . and make regulations as to the duties . . . of any officers requisite for the purpose of such election, and make regulations" for all necessary things "preliminary or incidental to an election.

Held (diss. Lord Young) that it was *ultra vires* of the Scotch Education Department to issue a General Order to the effect that "if the number of candidates nominated and not withdrawn . . . shall be less than the number of members to be elected but sufficient to constitute a quorum of the school board . . . they shall

at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members." No. 115.

Mar. 10, 1892.
Duncan v.
Crichton.

The number of the school board of a burgh was fixed under the statutes at nine. On the occasion of the election in 1891 six persons only were nominated. The returning officer declared them duly elected, and they then met and elected three others. The declaration of election was made, and the meeting was held in compliance with a General Order of the Scotch Education Department of 1st October 1890 which dealt with cases such as had occurred, and bore to be issued under the schedule annexed to the Education Act of 1878. Certain ratepayers in the burgh brought a reduction of the return and of the minute of meeting, calling as defenders the returning officer and the nine persons concerned. *Held* (1) that the pursuers as ratepayers had a title to sue, and (2) that they were entitled to decree in respect that no election had taken place under the statute, and that the schedule of the Act of 1878 did not warrant the General Order of the Department, which was therefore *ultra vires* and illegal. *Diss.* Lord Young, who was of opinion that the case could not be disposed of in the absence of the Department, the question at issue being one of public interest and involving an interference between a public department and one of its officers, and further, that the order was in accordance with the Education Acts.

THE number of members of the School Board of Port-Glasgow was fixed under the statutes at nine. At the triennial election on 26th March 1891 there were only six candidates. These six candidates were declared duly elected by the returning officer, and intimation of the election was sent to the Scotch Education Department. These six members appointed three other persons to be members along with them, so as to complete the number of the board. This was done on 2d April 1891. 2D DIVISION
Lord Kin-
cairney.

Archibald Duncan and others, twelve persons who were entitled to vote in the election of the school board, and some of whom had children in attendance at the public schools of Port-Glasgow, raised an action against the six persons who had been nominated, and the three persons who had been selected by them as members of the board, to test the validity of the election. Mr James Grieve, who acted as returning officer, was also called as a defender. The pursuers averred that they were "members of a ratepayers' committee, whose action has been unanimously approved of at two large public meetings of ratepayers in the town hall of Port-Glasgow." This was not admitted. It was the fact that one of the pursuers was provost, and another one of the magistrates of Port-Glasgow.

The conclusions of the action were for reduction of (1) the declaration of the result of the election by which the first six defenders were declared to have been elected, and (2) the minutes of these six persons recording the election of the other three pretended members of the board. There were also conclusions for declarator that there was no valid election on the 26th March of the six persons nominated, and no valid election of the persons subsequently selected by them.

The pursuers stated that the 13th section of the Education Act of 1872 (35 and 36 Vict. c. 62)* made provision for the case that had occurred.

* Sec. 13.— . . . "and should any election not take place as required by this Act, and at the times hereinbefore specified, the Scotch Education Department may issue an order for the election at such time and place as the said Department shall determine, or may allow the existing school board to continue in office, or may nominate a school board . . . in the manner hereinafter provided" [viz., by sec. 20, which allows an interim nomination of a board for a year] . . . "and should a vacancy occur in any board during the currency of its period of office, such vacancy shall be supplied by the board itself nominating a person to supply such vacancy."

No. 115. They also stated that the proceedings of which they now complained had been taken in pursuance of a General Order dated 1st October 1890 by the Scotch Education Department.* For this order they stated that there was no warrant in the Statutes of 1872 or 1878, that it was *ultra vires* of the Department, and illegal.

Mar. 10, 1892.
Duncan v.
Crichton.

The defenders maintained the validity of the Order, upon which they admitted that these proceedings had taken place, by referring to the schedule appended to the Act of 1878,† and to the undernoted sections of the Education Acts.‡

The pursuers pleaded;—1. The pursuers are entitled to decree of reduction and declarator as concluded for, in respect there was no valid election on 26th March, nor any effectual appointment on 2d April 1891. 2. There having been no election on 26th March 1891, and none of the

* That General Order ran thus:—13—“If the number of candidates nominated and not withdrawn as aforesaid shall be less than the number to be elected, but sufficient to constitute a quorum of the school board, the returning officer shall, on the day fixed for the election, declare such candidates to be duly elected, and shall publish a list of the names, with the places of abode and designation of the persons so elected, and a copy of such list certified by the returning officer shall be conclusive evidence of the election of the persons therein named: and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members, and shall give notice of such appointment to the Scotch Education Department. If the number of candidates so nominated and not withdrawn shall not be sufficient to constitute a quorum, the returning officer shall report to the Scotch Education Department that no election has taken place. Three members constitute a quorum of a school board.”

† “The triennial election of a school board for any parish or burgh shall be held at such time, and in such manner, and in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe, and the Scotch Education Department may by order appoint or direct the appointment, and make regulations as to the duties, remuneration, and expenses of any officers requisite for the purpose of such election, and make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous order.”

‡ Sec. 15 of the Act of 1878 (41 and 42 Vict. c. 78) provides that in the event of a vacancy caused by resignation the vacancy “shall, where a quorum remain, be supplied by the school board in the manner provided in sec. 13 of the principal Act, and if the school board fail for eight weeks to fill up the vacancy the Scotch Education Department may nominate a person to fill up such vacancy, or may issue an order for an election of a person to fill such vacancy, at such time and place and in such manner as the said Department shall determine.”

Sec. 16 of the Act of 1878 provides for the case of a vacancy arising from non-attendance of a member of the board.

Sec. 15 of the Act of 1872 provides that “in case the election of any person or persons shall be declared to be invalid, and the full number of persons shall not without such person or persons have been validly elected, the school board, if a quorum exist,” shall make the appointments necessary to fill up the vacancy, “and if a quorum do not exist, or if the school board fail for three weeks to make such nomination and appointment as aforesaid, the Board of Education may order a new election of as many members of the school board as shall be necessary to make up the full number of members.”

Sec. 17 of the Act of 1878 provides that “if by the death, resignation, or disqualification of any member or members of a school board there shall be a vacancy, and the full number of persons shall not without such person or persons be a quorum, the Scotch Education Department may nominate as many persons as shall be necessary to make up the full number of members, or may issue an order for an election of such number of members, at such time and place and in such manner as the said Department shall determine.”

courses prescribed by section 13 of the Education (Scotland) Act, 1872, No. 115. having been adopted, the said pretended school board was never validly constituted.

Mar. 10, 1892.
Duncan v.
Crichton.

The defenders pleaded;—1. The action is incompetent . . . (2) in respect that it is an attempt to review in the Court of Session an Order of a Committee of the Lords of the Privy Council. 2. All parties interested are not called. 4. The defenders having been duly and validly elected and appointed as the School Board of Port-Glasgow, ought to be assoilzied.

The Lord Ordinary (Kincairney), on 12th December 1891, of consent dismissed the action as against three of the defenders, viz., the returning officer, one of the nominated persons who did not defend, and one who had retired from the pretended board, and, as against the others, reduced, declared, and decerned in terms of the conclusions of the summons.*

* "OPINION.— . . . I have come to be of opinion that the present is a case to which section 13 applies. I think that it cannot be maintained that an election of a number of candidates under the fixed number is an election of a school board; and that therefore, when such an election takes place, it is the fact that 'an election has not taken place as required by the statute.' Further, there is no other clause of the Acts or schedules which applies to the case of a deficiency of candidates, and it is not to be easily assumed that that case was overlooked.

"It has not been overlooked, it may be remarked, in the English Education Acts, for there is a provision in article 6 of the second schedule of the Act 33 and 34 Vict. cap. 75, which meets the case expressly.

"The General Order issued by the Education Department purports to introduce in regard to school board elections in Scotland a provision substantially the same as that contained in the English Act, and it purports to extend the provisions of the 15th section of the Scotch Act of 1872 to circumstances different from those mentioned in that section.

"I have no doubt that the Order is a very salutary one indeed, and I see nothing in it inconsistent with the general scope or spirit of the Education Statutes, but if it be true that the case in question is provided for by the 13th section of the Act of 1872, it appears to me that the Order is nothing but an amendment of the statutes, and is of the character of an act of legislation. That is, I apprehend, *ultra vires* of the Education Department.

"My view is that section 13 of the Act of 1872 covers the case of a deficiency of candidates at a school board election, and that section 15 does not apply, and I do not need to determine whether the Order would be *ultra vires* if the 13th section did not apply, and if a deficiency of candidates were a *casus imprevistus*. But I do not think that in that case I could come to a different conclusion. I think that the powers conferred by the schedule relate to matters of form and detail, and not to the persons entitled to elect. That appears to be the true construction of the words, having regard to the special and detailed provisions of the Act in relation to the circumstances in which the intervention of the Department in a school board election is authorised. As illustrative of this point, the pursuers referred to *Hamilton v. Police Commissioners of Dunoon*, 15th January 1875, 2 R. 299.

"But the defenders have stated certain prejudicial pleas which it is necessary to notice. . . . But it is further pleaded that the action is incompetent because it is an attempt to review an Order of a Committee of the Lords of the Privy Council. But no authority was referred to which appeared to support this plea, which, indeed, is plainly untenable; for the Education Department has no powers but statutory powers, and the Court is bound to consider, when necessary in order to decide any question between two litigants, whether an act of the Department is within its powers or is beyond them, and, therefore, without authority or validity.—See *Macfarlane v. Mochrum School Board*, 9th November 1875, 3 R. 88, and see, per Lord President, p. 98; *School Board of Lochgilphead v. School Board of South Knapdale*, 30th June 1877, 4 R. 389; *Denny & Brothers v. Board of Trade*, 25th June 1880, 7 R. 1019.

No. 115.

Mar. 10, 1892.
Duncan v.
Crighton.

The defenders reclaimed, and argued ;—The Lord Ordinary's view hinged upon the idea that here there had been no election, but that was a mistake. The electors had done their part, or all that they cared to do, and had elected a quorum. It was for that quorum, under the direction of the Department, to supplement the action of the electors. The pursuers relied on the case of *Kidd*,¹ in which it had been held that where a set of fifteen magistrates was to be elected, and one of the persons so elected was in minority, the whole election was bad. But a statute² had at once been passed to correct, as regarded municipalities, the evils pointed out by that decision, and it was clearly not the law of the present statutes, for section 15 of the Act of 1872 would prevent any such miscarriage. That section was the section which truly ruled the present case, and which the Department had by their Order called into operation ; or at least the spirit of that section justified the action of the Department. It must be conceded that the 15th section would apply if three unqualified persons—imaginary beings—had been returned ; but in that event there would have been a defective election from the beginning, a “non-election” as the pursuers said there had been here. If section 15 might be used in such a case, it was plain that the return of six in place of nine members could not be said, as the pursuers contended, to be no election. The words of the schedule of 1878 were broad enough to cover this case. It was plain that it was not required that every member of a board should owe his election to the voice of the people, and if that were so this was just a thing “incidental” to the election which the Department might put right. It certainly was well qualified to do so.

Argued for the pursuers ;—There was here no case of hardship and no *casus improvisus*. The 13th section covered the case, and gave a wealth of remedies. Why not take one of them ? There was no election on 26th March. That that was so at common law was settled by *Kidd*'s case, which did not stand alone.³ The common law remained, except in so far as it was altered by section 15 of the Act of 1872, and that section only applied where a full board had been *prima facie* returned. No power could make the six members returned on 26th March into nine and without nine members there could be no school board in Port Glasgow. No board, no quorum. There must be an election before section 15 could come into play, and here there was no election. The Department's powers were only such as Parliament gave it,⁴ for it was

“It was further pleaded that this action involved in reality, although not in form, a reduction of the Order of the Education Department, and that it ought therefore, to have been directed against the Department. The pursuers, however, declined to call the Department. They considered that they had no question with the Department, and no title to conclude for the reduction of the Order ; that they had no concern except with the particular election of the School Board of Port-Glasgow, which they challenged ; and that they required only to establish that an act, otherwise without authority, was not legalised by the Order.

“I do not see that the Department is a necessary party in this case, or that there are any equitable considerations which make it proper to call it. Nor does it appear to be necessary to make any formal intimation of the dependence of this action, of which I understand the Department is aware.”

¹ *Kidd v. Magistrates of Anstruther Wester*, Dec. 17, 1852, 15 D. 257, 25 Scot. Jur. 170.

² 16 Vict. c. 26.

³ See *Kay, &c. v. Magistrates of Dundee*, March 9, 1830, 8 S. 688, 2 Scot. Jur. 325, in H. L. 1831, 5 W. and S. 152, 3 Scot. Jur. 380.

⁴ See Lord President in *Macfarlane v. School Board of Mochrum*, cited by the Lord Ordinary.

creature of statute, and by statute it had no power to delegate to the six candidates the powers delegated to itself by section 13. The Department had no power to declare that which the statute said was no board to be a board, and to make it do the work of a board.

No. 115.
Mar. 10, 1892.
Duncan v.
Crichton.

The Court, after considering the arguments, desired further argument on the question of the pursuers' title to raise the present action.

Argued for the defenders;—The important consideration in determining this question was that the proceedings were instituted in the public interest, and did not touch any patrimonial right of the pursuers. Without an allegation of injury to a patrimonial right, no such action could be sustained.¹ [LORD RUTHERFURD CLARK.—But my difficulty is here. A school board can assess, a body of persons who are not a school board cannot. Are ratepayers not entitled to test the validity of an election of persons who will or will not have that power according as the election is good or bad?] A board *de facto* returned could assess until their election was set aside, and the proper way of setting it aside was by an appeal to the Government Department.

Argued for the pursuers;—The question here was, whether this board had any right to administer educational affairs in the burgh. That fact differentiated the present case from *Ewing's* case, for there the Magistrates had undoubtedly a right to administer, the question being as to their method of administration. In municipal matters it had been held² that every ratepayer had a right to see that the burgh was "legally governed." That proposition had not been questioned on appeal in the House of Lords, the judgment being reversed on the ground of personal bar. The principle had been reaffirmed in subsequent cases.³

At advising,—

LORD JUSTICE-CLERK.—The question in this case is, whether a school board has been properly elected for the burgh of Port-Glasgow. The Scotch Education Department is empowered to fix the number of a school board according to the requirements of the district, and the number which was fixed in this case was nine. At the recent election there were only six candidates nominated, and the course which was then taken was taken under a deliverance of the Scotch Education Department by which it was directed that if the number of candidates nominated be less than the number to be elected, but sufficient to form a quorum, the returning officer shall declare such candidates duly elected, "and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members." That was done here, and it is now impugned.

The contention of the pursuers is that there was no election at all, and that there could be no good election of the three members subsequently named, there being no board, and therefore no quorum, to elect them. I need not state my reasons at length, for I concur in the opinion of Lord Rutherford Clark, which I have seen. But I also concur in that of the Lord Ordinary, and I may state shortly the grounds on which I proceed.

I think that the Scotch Education Department had no power to make any such order as that, if a number is elected which would be a quorum if the full

¹ *Ewing v. Glasgow Commissioners of Police*, 1839, M'L. and Rob. 847.

² *Mill v. Magistrates of Montrose*, Jan. 28, 1824, 2 Sh. 652 (O. E.), 549 (N. E.), 1825, 1 W. and S. 570.

³ *McBain, &c., v. Innes, &c.*, March 2, 1827, 5 S. 505 (O. E.); *Aitchison, &c., v. Magistrates of Dunbar*, Feb. 4, 1836, 14 S. 421, 8 Scot. Jur. 212.

No. 115.

Mar. 10, 1892.
Duncan v.
Crichton.

board were elected, that number may elect the rest, so as to make up the full number. I think that is not covered by the schedule to which reference has been made. That schedule provides that the election of a school board "shall be held at such time and in such manner, and in accordance with such regulations as the Scotch Education Department may from time to time by order prescribe," and that the Department may "make regulations respecting all other necessary things preliminary or incidental to such election, and revoke or alter any previous order."

I take that to be merely a power to make rules or regulations to carry out the statute, but not a power to render the statute nugatory, or to substitute some new procedure for the procedure prescribed by the statute.

Now, the case which has occurred is otherwise provided for, for if the returning officer had returned "no election," then the 13th section affords three methods of dealing with the matter. The Department should have proceeded under that section.

LORD RUTHERFURD CLARK.—In March 1891 the burgh of Port-Glasgow had to elect a school board. The purpose of this action is to declare that the election was not validly and legally made.

The pursuers are ratepayers in the burgh, and among the electors of the school board. It is maintained that they have no title to sue, because the election which is challenged was made in the manner directed by the Education Department of the Privy Council, and therefore with their sanction.

In my opinion this argument is not well founded. The sanction of the Department cannot validate an election which is not in terms of the statutes, nor is the Department entrusted with the duty of determining whether the election has been validly made. The decision of that question rests, I think, entirely with this Court.

Again, a school board which has not been duly elected is no school board at all, and the ratepayers are not bound to submit to its authority. The pursuers, therefore, seem to me to have a good title to try the question whether a school board was duly elected in 1891. Of course it will be understood that I am giving no opinion with respect to the validity of the acts done by the school board before the legality of their election was challenged, or before that question has been finally determined. In such matters other and different considerations are involved than those with which we have to deal in the present action.

I have now to consider the merits of the question. I may say at once that I agree with the Lord Ordinary, and I have very little to add to what his Lordship has said.

It seems to me that the 13th section of the Act applies to the case which has occurred. The School Board of Port-Glasgow must consist of nine persons. In March 1891 there were only six candidates, therefore, in my judgment, there could be no election. With six nominees only it was impossible to proceed to the election of a board which must consist of nine. Nor, in my opinion, can any person be returned as a member of a school board which does not exist.

I do not think that the 15th section applies. It deals with the case where the election of any person or persons is declared to be invalid. It assumes, therefore, that there was an election of a board in apparent compliance with the provisions of the Act. It is said that there is no difference between this case

The defenders reclaimed, and argued;—(1) Assuming that the fire had been caused by a spark from engine No. 85, the defenders, nevertheless, were not liable. Railway companies having statutory authority to bring fire into the neighbourhood of combustible articles were not liable for any damage caused by the exercise of this authority, unless it was proved that they had neglected some reasonable precaution. The precautions thus demanded of a railway company must be consistent with the carrying on of their business in a reasonable way. Railway companies were to use the best means of carrying on their business known to practical science at the time, and they were not to refuse to use new inventions merely because some slight increase of danger might result, if, as a whole,

No. 118.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

the effect that the engine in question was of the newest and best construction . . . I confess I am not satisfied on the evidence that the engine No. 85 and the other engines of its class are so constructed as to contain the best known and practicable arrangements for preventing the emission of sparks. Differing in this respect from the older class of engines, they contain no 'spark arrester' in their smoke-box; and assuming in their favour (what, however, is matter of dispute) that their vortex blast arrangement does not tend to increase the risk of sparks, or even that its associated arrangements tend to diminish that risk,—still the sparks *ex hypothesi* issue, and issue of such size as to be dangerous; and that being so, I am not, I confess, satisfied upon the evidence that the spark arrester if used would not at least have reduced that risk. Neither have I been convinced that its introduction would have materially interfered with the working of the engine or been in any other respect injurious. It is true that a majority of the great railway companies in England have ceased to use 'spark arresters.' But they are still largely used; and having given my best attention to the views of the defenders' witnesses, I have been unable to see sufficient reason why they should not continue to be used, or why, if used, they should not go at least a considerable way to obviate the risk of fire.

"It only remains to consider the question of contributory negligence, and here I am bound to say that the situation of the pursuers' store, and the arrangements of the building, were certainly not such as to minimise the risks arising from sparks thrown by passing engines. The store was only 29 feet from the railway. There were doors on the side next the railway, and there being no window in the roof (as there might have been), it was sometimes necessary (as on the occasion in question) to open one of these doors for the purpose of obtaining light. All this was certainly the reverse of cautious. But, on the other hand, I do not know that the pursuers were bound—because of the risk of the negligent discharge of sparks from the defenders' engines—to forego the full use of their ground, or to depart from what they considered the most convenient arrangements for obtaining access to, and for lighting their flax store. In other words, I doubt whether it can be imputed to them as fault that they took their chance of the defenders doing their duty. But in any case, the law—as I understand it—is, that in questions of contributory negligence *causa proxima et non remota spectatur*, and it is impossible to say that the position or arrangements of the pursuers' store formed in any proper sense the direct or proximate cause of this fire. The defenders could certainly, if I am right, have by ordinary care avoided inflicting the injury to which the pursuers, perhaps somewhat rashly, exposed themselves, and, according to the authorities, that is sufficient. See *Rulley v. L. and N.-W. Railway Co.*, L. R., 1 App. Cases, 754, 759; *Rooney v. Allans*, 10 R. 1224; *Florence v. Mann*, 18 R. 247.

"On the whole, therefore, I consider that my judgment must be for the pursuers, and I have only to add that I am not able to see that the fact of the pursuers being covered, or nearly covered, by insurance makes any difference in their position. It may be that they are really suing on behalf of the insurance companies, but that is after all merely matter of process, and in the present case, where there is no question of responsibility for costs, I do not see that anything could be gained by sisting the insurance companies as pursuers."

No. 115. conceived, and in the absence of the Department. Do we know how many school boards have been elected, and acted, all over the country in this way!

Mar. 10, 1892.
Duncan v.
Crichton.

We are asked to declare this election illegal. The Lord Ordinary, as I understand, is of opinion that the Department had no authority to issue this order to its officer. It is a curious announcement for the Court to make to the officer of a Government Department: "You cannot rely on your instructions got from the Department, you must have declarator that you are entitled to obey the orders of your superior officers."

The schedule of the Act of 1878 is worthy of attention. Does it include instructions to a returning officer? He is appointed by the Department, his duties, the rules for the discharge of his duties, are prescribed by the Department. We are asked to tell him and others that these rules are illegal. All that is contrary to my notions of the functions of a Court of law, and I think it may be attended with serious prejudice to the public interest.

The question is whether, there having been a nomination of six only, it was not the duty of the returning officer to refuse to proceed with the election, or to refuse to declare that there had been an election. It is said it is a case for sec. 13. It never occurred to me to doubt that that section was applicable to a case of contumacious abstention, on the part of persons who object to the school board system, from nominating a school board. It never occurred to anyone, till this moment, that its provisions were applicable to the case of a number short of the full number being nominated and elected.

Sec. 15 applies to the case of a number short of the proper number being elected. That section is admitted to come very near the present case. Now, there can be no such thing as an invalid election. There may be an improper declaration of an election which has not taken place. But that is no election at all. Suppose you have eight persons duly nominated and elected—I say duly, without any intention of affecting the argument—it is said that there is no election at all. If the declaration had been of nine persons, and one of them had died—died the evening before the declaration—but the returning officer had declared them all, the whole nine, elected; what would be the proper course then? The eight survivors are permitted by sec. 15 to act. But if the man who dies is not declared to have been elected, then the case is different. Can anyone in his senses say so? In the one case the returning officer knows that the man is dead and gives effect to his knowledge, in the other case he does not. These are two separate cases, to be determined on different principles in a matter of public interest. I think the cases are identical, and I think that the Department was justified in declaring them to be identical.

What is all this to lead to? What is the result of this interference with public Department instructing its own officer in accordance with the meaning and spirit of the Education Statutes?

The case falls within sec. 13—suppose that. Then there is an absolute power in the Scotch Education Department to choose a school board. The Department is of opinion that the six persons who were the choice of the constituents should be members; they nominate them; they will certainly do so. The six name three others; they have done so; the Scotch Education Department will nominate them. In all good sense and reason they will do so. That is the result of all this matter.

I am of opinion that if we were to have any debate in the public interest to the powers of the Department they should have been here, to explain it.

views which they have expressed in their order to their officer. I am of opinion No. 115.
that all parties are not called.

But further, I am of opinion that this order is in accordance not only with Mar. 10, 1892.
the spirit and scope of the Education Act, but also the letter, and I think that Duncan v.
we should assoilzie the defenders. Crighton.

LORD TRAYNER.—I am of opinion that the judgment which the Court is about to pronounce in no way interferes with or impinges upon the authority confided to the Scotch Education Department by the statutes. I am further of opinion that the matter is not to be determined on any considerations of expediency. The only question for our decision is, Has the election been carried out in terms of the Education Acts? On that question I entirely agree with Lord Rutherford Clark.

THE COURT adhered.

MORTON, SMART, & MACDONALD, W.S.—J. & J. H. BALFOUR, W.S.—Agents.

THE SECOND EDINBURGH AND LEITH 493D STARR-BOWKETT BUILDING No. 116.
SOCIETY AND PETER RONALDSON, Pursuers (Reclaimers).—
Dickson—Crole.

THOMAS AITKEN, Defender (Respondent).—*Gunn.*

Building society—Instrument of dissolution—Consent of members—The Building Societies Act, 1874 (37 and 38 Vict. cap. 42), sec. 32, subsec. 2.—The 32d section of the Building Societies Act, 1874, enacts,—“A society under this Act may terminate or be dissolved . . . (2) By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution.”

Held that the word “signatures” in this enactment means signatures of the members themselves, and that signatures adhibited by the mandataries of members cannot be reckoned in calculating whether the instrument was signed by the requisite number of members.

In March 1891 the Second Edinburgh and Leith 493d Starr-Bowkett 1st Division.
Building Society, incorporated under the Building Societies Act, 1874, Ld. Kyllachy.
and Peter Ronaldson, as its trustee under an instrument of dissolution, brought an action against Thomas Aitken, a member of the society, for payment of £33, 10s. 6d., as the balance due by him in respect of advances which he had received from the society.

The defender pleaded ;—(1) No title to sue,—stating that the names of certain of the members adhibited to the instrument of dissolution had not been written by the members themselves but by mandataries, and that if these names were not counted the number of consents required by the Act of Parliament to an instrument of dissolution had not been obtained.*

A proof was allowed. The evidence established the defender's averments in point of fact.

On 1st December 1891 the Lord Ordinary (Kyllachy), sustained the first plea in law stated for the defender, and dismissed the action.†

* The 32d section of the Building Societies Act, 1874, enacts,—“A society under this Act may terminate or be dissolved . . . (2) By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution.”

† “OPINION.—I am very unwilling to sustain this defence, for I see that if I do so there may be great practical difficulty in working out the society's remedy against this member, who is undoubtedly due, and must ultimately, in some form

No. 116.

Mar. 11, 1892.
Second Edin-
burgh and
Leith 493d
Starr-Bowkett
Building
Society v.
Aitken.

The pursuers reclaimed, and argued;—The signatures adhibited by the mandataries must be held to be the signatures of the members, who had given the mandates, and such members had accordingly testified their consent to the instrument of dissolution in terms of the Act.

The defender was not called upon.

LORD PRESIDENT.—The question is whether the Lord Ordinary is right in holding that as regards eleven of the shareholders said to consent to dissolution, the instrument of dissolution is defective in the statutory requisite of signature. Now, it appears to me that the objection is well founded and fatal. The company purports to be dissolved by the instrument of dissolution, and in order to make the dissolution valid it is necessary that a certain proportion of the shareholders should have consented to the dissolution and expressed their consent on the face of the deed, the statute providing that the consent of the necessary number of the shareholders shall be obtained “as testified by their signatures to the instrument of dissolution.” In order to bring the number of consenting shareholders up to the required proportion, it is necessary for the reclaimers to rely on signatures, not of shareholders but of mandataries of shareholders, or at least of persons who may for the present purpose be assumed to be mandataries.

I do not think such an attestation meets the requirements of the statute. It was pressed on us that the members of a society of this kind being generally working people, it would be reasonable to expect special provision to be made by the Legislature for relaxing the formalities of execution where their signatures are required; but it appears to me that the Legislature has allowed a relaxation of the usual formalities, because the statute does not demand that there should be instrumentary witnesses to the signatures of the shareholders. It is enough if the necessary consents are testified by the signatures of the shareholders themselves. It is all the more necessary, therefore, to see that the formalities required by the Legislature have been complied with; and in a word I think that to maintain that the signatures of mandataries are the signatures of the shareholders themselves in the sense of the statute is a hopeless contention.

LORD M'LAREN.—I concur with your Lordship, and at the same time I

pay, a considerable sum of money to the society. But the question is, whether I have any option in the matter . . . There are, it appears, eleven signatures to the deed which were not adhibited by the members themselves, but by certain persons alleged to be their mandataries. I shall assume that these persons had good mandates at the time they signed, although I am afraid I cannot hold that proved. But assuming that that is so, I am afraid that the terms of the 32d section of the Act make it really too clear for argument that a member cannot under this statute testify his consent to a dissolution otherwise than by his own signature. The words of the statute are ‘as testified by their signature to the instrument of dissolution.’ I think that contemplates that the member’s own signature, and not his signature through a mandatary, must be adhibited. If that be so, I am afraid it is fatal, because, taking the shareholders on the register at May as 164, and adding the 39 shareholders who became members in August, the total number of members on the register when the deed of dissolution took effect was 203. I think these must all be taken as members, and that being so, how many signed this deed of dissolution? There are 158 signatures in all, taking everything most favourably for the pursuers. But if eleven mandates are to be deducted, as the signatures of mandataries, that leaves only 147 good and genuine signatures. Now, I am afraid that 147 is not three-fourths of 203, and therefore this deed was not well executed, and the procedure was irregular.”

sympathise with the observations made by the Lord Ordinary as to the difficulties that may be caused to the society by our deciding that it is not possible to carry out the winding-up under the present administration. But I cannot help adding that the liquidator might have perfected his title, if he really has, as he professes to have, mandates from a sufficient number of shareholders, because, if these mandates were granted by the shareholders in full knowledge of the purpose for which they were to be used, I can hardly doubt that the shareholders would, on a proper representation, be willing to sign the instrument of dissolution. Therefore, it rather appears that there may be substance in this objection, and that it is impossible at present to obtain the requisite consents to a dissolution under the present management.

LORD KINNEAR concurred.

LORD ADAM was absent.

THE COURT adhered.

MORTON, SMART & MACDONALD, W.S.—JOHN MACKAY, Solicitor—Agents.

THE TRUSTEES OF CARNEGIE PARK ORPHANAGE, Petitioners.—*James Reid*. No. 117.

Trust—Cy près—Nobile officium.—A testator left lands and the residue of his estate to trustees to found an orphanage for orphans belonging to a certain district between the ages of eight and fourteen, so soon as the residue and accumulations of rent amounted to £6000, directing that accommodation should be provided for as many children as the revenue would support. The residue, at the date of the testator's death, greatly exceeded that sum, and the trustees erected an orphanage with accommodation for sixty children. As few applications for admission were received, the trustees presented a petition to the Court for authority to reduce the limit of age from eight to five that the homes might be filled, a preference, however, being given to children of the age of eight and upwards.

The Court *granted* the prayer of the petition.

JAMES MOFFAT, of Carnegie Park, in the county of Renfrew, died on 1st Division. 16th February 1884.

By his settlement dated in 1870, on the narrative that he had determined to found an institution "for the education and upbringing of orphan children of the age after mentioned belonging to or resident in the lower ward of Renfrewshire, and who are not chargeable to the parochial board," he directed his trustees to convey to the Provost and Bailies of Port-Glasgow, the Provost and Senior Bailie of Greenock, and the Sheriff-substitute of the lower ward of Renfrewshire, and their successors in office, as trustees, to be known as the Trustees of Carnegie Park Orphanage, his lands of Carnegie Park, and the residue of his estate.

The orphanage trustees were directed to hold the lands of Carnegie Park, and to accumulate the rents till the accumulations along with the residue of the estate amounted to £6000, and then to erect on the estate an orphanage sufficient to accommodate as many orphans between the ages of eight and fourteen as the yearly proceeds of the trust could maintain.*

* The provisions as to the class of orphans and the education to be given were,—“Quarto, The orphans to be admitted shall be natives of or residents for the period of not less than twelve calendar months in the lower ward of Renfrewshire previous to their application for admission, who have not been chargeable on any parochial board, whose parents were Protestants, and who have been brought up as such, . . . and such orphans shall not be admitted under eight years of age, and shall not be allowed to remain in the orphanage after they have attained fourteen years of age. Quinto, The orphans

No. 116.
Mar. 11, 1892.
Second Edinburgh and
Leith 493d
Starr-Bowkett
Building
Society v.
Aitken.

Mar. 12, 1892.
Trustees of
Carnegie Park
Orphanage.

No. 117. The deed provided,—“Septimo, While I have indicated in the foregoing articles generally the object I have in view, the said trustees of Carnegie Park Orphanage shall have full power, and I hereby authorise them, to make such rules and regulations for the working of the trust, superintendence of the orphanage, appointment of teachers, and nurses, and other officials, admission of orphans, and generally for carrying out my intentions as before indicated, . . . and such rules and regulations, so long as they are not subversive of the real object I have in view, shall be valid and effectual.”

Mar. 12, 1892.
Trustees of
Carnegie Park
Orphanage.

The residue of the testator's estate at his death greatly exceeded £6000, and the trustees erected an orphanage.

On 23d February 1892 the trustees of the orphanage presented a petition to the Court, in which they made the following statements:—“The funds at the disposal of the trustees were much larger than the testator had contemplated, and were amply sufficient for the support of a large number of orphans. The trustees accordingly erected two Cottage Homes, one to contain about thirty orphan boys and the other the same number of orphan girls. The present income of the trust is about £1250, and the expenditure last year was about £800. The homes were opened for the reception of orphans in January 1889, and every means taken of making known to the public the advantages of the institution. Notwithstanding the publicity given to the objects of the institution, the accommodation of the homes and the resources of the trust have not been taken advantage of to anything like the full extent. The number of orphan boys admitted since the opening of the homes is only thirteen and the number of orphan girls six. There are at present only ten boys and five girls in the homes. The homes are capable of accommodating about sixty boys and girls, and as the fixed expenses are nearly the same whether the homes are fully occupied or not, a largely increased number of children could be supported with the present income.

“The petitioners are satisfied that the present position of the charity is largely due to the fact that they are not entitled to receive orphans under the age of eight, or those who have been chargeable to any parochial board. It is found that in many cases where the relatives of orphan children have taken charge of them until they are eight years of age they are unwilling to allow them to enter the institution. Also, where children are left orphans under the age of eight they very generally become objects of parochial relief, and thereby become ineligible for the benefits of the institution. The age limit has thus been found to lead to the breaking up of families, which the friends and relatives are unwilling to do, and to the entire exclusion of the younger members from the benefits of the charity. The trustees have experienced the further difficulty in connection with the age of admission being fixed at so high a limit, viz., that the children in many cases having been neglected in their infancy have formed objectionable habits, of which it is very difficult to cure them, and which are apt to be communicated to the other children in the homes.

admitted to the orphanage shall be boarded, lodged, clothed, and educated in a plain and simple manner, such education to be confined to reading, writing, and arithmetic, but with regard to the boys, they shall be taught the cultivation of the kitchen garden in connection with the orphanage, and if thought prudent and for their advantage, they, or any of them, might be allowed to leave the house during the day for the purpose of learning a trade, . . . and as to girls, they shall, in addition to the ordinary education, be taught to sew, knit, and spin, and to cultivate a flower garden in connection with the orphanage, and such other branches as may make them honourable and useful in the world.”

"The petitioners are of opinion that were the age of admission reduced so that children of five years and upwards would be eligible for admission, the trustees at all times giving a preference to orphans of eight years of age and upwards, so long as they can be found in such numbers as to fill the homes, the institution would be much more largely taken advantage of, and the aims and wishes of the testator still efficiently carried out."

No. 117.

Mar. 12, 1892.
Trustees of
Carnegie Park
Orphanage.

The petitioners therefore craved the Court "to reduce the limit of age of orphans for admission to said institution from eight years to five years, and to authorise the trustees to receive into said institution children of the age of five years and upwards, the trustees at all times giving a preference to children of the age of eight years and upwards in the event of children of the latter age being found in sufficient numbers to fill said institution."

The petitioners referred to the following authorities—*University of Aberdeen v. Irvine*, July 20, 1869, 7 Macph. 1087, 41 Scot. Jur. 609; *McDougall*, July 29, 1878, 5 R. 1014.

LORD PRESIDENT.—I think the case made out by the petitioners is abundantly sufficient to justify us in doing what the petitioners propose. The truster directed his trustees to accumulate the funds left by him until they reached the sum of £6000, and then on that basis he proceeded to deal with these funds and appointed the trustees to put up an institution for the accommodation of children of a specified class between the ages of eight and fourteen. Now it has turned out that the truster's estate amounts not to £6000 but £40,000, and the trustees have erected a building capable of accommodating sixty children, and it is perhaps not surprising to find that, there being this redundancy of money over the estimated amount, it is now discovered that there are not a sufficient number of children of the specified ages to exhaust the benefit provided by the testator for their particular class. The trustees, we find, have from the opening of the institution admitted thirteen boys and six girls, and there are at present ten boys and five girls in the homes. It is therefore plain that to a large extent the intended benefaction has been unused. The trustees state that they have done their best to make known the benefits of the institution to the class for whom they were intended, and that they are not able, owing to the age limit imposed by the testator, to make full use of the estate made over to them. They therefore propose that the Court should reduce the age limit, and authorise them to receive into the institution children between the ages of five and eight years, but with the restriction that they shall only apply for the benefit of such children the surplus funds remaining after provision has been made for all children between eight and fourteen, as directed by the testator. Now, this appears to me to be a legitimate proposal, because it will merely lead to the application of the scheme to a larger number of the same class as the truster desired to benefit, and the restriction prevents any violence being done to the intentions of the testator. Mr Reid has also shewn that advantageous results may be expected from having the younger as well as the older children in the institution, but the salient feature of the petitioners' proposal, in my view, is that it only applies to the surplus funds remaining after the testator's intentions, as these are specifically expressed, have been fully carried out.

LORD ADAM.—I have no doubt that the proposal made by the petitioners is a very excellent one, and that, looking to the cases, especially the case of *The University of Aberdeen v. Irvine*, it is competent for the Court to do what is asked.

No. 117.

Mar. 12, 1892.
Trustees of
Carnegie Park
Orphanage.

LORD M'LAREN.—It is a general principle of charity law and administration that, where it is not possible to carry out the intentions of a testator in the precise manner directed by him, either from a failure in the objects of the charity, or from an increase in the trust-funds beyond the sum required for the prescribed purpose, it is within the power of the Court to direct that the funds shall be applied to other purposes as near as possible to those prescribed by the testator. There are traces of the application of this principle in some of the older cases, but in recent times it has been applied unequivocally in more than one important case. In addition to the cases cited to us, I may mention the case of the *Trinity Hospital*. That case was twice appealed to the House of Lords, and it was under a remit from the House of Lords on disposing of the first appeal that the Court of Session adjusted a scheme for the administration of the charity. Now, this scheme so far altered the purposes of the charity that the hospital was suppressed, and the pensioners instead of being maintained in an hospital received outdoor relief in the shape of annual pensions. This was a strong assertion of the principle of “*cy près*” administration, and as we may term it, the principle of approximation. The scheme adjusted by the Court of Session was taken to the House of Lords and was approved there—*Magistrates of Edinburgh v. M'Laren*, 8 R. (H. L.) 140.

I have no doubt in the present case that the power sought will be beneficially exercised, and substantially in accordance with the intentions of the testator. The removal of an age limit will in general be doing the least possible violence to the testator's intentions, because we are at liberty to suppose that if the funds available had been greater, the testator would have extended the limit.

LORD KINNEAR.—I have no doubt as to the expediency of the proposal made, or the power of the Court to give it effect.

THE COURT granted the prayer of the petition.

CARMENT, WEDDERBURN, & WATSON, W.S., Agents.

No. 118.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

THE PORT-GLASGOW AND NEWARK SAILCLOTH COMPANY, Pursuers
(Respondents).—*Ure—Salvesen.*

THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—
D.-F. Balfour—C. J. Guthrie.

Reparation—Railway—Fire caused by spark from engine—New type of engine in which old means of arresting sparks omitted.—The owners of a flax store near the line of the Caledonian Railway Company brought an action against the company for damages on account of the destruction of the store, which had been set on fire by a spark from one of the company's engines. The pursuers alleged that the engine was improperly constructed in respect that it had no “spark arrester.” The evidence shewed that spark arresters were in common use at that time, but in the case of engines of a modern type, such as the engine which caused the fire was, they had been discontinued, both because they impaired the efficiency of the engine and because other means were adopted of preventing the emission of sparks, which, as the defenders' witnesses—a number of locomotive engineers—alleged, were as efficacious as spark arresters; and it was proved that the use of spark arresters had been given up by most of the large English railway companies. The pursuers, on the other hand, adduced witnesses, who deposed that in their opinion spark arresters ought to be used in modern engines.

Held that it had not been proved that the defenders were negligent in using an engine which had no spark arrester, and therefore that they fell to be absolved.

Observed, per Lord President, that it is a rule fixed by a series of decisions that:

railway company is not liable in damages for a fire caused by one of its engines, No. 118. unless it is proved that the company was negligent.

Opinion, per Lord M'Laren, that railway companies are not under a legal disability to improve the efficiency of their engines, merely because such improvement may tend in some small degree to increase the risk of setting fire to adjacent property.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

Reparation—Railway—Contributory negligence.—A flax store was built near a railway, with no window or other means of lighting except a door facing the railway. The flax was set on fire by a spark from a passing train, when the door was open. *Held* that there was no contributory negligence on the part of the owner of the store.

Title to sue—Insurance.—A person whose property is injured by fire through the fault of another is not deprived of his title to sue by having his property fully insured.

On 7th October 1890 the Port-Glasgow and Newark Sailcloth Company raised an action against the Caledonian Railway Company, concluding for £12,000 as damages for the destruction by fire, on 5th June 1890, of a flax store belonging to the pursuers, and situated close to the defenders' Greenock line. The pursuers averred that the fire had been caused by a spark or cinder from one of the defenders' engines, and that the engine was not of proper construction, in respect that it was not fitted with what was commonly known as a "spark arrester," or with any efficient mechanical contrivance to prevent sparks from being emitted.

The pursuers pleaded ;—(2) The fire in question having been occasioned by the failure on the part of the defenders to use reasonable and proper appliances, precaution, and skill, in the use of their railway, the defenders are liable for the loss, injury, and damage thereby sustained.

The defenders denied the pursuers' averments, and stated further that pursuers were fully insured and consequently had no interest to maintain the action, and also that they had failed to take proper precautions to prevent damage to their works from the sparks of passing engines.

The defenders pleaded ;—(1) The said insurance companies having the chief interest in the subject-matter of this action and control over the proceedings therein ought to be ordered to sist themselves as pursuers. (4) Any loss which the pursuers may have sustained not having been occasioned by the fault of the defenders, they are not liable in any portion of the sum concluded for. (5) The said fire having been caused or materially contributed to by the negligence of the pursuers, they are not entitled to recover damages from the defenders.

On 6th December 1890 the Lord Ordinary (Kyllachy) repelled the first plea in law for the defenders and allowed a proof.

The evidence established, in the opinion of the Court and the Lord Ordinary, that the fire had been caused by a spark from the defenders' engine No. 85, which passed the pursuers' store on the day in question with the 11.20 A.M. passenger express from Glasgow to Greenock. Engine No. 85 was an engine of a new type, having been built in 1888 from designs adopted by the company in 1885. The pursuers did not dispute that No. 85 was a very powerful engine, and in every respect efficient except in the single particular that it had no spark arrester. The spark arrester is a netting of iron which is placed in the smoke-box of the locomotive, with the effect of preventing the emission of sparks to a greater or less extent according to the size of the meshes and of the sparks. Spark arresters were in common use in engines of older types, but they were discarded by the defenders in their modern engines, including those of the type of No. 85, and most of the large English railway companies had likewise given up the use of spark arresters. Mr Drummond, formerly

1st DIVISION.
Ld. Kyllachy.

No. 118. the defenders' locomotive engineer, deposed that spark arresters impaired the efficiency of the engine by interfering with the force of the blast, and that consequently what is called the "vortex blast" was devised, which was not only more powerful than the old "solid" blast, increasing the power of the engine, but was also much more equable and continuous, so that it had little or no tendency to stir up the fuel in the furnace and thereby cause cinders to be emitted. There was thus in Mr Drummond's opinion no need for a spark arrester when the vortex blast was used, as it was in No. 85, seeing that few if any cinders were stirred out of the furnace. This view was corroborated by the evidence of the locomotive engineers of several of the large English railway companies. None of these witnesses had ever seen or heard of an engine like No. 85 having a spark arrester, and they all thought that to fit one into it would impair its power and speed.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

The pursuers adduced several engineers who spoke to experiments they had made several years before. They were of opinion that the vortex blast made the use of a spark arrester more necessary than when the old form of blast was used, the vortex blast being so much more powerful. These witnesses were of opinion that a spark arrester might be fitted on to an engine like No. 85 without in any way impairing its efficiency, but they had never seen or heard of such a thing being done. The pursuers also adduced some witnesses, engine-drivers and others, who stated that they had seen No. 85 or sister engines emitting a large number of sparks.

The evidence bearing on the defenders' plea of contributory negligence was to this effect:—The pursuers' store was about 29 feet from the defenders' line of rails; it had no window, and the only means of lighting it was by opening doors, one of which was on the side next the railway. On the day in question one of the pursuers' servants went into the store to sort flax, leaving that door open; while so engaged a train passed, and shortly afterwards he observed the flax on fire.

On 13th August 1891 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the fire in question was due to the fault of the defenders, and that the defenders are liable for the damage thereby caused. And in respect that parties are agreed that the amount of damage shall be assessed by an accountant, to be named by the Lord Ordinary, remits . . . and grants leave to reclaim."*

* "OPINION.— . . . The parties were not at issue as to the law. Assuming that the damage was caused by sparks discharged from one of the defenders' engines, it was agreed that the defenders were liable, unless it appeared that they had used the best means known and practicable for obviating the danger, or, otherwise, that the pursuers were (in the requisite sense) guilty of contributory negligence.

"The first question, accordingly, is, whether the pursuers have proved that the fire was, as they allege, kindled by a spark from one of the defenders' engines. I am of opinion that they have. The evidence, I think, leaves little doubt that the flax in the pursuers' store was ignited by a spark from the defenders' engine No. 85, which passed the store about 11.51 A.M. on the morning in question drawing the 11.20 express from Glasgow to Greenock.—(His Lordship then examined the evidence on this point.)

"I must therefore hold it proved that the engine No. 85 did, on the occasion in question, discharge dangerous sparks, which reached the flax in the pursuers' store at a distance of about 29 feet from the rails; and I am further obliged to hold, upon the evidence, that that engine was and is in the habit of discharging dangerous sparks. There is a concurrence of testimony to that effect which, I think, is explained away.

"Now, that being so, a considerable *onus* is thrown on the defenders, and I am afraid they hardly discharge themselves of that *onus* by leading evidence.

The defenders reclaimed, and argued;—(1) Assuming that the fire had been caused by a spark from engine No. 85, the defenders, nevertheless, were not liable. Railway companies having statutory authority to bring fire into the neighbourhood of combustible articles were not liable for any damage caused by the exercise of this authority, unless it was proved that they had neglected some reasonable precaution. The precautions thus demanded of a railway company must be consistent with the carrying on of their business in a reasonable way. Railway companies were to use the best means of carrying on their business known to practical science at the time, and they were not to refuse to use new inventions merely because some slight increase of danger might result, if, as a whole,

No. 118.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

the effect that the engine in question was of the newest and best construction . . . I confess I am not satisfied on the evidence that the engine No. 85 and the other engines of its class are so constructed as to contain the best known and practicable arrangements for preventing the emission of sparks. Differing in this respect from the older class of engines, they contain no 'spark arrester' in their smoke-box; and assuming in their favour (what, however, is matter of dispute) that their vortex blast arrangement does not tend to increase the risk of sparks, or even that its associated arrangements tend to diminish that risk,—still the sparks *ex hypothesi* issue, and issue of such size as to be dangerous; and that being so, I am not, I confess, satisfied upon the evidence that the spark arrester if used would not at least have reduced that risk. Neither have I been convinced that its introduction would have materially interfered with the working of the engine or been in any other respect injurious. It is true that a majority of the great railway companies in England have ceased to use 'spark arresters.' But they are still largely used; and having given my best attention to the views of the defenders' witnesses, I have been unable to see sufficient reason why they should not continue to be used, or why, if used, they should not go at least a considerable way to obviate the risk of fire.

"It only remains to consider the question of contributory negligence, and here I am bound to say that the situation of the pursuers' store, and the arrangements of the building, were certainly not such as to minimise the risks arising from sparks thrown by passing engines. The store was only 29 feet from the railway. There were doors on the side next the railway, and there being no window in the roof (as there might have been), it was sometimes necessary (as on the occasion in question) to open one of these doors for the purpose of obtaining light. All this was certainly the reverse of cautious. But, on the other hand, I do not know that the pursuers were bound—because of the risk of the negligent discharge of sparks from the defenders' engines—to forego the full use of their ground, or to depart from what they considered the most convenient arrangements for obtaining access to, and for lighting their flax store. In other words, I doubt whether it can be imputed to them as fault that they took their chance of the defenders doing their duty. But in any case, the law—as I understand it—is, that in questions of contributory negligence *causa proxima et non remota spectatur*, and it is impossible to say that the position or arrangements of the pursuers' store formed in any proper sense the direct or proximate cause of this fire. The defenders could certainly, if I am right, have by ordinary care avoided inflicting the injury to which the pursuers, perhaps somewhat rashly, exposed themselves, and, according to the authorities, that is sufficient. See *Ridley v. L. and N.-W. Railway Co.*, L. R., 1 App. Cases, 754, 759; *Rooney v. Allans*, 10 R. 1224; *Florence v. Mann*, 18 R. 247.

"On the whole, therefore, I consider that my judgment must be for the pursuers, and I have only to add that I am not able to see that the fact of the pursuers being covered, or nearly covered, by insurance makes any difference in their position. It may be that they are really suing on behalf of the insurance companies, but that is after all merely matter of process, and in the present case, where there is no question of responsibility for costs, I do not see that anything could be gained by sisting the insurance companies as pursuers."

No. 118.
Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

the invention conduced to the more efficient working of the railway.¹ In the present case, the evidence shewed that engines like No. 85 did not require a spark arrester, and that to fit them with one would impede their power and speed. (2) The pursuers were guilty of contributory negligence in keeping such a combustible material as flax so near a railway under the circumstances disclosed in the proof. (3) The pursuers had no title to sue, because they had no interest.

Argued for the pursuers ;—In not using a spark arrester in No. 85, the defenders were not neglecting to take advantage of a new, and it might be comparatively untried invention ; they were throwing aside a precaution which had for twenty years been regarded as essential. The *onus* was upon them to shew that it was not necessary, or that they had substituted something equally efficient.² This they had failed to do. It was nothing to the point to say that the absence of a spark arrester increased the power and speed of the engine. That was all a matter of money, and if, for the sake of increased power and speed, the defenders chose to dispense with spark arresters, they must pay the penalty. (2) The pursuers were not guilty of contributory negligence.³ (3) They had a title to sue. The authorities shewed this.⁴

At advising,—

LORD M'LAREN.—This is an action instituted for the recovery of damages from the railway company on the alleged ground that the pursuers' flax store was destroyed by fire caused by a spark from a locomotive engine. Two questions were argued ; the first, whether the fire was in fact caused by a spark from the defenders' engine, and secondly, whether in the circumstances the defenders are liable to make compensation for the damage caused by their involuntary act.

On the first question I believe that your Lordships are in agreement with the Lord Ordinary that the pursuers' store was set on fire by a spark from the engine No. 85, which passed the store about 11.51 on the morning of 5th June 1890, drawing the 11.20 passenger express from Glasgow to Greenock.—(His Lordship then considered the evidence on this point.)

The next question in the case is the criterion of liability or responsibility on the part of the company. The Lord Ordinary puts it that the defenders are liable, unless it appears that they had used the best means known and practicable for obviating the danger. This definition is in accordance with the authorities on this subject, but like many legal propositions it needs explanation and

¹ Aldridge v. Great Western Railway Co., 1841, 3 Man. & Gr. 515 ; Vaughan v. Taff Vale Railway Co., 1860, 5 H. & N. 679 ; Jones v. Festiniog Railway Co., 1868, L. R., 3 Q. B. 733 ; Smith v. London and South-Western Railway Co., 1870, L. R., 6 C. P. 14 ; Murdoch v. Glasgow and South-Western Railway Co., May 17, 1870, 8 Macph. 768, 42 Scot. Jur. 418 ; Wisely v. Aberdeen Harbour Commissioners, Feb. 2, 1887, 14 R. 445 ; The King v. Pease, 1832, 4 Barn. & C. Ad. 30.

² Ford v. London and South-Western Railway Co., 1862, 2 F. & F. 730 ; Foxmantle v. London and North-Western Railway Co., 1861, 31 L. J., C. P. 122 ; Piggot v. Eastern Counties Railway Co., 1864, 3 C. B. 229.

³ Cases cited by the Lord Ordinary, and Smith v. Baker & Sons, L. R., 1891, App. Cases, 325.

⁴ Delaurier v. Wyllie, Nov. 30, 1889, 17 R. 167 ; Simpson v. Thomson, Dec. 13, 1877, 5 R. (H. L.) 40, per Lord Chancellor Cairns, p. 42 ; Bradburn v. Great Western Railway Co., 1874, L. R., 10 Exch. 1.

reference to the facts of the case which I am about to state. It is in evidence No. 118. that with the view of lessening the risk of fire it was at one time usual to put into the smoke-box of the locomotive below the chimney a netting or "grid" of iron, which was called a spark arrester, and in engines of the older type this appliance is still in use. The spark arrester would of course have the effect of intercepting such sparks or cinders (I shall term them) as were too large to pass through the grating. It was not a complete protection against fire, and it is the case of the company that the ejection of sparks is more effectually prevented by improved methods of regulating the draught from the furnace than by the cruder mechanical method formerly in use. There can be no doubt that very great attention and skill have been directed to the object of the production of an equable draught in the engine, and there is a very strong body of evidence to the effect that while the chief object of such improvements is the attainment of high speed, they also have the effect of leaving the furnace comparatively undisturbed, and thereby reducing the quantity of solid material which is carried up the chimney. It is also the opinion of all the witnesses who have experience in the construction of engines of the best modern construction, that the introduction of a grid into the chimney or smoke-box would nullify or most seriously interfere with the efficiency of the draught arrangements. For this reason it appears that in engines of the new type the grid has been discarded, not only by the Caledonian, but by all the great railway companies of England. The opinion of the companies' engineers is that the arresting of sparks is better accomplished by providing an equable draught through the engine than by trying to stop the cinders in their passage, and they all agreed that the old spark arrester cannot be applied to engines of the new type. Their opinion is so far verified by this consideration that while it is the fact that the so-called "spark arrester" has for some years gone almost entirely out of use, there is no evidence, and no suggestion, that in consequence of its disuse fires have become more frequent.

I shall consider the evidence on this subject a little more in detail, but before doing so, let me ask, supposing the case of the company on this head to be well founded, what is the bearing of these facts and opinions on the liability of the Caledonian Company? Is the company, these facts and opinions notwithstanding, bound to go on using the old spark arrester, or to pay for the fire damage which it may be supposed will sometimes occur when even all practicable means are used to prevent it?

The argument for the pursuers was to this effect: Admitting that by the new construction of furnaces, and the introduction of the vortex blast, the engines are greatly improved as engines, and their speed and efficiency increased, they say that one effect of these improvements is to increase the quantity of sparks ejected by the engine, and therefore the company is liable. One difficulty which the argument immediately suggests consists in the absence of any standard frequency of spark emission to which the company is to conform. It is tacitly assumed that under no circumstances of speed, or weight to be carried, is an engine to be permitted to send out a greater quantity of sparks than were emitted by the smaller and slower and less efficient engines that were in use in the infancy of the railway system. But then the theory of the decisions is that the Legislature by authorising the use of steam-power without limitation as to the power of the engines or the speed of locomotion has impliedly indemnified the company against the consequences of the use of such engines, provided they are of the best construction, and that the proper safeguards are

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

No. 118.

Mar. 15, 1892.
 Port-Glasgow
 and Newark
 Sailcloth Co.
 v. Caledonian
 Railway Co.

used for minimising the risk of fire-damage. These safeguards may be different according to the type of engine in question, and I cannot hold, consistently with the decisions, that railway companies are under a legal disability to improve the efficiency of their engines, because such improvement may in some small degree tend to increase the risk of setting fire to adjacent property. Nor would a company, in my opinion, be bound to reduce the speed of its trains if someone should discover a better mode of arresting sparks, which could only be used with a speed of say twenty miles an hour. On the other hand, it may be fairly enough maintained that considerations of safety to landowners are not to be sacrificed altogether to the demand of the travelling public for express speed. The question is one of degree, in which common sense rather than legal refinement must be the guide. It is certainly most legitimate to refer to past experience, and to known appliances such as the old spark arrester, but not as constituting an absolute standard to which the railway companies are bound to conform. It has not been shewn that the quantity of sparks emitted by engines of the new type is sensibly greater, or that the risk of fire from them is of a different order of magnitude from the risk which existed when engines of the old type were alone used. If such a case could be established it might be necessary to consider what are the limits of the exemption from pecuniary responsibility which is claimed by railway companies under the decisions referred to by the Lord Ordinary. But for the purposes of the present case it may be sufficient to say that the company is within the exemption where these two conditions concur—first, that the means used for preventing the communication of fire are the best known and attainable with reference to the class of engine in use; second, that the risk of fire from such engines is not of a different order from that attending the use of engines of the class employed when the railway companies got authority from Parliament to use locomotive power.

I will now briefly indicate what I understand to be the means used in the engine No. 85 for obviating the emission of sparks. These, as I collect from the evidence, are substantially identical with the means and construction which are used by the leading railway companies in England. The furnace is surmounted by a brick arch, and the supply of air which feeds the furnace is regulated by a deflector. The gases or fumes from the furnace are led through a very large number of tubes, which are all kept clean and efficient throughout the journey, and the exhaust steam passes into a wide chamber, and is there sent into the chimney through an annular opening, while the products of combustion are led into the centre of the chimney by a tube placed inside the annular tube, which carries away the exhaust steam. It is explained by Mr Drummond, formerly the locomotive superintendent of the Caledonian Company and the designer of this engine, that each and all of these mechanical arrangements tend to lessen the production of sparks. The object in view is, as far as possible, to avoid disturbing the cinders in the furnace by the effect of pulsations or an intermitting draught. The air is supplied to the furnace through a regulated opening, and is partially heated before mixing with the flame. The brick arch stops and throws down the larger cinders that may be carried up in the flame, and attracts and burns up the smaller ones. By the combined effect of the wide chamber for the reception of the exhaust steam, and of the various blast arrangement, by which the steam and the gases are carried in separate currents into the chimney, the flame is said to be carried through the tubes and up the chimney in a continuous equable current, and the cinders in the furnace

are not disturbed by the pulsations attending the escape of steam, as was the case in the engines of the old pattern. In engines of the old pattern by the effect of these pulsations such a quantity of ash was driven through the tubes that at the end of a long journey as many as one-fourth of the tubes of the tubular boiler were found to be completely choked by the accumulation of ash, and this irregularity again rendered necessary a sharper blast, thereby increasing the emission of sparks. In the new engines the tubes do not get choked with ashes. The pursuers say that this is because the ashes are carried up the chimney; but it is not easy to see why this should be the result of the more equable blast which is admittedly obtained in engines of the improved construction. The corroborative evidence includes that of the locomotive superintendents of the London and South-Western, the Midland, the Great Western, the London and North-Western, the Caledonian, and the North British Railways. These are men the business of whose lives is the designing and working of locomotives. The improvements to which they speak were not made for the special purpose of lessening the risk of fire, but it is impossible to read their evidence without seeing that the means which have been devised for ensuring more perfect combustion and more equable draught with a view to efficiency of speed and economy of fuel, are also the best known and practicable means of preventing the discharge of solid particles through the chimney of the engine. These gentlemen are all of opinion that the grid cannot be used with the present type of engine because of its tending to interfere with the regular and steady current of flame, which is a necessary accompaniment of the new system. Against such evidence there is the opinion of more than one witness of ability and science, but on such a subject I think the opinion of practical engineers is the best opinion. It may be said that the practical witnesses are all railway men, but then it is their interest to make these engines as perfect as possible; they say that the escape of sparks cannot be altogether prevented, and that their way is the best way. No one has come forward to shew a better way; and while the pursuers' witnesses say that there is no mechanical difficulty in introducing a grid into the new type of engine, they do not satisfactorily meet the defenders' evidence, which is to the effect that the grid would render useless the other arrangements which in a different way tend to the same result of preventing sparks.

My opinion on this engineering question is, that the defenders have proved that they use the best known and practicable means available in engines of the type of No. 85 for preventing the emission of sparks. I am satisfied that in fact the engine 85 was not so constructed as to send forth sparks in excess of what are usually and unavoidably produced by engines running at a high speed. For these reasons I propose that the interlocutor should be recalled, and the defenders absolved from the action.

LORD ADAM and LORD KINNEAR concurred.

LORD PRESIDENT.—Were it not for the importance of this case and the anxiety with which it has been argued, I should have said no more than to express my concurrence, being well content with Lord M'Laren's exposition of our judgment.

(On the question of fact as to the cause of fire—[Here his Lordship referred to the evidence upon that point, stating that he agreed with the view taken by the Lord Ordinary].

No. 118.

Mar. 15, 1892.

Port-Glasgow

and Newark

Sailcloth Co.

v. Caledonian

Railway Co.

No. 118.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

On the more generally important question which arises, assuming engine No. 85 to have caused the fire, the Lord Ordinary has not explicitly formulated what he takes to be the issue to be tried, but he says several things which indicate that he has considered the question from a standpoint different from that which is adopted by your Lordships.

He begins by holding, upon the evidence, that No. 85 "was and is in the habit of discharging dangerous sparks," and goes on to say, "Now that being so, a considerable *onus* is thrown on the defenders." If this means that this particular engine differs for the worse from other engines in regard to the sparks it throws, I think this is not made out. There is nothing substantial to shew that the observers who noted the proceedings of No. 85 would not have seen just the same things if they had watched any other engine with or without a spark arrester. If, on the other hand, the Lord Ordinary means that if any engine or all engines be in the habit of discharging dangerous sparks (meaning thereby sparks which do not go out on the way to the ground), then the *onus* is on the company,—I think that proposition is irreconcilable with the law as it is now settled.

The question of *onus* is highly important to the stability of the interlocutor, for the Lord Ordinary ultimately decides against the defenders on the ground that they have not convinced him that the type of engine which is prevalent on most of the principal English and Scottish railways is so constructed as to contain the best known and practicable arrangements for preventing the emission of sparks. And what this means is made more manifest when his Lordship says in the last sentence relating to this subject,—“I have been unable to see sufficient reason why spark arresters should not continue to be used, or why if used they should not go at least a considerable way to obviate the risk of fire.” From this I gather that the Lord Ordinary does not pronounce either upon the question (unsolved by experience) whether the spark arrester is practicable in the new engines or on the other question (which is equally problematical) whether, if it could be so combined, it would do much or any good. Nothing therefore but the initial *onus* has led to his Lordship's decision.

Now, I must say that I cannot see how this can be supported. I do not think that our duty is to discuss these complicated questions of mechanism as if we had now to construct a safe engine, and to conjecture whether combinations, hitherto untried, would or would not be better than those in use. We have got to say whether the pursuers have proved that the defenders are negligent because they use this type of engine.

I take the broad facts of the case. This type of engine (of which No. 85 is simply a specimen) is, as I have said, prevalent on most of the principal lines. It has been in use for many years, and there has been abundant opportunity of judging whether more fires occur where it is used than where the spark arrester is in vogue. There is no evidence whatever of the affirmative. Therefore, when the defenders got this engine, they were simply getting the best engine to be had without anything to suggest that it was dangerous. If, going further back, we ask whether the question of safety was considered by the constructors of these engines, I say the evidence shews that it was considered and decided in favour of the new system, and we find that the skilful mechanics who advised the company and are examined as witnesses give strong reasons for their choice. It may be that ingenuity may in the future combine the spark arrester with the new system without spoiling the efficiency of engine

all I can say is that this has not yet been done, and it forms no part of the existing knowledge available to railway companies. At present it is, to say the least, a moot point whether the thing is practicable. Because the defenders have not demonstrated it to be impracticable, the Lord Ordinary has found them liable.

No. 118.

Mar. 15, 1892.
Port-Glasgow
and Newark
Sailcloth Co.
v. Caledonian
Railway Co.

I deem this quite inconsistent with the series of decisions, of which *The King v. Pease*¹ and *Vaughan v. The Taff Vale Railway Company*² are leading instances, approved by the House of Lords in *Hammersmith v. Brand*.³ The consequences of these decisions are no doubt serious and striking, but the rule fixed by them is that if locomotives set fire to property, the railway company are not liable unless they are proved to have been negligent. It is true that such negligence may be in the construction of the furniture or the conduct of the engine—*Freemantle v. London and North-Western Railway Company*,⁴ and this opens responsibilities which would not be discharged by a facile acceptance of any engine proposed by advisers who necessarily are not stimulated by any independent regard to the safety of the property of third parties. Still, negligence there must be, in a fair sense of the term. The facts of this case seem to me to disclose none.

I have only to add that I understand we all agree with the Lord Ordinary in rejecting the arguments founded on account of contributory negligence and on the insurance of the premises which were destroyed.

THE COURT recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

W. B. RAINNIE, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

THE COUNTY COUNCIL OF THE COUNTY OF LANARK, Pursuers (Respondents). No. 119.

—C. J. Guthrie—Dundas.

THE LORD ADVOCATE, Defender (Reclaimer).—Mackay—Young.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

Valuation-roll—Expenses connected with printing roll—Liability of Crown—Valuation Act, 1854 (17 and 18 Vict. cap. 91), secs. 3, 18—Valuation Act, 1857 (20 and 21 Vict. cap. 58), sec. 1—Registration Amendment Act, 1885 (48 Vict. cap. 16), sec. 12.—When the Assessor under the Lands Valuations Acts is the Surveyor of Inland Revenue for the district, and the County Council has resolved, under sec. 12 of the Registration Amendment Act, 1885, that the Valuation-roll shall be printed, the extra trouble caused to the Assessor and his clerks in preparing and revising the roll for the press falls to be paid for by the Inland Revenue.

County Council—“Regulation”—*Local Government Act, 1889 (52 and 53 Vict. cap. 50), sec. 83.*—*Held* that a resolution of the County Council to have the Valuation-roll printed is not a “regulation” requiring the approval of the Treasury in the sense of the 83d section of the Local Government Act, 1889.

ON 21st October 1890 the County Council of the County of Lanark resolved, in virtue of the provisions of the Registration Amendment (Scotland) Act, 1885,* that the Valuation-roll of the county should be printed for a period of five years. The Commissioners of Supply of Lanark-

1ST DIVISION.
Ld. Wellwood.

¹ *The King v. Pease*, 1832, 4 B. and Ad. 30.

² *Vaughan v. Taff Vale Railway Co.*, 1860, 5 H. and N. 679.

³ *Hammersmith Railway Co. v. Brand*, 1869, L. R., 4 Eng. and Ir. App. 171.

⁴ *Freemantle v. London and North-Western Railway Co.*, 31 L. J., C. P. 12.

* By the Registration Amendment (Scotland) Act, 1885 (48 Vict. cap. 16),

No. 119. shire took advantage of the Lands Valuation (Scotland) Act, 1857, sec. 1,* and appointed the surveyors of taxes in the county to be the county assessors, and the expense of making up the Valuation-roll was defrayed by the Inland Revenue department; but after the County Council had entered into a contract for the printing of the roll, the Comptroller of Inland Revenue, at Edinburgh, on 10th July 1891, issued instructions to the Lanarkshire assessors, as surveyors of taxes, not to supply a manuscript copy of the roll to the printers until the County Council paid the Inland Revenue a sum of £80, which sum was represented to be the extra expense caused to the Inland Revenue Department in consequence of the extra work devolving on the assessors and their clerks through the first printing of the roll. The County Council repudiated liability for this sum, but ultimately, in consequence of the urgent requirements of the statutes, paid it under protest on 27th August, and the manuscript of the roll was thereafter delivered to the printers in portions as they required it.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

The Inland Revenue having refused to repay the £80, the County Council, on 18th November, brought an action against the Lord Advocate, as representing the Board of Inland Revenue, concluding for decree for £80, with interest from 27th August 1891.

The pursuers pleaded, *inter alia*;—(1) The Surveyors of Taxes for the county of Lanark, as Lands Valuation Assessors for said county, being bound, in terms of the Acts 17 and 18 Vict. c. 91, and 20 and 21 Vict. c. 58, to make up the Valuation-roll of the county, the Commissioners of Inland Revenue were not entitled to require payment of the sum sued for as a condition of their doing so. (2) The pursuers having resolved that the Valuation-roll should be printed, the surveyors, as assessors

sec. 12—which was substituted for the Lands Valuation Amendment Act, 1867 (30 and 31 Vict. cap. 80), sec. 10—it was enacted,—“It shall be lawful for the Commissioners of Supply of any county, or the magistrates of any burgh, to resolve at any meeting of their number, ordinary or special, duly called, and by a majority of those attending and voting, that the Valuation-roll of such county or burgh shall be printed for any period of years not exceeding ten, and it shall be lawful for such commissioners or magistrates to enter into contracts for printing the same, and the expenses of such printing shall be deemed to be part of the expenses of making up such roll, and shall be assessed for and levied accordingly.”

* By the third section of the Valuation Act of 1854 (17 and 18 Vict. cap. 91), sec. 3, the Commissioners of Supply are empowered to appoint one or more fit persons to be assessors or assessor for the purposes of the Act, and by section 18 to defray the costs and expenses of making up Valuation-rolls by levying assessments for the same.

By the Lands Valuation (Scotland) Act, 1857 (20 and 21 Vict. cap. 58), sec. 1, it is enacted,—“1. It shall be lawful for the Commissioners of Supply of each county, and the magistrates of each burgh in Scotland respectively, if they shall think fit, to appoint the officer or officers of Inland Revenue having the survey of the income-tax and assessed taxes within such county or burgh, to be the assessors or assessor for the purpose of the said Act, and such officer or officers when so appointed, as long as such appointments remain unrecalled, shall in all respects and for the purposes stand in the place of, and shall have, use, exercise, and perform all the powers and duties of the person or persons who the said commissioners and magistrates respectively are authorised to appoint for the like purposes, under or by virtue of the third section of the said Act; and in such case the expense attending the making up of Valuation-rolls by such officer or officers shall be defrayed by the Commissioners of Inland Revenue, or as the Commissioners of Her Majesty's Treasury shall direct in the behalf.”

foresaid, were bound to supply a MS. copy of the roll for the use of the printer, and to revise the proof print, without requiring from the pursuers the payment of the said sum. No. 119.

The defender pleaded, *inter alia*;—(1) The printing of the Valuation-roll and the work connected therewith being no part of the duty of surveyors of taxes as assessors in making up the roll, the payment required for their services on that account was properly and legally charged. (3) The direction given by the pursuers to print the roll is subject to the approval of the Treasury,* and in respect that the Treasury would insist on remuneration as a condition of their approval, the claim which is now made is untenable.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

On 12th February 1892 the Lord Ordinary (Wellwood) pronounced an interlocutor repelling the defences, and decerning against the defender in terms of the conclusions of the summons.†

* By the Local Government Act, 1889 (52 and 53 Vict. cap. 50), sec. 83, subsec. 3, it is provided that, "where the assessor is an officer of Inland Revenue, any regulations made by the County Council with respect to his duties shall be subject to the approval of the Treasury."

† "OPINION.—(After stating the circumstances and quoting the first section of the Valuation Act, 1857)—It will be observed that this section contains important and clear provisions in regard to the duties of an officer of Inland Revenue when appointed Valuation Assessor, and the mode in which the expense of making up Valuation-rolls shall in such a case be defrayed. The officer of Inland Revenue is to perform without qualification all the duties incumbent on any other assessor appointed by the Commissioners of Supply; and the whole expense of his making up the Valuation-roll, which would otherwise have been defrayed by assessment, is, without qualification, to be defrayed by the Commissioners of Inland Revenue or the Treasury. The arrangement thus made was advantageous to both departments, and I think it may safely be assumed that the Treasury obtained a sufficient equivalent for the expenses which they undertook.

"Two views may be taken of the expenses represented by the £80 now sued for. They may be regarded (1) as part of the expense of printing, or (2) as representing additional expense and trouble caused by the pursuers resolving that the roll should be printed. The latter view is the more favourable to the defender, because it does not necessarily involve liability for the printer's account. I shall consider it first.

"1. If the sum sued for is not held to be part of the expense of printing, then it is simply a part of the expense of making up the Valuation-roll, which, if the assessors had not been officers of Inland Revenue, the pursuers would have had power to defray by assessment, apart from the provisions of the Act of 1867 and the Act of 1885. Having statutory authority to print the roll, they would have been entitled to order their assessors to make it up on that footing, and, if necessary, they could have assessed for the additional expense, if any.

"If that be so, then under the first section of the Valuation Act of 1857 the officer of Inland Revenue, acting as and charged with all the duties of an assessor, would have been bound to obey such lawful orders given to him by the Commissioners of Supply, and the additional expense, if any, would have fallen upon the Inland Revenue Department.

"2. This may perhaps be a narrow ground of judgment. I am prepared however to hold, if necessary, that even if this additional expense is to be considered part of the expense of printing the roll, that expense must be borne, not by the pursuers, but by the Department of Inland Revenue or the Treasury. This is in accordance with the express words of the statutes. Under the Act of 1854 the Commissioners were empowered to defray the expenses of making up Valuation-rolls by assessment. The Act of 1857 throws that on the Commissioners of Inland Revenue where their officer is assessor. By the Acts of

No. 119.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

The defender reclaimed, and argued ;—(1) The present action did not directly raise any question of liability for the printer's account, but the defender maintained that neither the cost of actual printing nor the extra trouble caused to the assessors by the printing fell to be paid for by the Inland Revenue Department. The duty of the assessors, as representing the Inland Revenue, ended when they supplied a manuscript Valuation-roll, which was all that the Valuation Act of 1857 contemplated. It was true that the Registration Act of 1885, in empowering the Commissioners of Supply to print the roll, provided that the expenses of the printing should be deemed to be part of the expenses of making up the roll; but that could not be construed to impose the liability for the expenses of the printing, or in connection with the printing, on the Crown, for a statute was not to be held to impose a burden on the Crown unless it imposed it expressly, and here the statute expressly said that the cost of printing was to be raised by assessment. The case for the pursuers would have been stronger under the Act of 1867, for that Act did not empower the Commissioners of Supply to enter into contracts for printing, and the

1867 and 1885 it is provided that the expense of printing shall be deemed to be part of the expenses of making up such roll. No doubt it is added that the expense of printing shall be assessed for and levied accordingly, and it is also true that the latter enactments do not refer to the Act of 1857. But this is not material, because the first section of that Act, as I read it, simply provides that if the Commissioners appoint an officer of Inland Revenue as assessor, he shall come in the place of and perform all the duties which at the time any other assessor would have had to perform, and that the 'expense attending the making up of Valuation-rolls by such officer,' whatever it may be, shall be defrayed by the Commissioners of Inland Revenue or the Treasury. That enactment not having been repealed or modified must, I think, receive effect.

"If the defender's contention were correct it would involve a double account. The department of Inland Revenue would have to pay the expenses of making up the Valuation-roll, in so far as they could be distinguished from the expense of printing and the additional labour rendered necessary in connection with printing, while the pursuers would have to levy an assessment for the rest. I find no warrant in the statutes for any such division of the accounts. On the contrary, the statutes contemplate that the expenses of making the Valuation-roll shall be indivisible, and shall fall to be defrayed, either wholly by assessment or wholly by the Commissioners of Inland Revenue or the Treasury.

"The defender also founded upon section 83, subsection 3, of the Local Government Act, 1889, 52 and 53 Vict. cap. 50, which provides that any regulations made by the County Council with respect to the duties of the assessor when he is an officer of Inland Revenue shall be subject to the approval of the Treasury. I do not think, however, that the orders given by the pursuers in connection with the preparation of the printed roll can be regarded as a regulation in the sense of this clause. They had statutory authority to order the Valuation-roll to be made up and printed, and in instructing their assessors to prepare the roll and revise the proofs they were not, I think, issuing regulations but giving orders for the performance of certain new, it may be additional, duties, which they were empowered by statute to impose on the assessors.

"If this defence were well founded the preparation of the roll might be stopped at any moment, until the County Council succeeded in satisfying the Treasury as to terms.

"In conclusion, I would only say that I hope the matter in dispute, which is really a small one, may in the public interest be adjusted. Although the expense of printing the roll for the first time may be considerable, the advantage in future years to all concerned will be great, and will no doubt compensate for any additional work and expense which may have been rendered necessary during the first year."

expense of printing was there declared to be part of the expense of No. 119. making up the roll, in terms of the 18th section of the Act of 1854. (2) The resolution of the County Council to print the roll, in so far as it imposed a duty on the assessors, was a "regulation" in the sense of the 83d section of the Local Government Act of 1889, and required the sanction of the Treasury, which had not been obtained.

Mar. 15, 1892.
County of
Council of
Lanarkshire v.
Lord Advocate.

The pursuers were not called on.

LORD PRESIDENT.—I think this is a perfectly clear case.

By the Valuation Act of 1854 the duty of making up the Valuation-roll in each county or burgh is imposed upon the local authority for the county or burgh. They are authorised, for the purpose of making up the roll, to appoint an assessor whom they are to remunerate, and for whose remuneration, along with the expense of making up the roll, they are authorised to impose a rate, half on owners and half on occupiers. That Valuation-roll, as has been declared by judgment of this Court, was available for local taxation, and accordingly being a roll for local taxation, it was prepared by the local authority and the cost borne by local rates. But as experience grew, it was observed by the Legislature that there was an inconveniency in there being imperial rates on owners and occupiers, and local rates on owners and occupiers, while the machinery for the assessments was different in the one case from the other; and accordingly—there being a double method in existence causing double cost and creating some of the embarrassments which necessarily would arise from want of uniformity in the standard of valuation for local rates on the one hand and imperial taxes on the other—in 1857 it was provided that if any local authority thought good to appoint as their assessor the Surveyor of Taxes for the district, then by way of return for their, to a certain extent, parting with the complete latitude of their choice, they should have the expense of making up the roll borne by the Inland Revenue. The plain English of the Act of 1857 is, that if any local authority did not exercise its right of selecting a different assessor—for it was still in their power to exercise that option—and appointed the Surveyor of Taxes for the district, they should be relieved of the expense of the roll. But that was optional, and accordingly, as a matter of course, the Act of 1857 left standing the whole machinery by which the local authority was provided with the power of levying rates to meet the expense of what was the primary type of case—the case where they had an assessor of their own.

Now, as time went on, some counties and some burghs exercised this power and others did not. We have heard I think to-day—at least it is matter of common knowledge—that now that the system has developed, and the advantages of combining the offices are sufficiently seen, the great majority of the local bodies have the surveyors of taxes for their assessors, and in 1867 it was found that it was convenient and desirable that the local authorities should be authorised to have the Valuation-roll printed, and accordingly they are authorised by the statute to which we have been referred, in 1867, to print the Valuation-roll, and the expense of such printing was to form part of the expenses of making up the roll. I pause at the Act of 1867 to observe that I should have thought it perfectly clear that the expense of printing the Valuation-roll, being declared to form part of the expenses of making up the roll, was to be assessed for and defrayed in the same way as the rest of the expenses, and that in the case where the office of assessor was combined with that of surveyor of taxes it was to be defrayed by the Inland Revenue. In 1885 an Act was passed which enabled

No. 119. local authorities to resolve that the Valuation-roll should be printed for a series of years, and there is, as I think the Lord Ordinary rightly points out, a specific re-enactment of the provisions arranging for the cost of the printing whether for a period of years or not. Mr Mackay has very properly called attention to the differences between the Act of 1867 and the Act of 1885. They are appreciable, but I do not think that they affect the net result, which was that in 1885, as in 1867, the expense of printing was declared to be part of the expense of making up the roll.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

Now, it seems to me that, so standing the legislation, the process of reasoning by which the pursuer is entitled to prevail in this action is of the simplest possible description. The expense of printing is said to be part of the expense of making up the roll which by statute is to be defrayed, in the case in hand, by the Inland Revenue. As printing is part of the expense, it of course is to be defrayed by the Inland Revenue. But Mr Mackay has pointed out that in the Acts which authorise printing there is a reference to the power of assessment because these words are added, declaring that the expense of printing is to be deemed to be part of the expenses of making up the roll, and "shall be assessed for and levied accordingly." Well, that is a most natural provision, but it really adds nothing to the argument when it is considered that when relief was given under the Act of 1857, as regards the general expenses of the roll, there was the abrogation of the power of assessing on the part of local bodies. And so here there is not only no abrogation, but there is a confirmation of the existing powers which of course were necessary for the cases where there was not a combination of the two offices, and where the county had to meet the expense itself. It is quite conceivable that, as printers' bills must be paid, a question might arise as to payment, and it was necessary that that should be provided for.

A second argument has been advanced which I think is more untenable. It is founded on the Local Government Act of 1889. In the 83d section there are provisions which deal with the cases of local authorities exercising the power conferred on them of appointing as their assessor the surveyor of taxes. Such cases had become pretty frequent, and it cannot be doubted that in 1889 the burden thus imposed on the Treasury, owing to the growth of business at the assessor's office and the various purposes which the assessor's roll performs, had made the bargain, so to speak, of 1857 less beneficial to the Inland Revenue than it was at that date. I discover traces of that in the enactment. There is a provision that, unless with the consent of the Inland Revenue, the assessor shall not be appointed. There is another to the effect that where the offices are combined, the amount of salary or allowance shall be subject to the approval of the Treasury. That is quite natural, because there was a danger that the new local authority might starve the office of assessor looking for his being remunerated by the Treasury. Those were inconveniences which were very natural, and apparently they were suitably provided against. Then there is a third provision to the effect that where the assessor is an officer of the Inland Revenue, any regulations made by a county council with respect to his duties shall be subject to the approval of the Treasury. Now, can it be said that because the County Council of Lanark, in the exercise of its powers under the Act of 1885, resolves to print the roll, its instruction to the assessor to get it printed is to be regarded as a regulation in the sense of this Act, and to shift the burden which that statute had declared should go along with the other expense wherever that went? It appears to me that that is an impossible

construction of the word "regulation," or rather that to force the word "regulation" into service to this extent would have the effect of defeating the direct provision of the statute of 1857. No. 119.

I do not think there is any difficulty in arriving at the conclusion that the Lord Ordinary is right.

Mar. 15, 1892.
County
Council of
Lanarkshire v.
Lord Advocate.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR.—I am also of the same opinion. The 12th section of the Act of 1885, on which the argument of the reclaimer is rested, provides that the expense of printing shall be deemed part of the expenses of making up the roll, and shall be assessed for and levied accordingly. Now, that gives no specific power to assess irrespective of previous enactments, because we are referred back to previous legislation which authorises assessment for the expenses of making up the roll. When we go back to previous legislation we find that in the case where an officer of Inland Revenue, having the survey of the income-tax, is assessor, the expense of making up is not to be levied by assessment, but is to be defrayed by the Treasury. Therefore, when those statutes are read together, it appears that the argument of the reclaimer involves this, that a reference to an existing rule of assessment implies a power to commissioners of supply, or county councils in their place, to levy an assessment for a purpose for which they were not entitled to levy any such assessment prior to the passing of the Act. It may be that in particular cases a county council may be entitled to levy assessments, as in cases existing, which would cover this expense, but they are certainly not entitled to levy assessments for the purpose of defraying expenses which the Legislature has put upon the Treasury, and that is the purpose for which the reclaimer maintains they ought to have been made. Mr Mackay said there might be circumstances involved in making contracts with printers which would not necessarily or properly fall within the enactment in the Statute of 1857, which requires that the expenses attending the making up of the valuation-roll by such officer or officers shall be defrayed by the Commissioners of Inland Revenue or by the Treasury. I cannot say that I was satisfied with the illustrations that Mr Mackay gave us that such questions were likely to arise upon any such contracts as he indicated. It appears to me that it is sufficient for the purposes of this case that we have no such question involved, because the averment of the defenders upon which our judgment is challenged is, that the pursuer, while repudiating liability, paid the sum of £80 in respect of the services rendered by the assessor in printing the roll. Therefore the question that we have to consider in this case, and the only question is, whether the cost of the assessor's services in making up the roll is to fall upon the Treasury or upon the County Council? Upon that I have no doubt whatever, and I agree with your Lordship that the Lord Ordinary is right. The second point that has been put forward is also, I think, untenable for the reasons which your Lordship has indicated.

THE COURT adhered.

BRUCE & KERR, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

No. 120.

Mar. 15, 1892.
C. & A. John-
stone v.
Duthie.

C. & A. JOHNSTONE, Pursuers (Appellants).—*Comrie Thomson—Shaw.*
JAMES DUTHIE, Defender (Respondent).—*C. J. Guthrie—Crabb Watt.*

Cautioner—Liberation—Bill—Giving time.—A cautioner granted a letter guaranteeing to see A “duly paid for all goods you may supply from and after this date to the order of B.” After the account had been closed—a considerable balance being due to A, an arrangement was made between A and B for payment of the balance by instalments. This arrangement was made known to the cautioner, who repudiated all liability. Some months thereafter A, without the cautioner’s knowledge, drew two bills on B at three months’ date for the whole balance of the debt. B having become bankrupt before the bills were met, A sued the cautioner for the balance.

Held that the cautioner was liberated by A’s action in taking the bills and thereby giving B time,—*diss.* Lord M’Laren, who held that, as the cautioner had repudiated liability, A was entitled to make the best terms he could with B.

Question, whether the arrangement to take payment by instalments liberated the cautioner.

1st DIVISION.
Sheriff of
Aberdeen-
shire.

IN March 1888 James Duthie, provision merchant, Aberdeen, disposed of his business to John Reid Cormack, his brother-in-law, who had been his manager.

At the time of the transfer of his business to Cormack, Duthie owed Messrs C. & A. Johnstone, wholesale merchants in Aberdeen, £50 for goods supplied to him, and on 2d April 1888 he granted the following letter of guarantee to the Messrs Johnstone:—“2d April 1888.—To Messrs C. & A. Johnstone, merchants, Aberdeen.—Gentlemen,—In addition to the account of £50 pounds due by me to you for goods supplied to my shop at 50 Summerfield Terrace, I hereby guarantee and undertake to see you duly paid for all goods you may supply from and after this date to the order of J. R. Cormack, to whom I have made over my business there.—Yours truly, JAMES DUTHIE.”

Goods were supplied to Cormack under the guarantee after that date and down to April 1890 when the account was closed. Cormack became bankrupt on 19th November 1890.

Messrs Johnstone then brought an action against Duthie for payment of £137, 15s., the balance then admittedly due under the account.

Duthie, the defender, stated, that prior to March 1888 the grocery goods for the shop were obtained mainly from the pursuers, on the usual terms between wholesale and retail grocers in Aberdeen, namely, that the goods supplied during one month should be paid for at latest before the end of next month, and that the pursuers were bound by the arrangement with the defender by the custom of trade not to allow Cormack credit beyond this, but that instead of this, and outwith the defender’s knowledge, they took bills at currencies of three and six months, and even renewed these bills when they fell due. In particular, on 26th September 1890, they took two bills, at three months’ date, one for £99, 17s. 4d., and the other for £70, 18s. 4d. (Stat. 4) “By taking the bill and renewals of bills before specified, and by agreeing to accept payment of Cormack’s debt by instalments, the pursuers precluded themselves from using proper measures to compel payment of the sums due to them and for which the credit allowed by the trade had expired, and thereby and by otherways granting time to Cormack in the knowledge that his affairs were insolvent, they materially prejudiced the defender in his recourse against the principal debtor.”

In answer to the defender’s statement the pursuers averred that there was no fixed rule or custom of trade as to the extent or period of credit given by wholesale merchants to retail grocers in Aberdeen. They admitted that they “occasionally took bills from Cormack at two or three

months' date, for their own convenience, and on a few occasions they took partial renewals from him for a like period, as they were entitled to do under an open guarantee where no mention was made of dates or payments, and in accordance with the usual practice in such cases. The account annexed to the petition contains the whole of these bills, with the exception of the two last bills for £99, 17s. 4d. and £70, 18s. 4d. respectively, which were drawn by them on Cormack on 26th September 1890 in order to constitute and settle the amount then due by him to pursuers, and also to enable the pursuers to have the use of the money by discounting said bills with their bankers, as is usual and customary in such cases. The defender, even if unaware of the bills, was in no way prejudiced by the taking of them. They are now past due and unpaid, are in the pursuers' custody, and will be delivered up to the defender on the balance sued for being paid."

No. 120.
Mar. 15, 1892.
C. & A. John-
stone v.
Duthie.

The pursuers pleaded;—(1) The defender being bound by the terms of his said letter of guarantee for goods supplied by the pursuers to himself and the said John Reid Cormack, as specified in the account herewith produced, decree should be pronounced as craved. (2) The defender having ratified, approved of, and adopted the course of dealings between the pursuers and Cormack, and the amount due under said letter of guarantee, and having agreed that time should be given to Cormack as condescended on, is now barred *personali exceptione* from objecting to the account libelled, or the length and extent of the credit allowed, or the nature of the dealings between the said parties.

The defender pleaded;—(1) The pursuers having given time to Cormack for payment of his accounts beyond the usual period allowed in the trade, and in breach of the understanding between the parties, the defender was thereby liberated from liability under his guarantee. (2) *Separatim*, The pursuers having allowed Cormack unreasonable terms and an excessive period of credit, outwith the ordinary custom and conduct of trade, and without communication to the defender, he is not liable under the guarantee.

From the proof it appeared that the usual terms in Aberdeen between wholesale grocers and retail dealers were one month's credit beyond the month of supply, the accounts being rendered at the beginning of each month for that immediately preceding, and being paid at the beginning of the month following that on which they were rendered. Sometimes bills at two or even three months' date were taken, and it was proved that in Cormack's case this had been done, and the bills sometimes renewed for a further period, all without the defender's knowledge. The monthly dealings varied from about £50 to £100, the whole indebtedness rising from £105 in August 1888 to £290 in February 1890. When the guarantee was originally arranged, the defender had warned the pursuers that Cormack was occasionally unsteady, and in April 1890, owing to his habits and neglect to settle his monthly accounts, his debt then amounting to £264, 5s. 3d., the pursuers made an arrangement with him that he was to pay £10 a-week to account of his debt and cash for whatever goods he got, the credit thus coming to an end. The arrangement was communicated to the defender, who denied liability for the debt. On 13th August following, as Cormack had failed to pay the £10 per week, it was agreed that he should pay £5 per week instead. On 26th September the pursuers took two bills from Cormack for £70, 18s. 4d. and £99, 17s. 4d. at three months' date, so as to constitute their debt and enable them to have the use of their money. The bills were never met, and the balance still due when Cormack's bankruptcy occurred on 19th November following was £137, 15s.

No. 120.

Mar. 15, 1892.
C. & A. John-
stone v.
Duthie.

On 27th October 1891 the Sheriff-substitute (Grierson) pronounced this interlocutor:—"Finds . . . (3) that their ordinary period of credit allowed by the pursuers in the ordinary course of business with persons such as Cormack was about three months, and that there was nothing in Cormack's position to operate any change in their ordinary practice; (4) that they allowed Cormack credit to such extents as five, seven, and twelve months, and that such extensions were granted in respect of the sums now alleged to be due to the pursuers by Cormack; and (5) that the defender was in ignorance of these extensions of Cormack's credit: Finds in law that by their extending Cormack's credit far beyond the period usual in their ordinary business, in the circumstances of Cormack, and in the trade in which they were engaged, the pursuers have liberated the defender from his obligations under the letter of guarantee: Therefore assoilzies the defender, and decerns: Finds the defender entitled to expenses," &c.

The pursuers appealed, and argued;—The letter of guarantee was quite unlimited in its terms. There was no reference to the course of business or of dealing either in Aberdeen or elsewhere. Custom of trade was a matter which was capable of precise proof, and none had been offered. Neither had any unreasonable credit been given. That was a relative term, and must be interpreted to mean what might fairly be regarded as within the contemplation of parties. But there was really no fixed period of credit proved in the trading in question. If there was it had not been exceeded, for it could not be said that the taking of bills at three months' date was at all exceptional or unreasonable. The case of *Calder*,¹ and Lord Shand's opinion there, were therefore in point. So far, at anyrate, as April 1890, when the account was closed, and the letter of guarantee came to an end, nothing had occurred which could be said to liberate the cautioner.² After that date it was to the interest of the cautioner that the creditor should take the best means he could of getting payment from the principal debtor, and of satisfying his debt. The taking of the two bills on the 26th September 1890 was designed with that intention. The creditor thereby constituted his debt, and was enabled to have the use of his money. In point of fact the bills were far extinguished when the bankruptcy occurred. Further, in order to succeed in his defence the cautioner must shew that in point of fact he was prejudiced by the action of the creditor, and he had not done so.

Argued for the defender;—Where as here there was no term of credit mentioned in the guarantee, the custom of trade must be imported to interpret the contract. The words "duly paid" clearly implied that. The appellants must prove, therefore, that they had not extended more than "the utmost credit allowed in ordinary circumstances."³ In the present case, the proof shewed that that meant, in the case of a customer who was not known, cash payments in one month,—if he was well known, three months' credit. But the creditor here had given a wholly unusual term of credit, because even admitting that the taking of bills prior to the closing of the account at three months was not an unreasonable extension of credit, the renewal of these bills certainly was. The case of *Bingham* and the *Croydon Gas Company*² were not in point, because

¹ *Calder & Co. v. Cruickshank's Trustee*, Nov. 15, 1889, 17 R. 74.

² *Bingham v. Corbitt*, 1864, 34 L. J., Q. B. 37; *Croydon Commercial Gas Co. v. Dickinson*, 1876, L. R., 1 C. P. Div. 707, affd. 2 C. P. Div. 46.

³ *MacLagan & Co. v. Macfarlane*, Nov. 19, 1813, F. C.; *Cook v. Moffat*; *Couston*, June 7, 1827, 5 S. 774, Lord Balgray, p. 775; *Warne & Co. v. Lillie*, Jan. 16, 1867, 5 Macph. 283, 39 Scot. Jur. 127; *Stewart, Moir, & Macph. v. Brown*, May 24, 1871, 9 Macph. 763, 43 Scot. Jur. 417; *Samuel v. Howard*, 1817, 3 Merivale, 272; *Combe v. Woolf*, 1832, 8 Bing. 156.

in each of these the transactions which were the subject of the guarantee were held to be separable. But whether the defender was freed or not by the course taken by the pursuers prior to the closing of the account, the taking of the two bills on 26th September without his knowledge certainly released him. He was thereby prevented from taking action against the principal debtor, and it was not necessary that he should prove prejudice.¹ There was an Irish case² which appeared to be an authority against the defender, but the ground of judgment there appeared to be that the position of the surety was not wholly altered by the action of the creditor in taking bills from the principal debtor.

No. 120.

Mar. 15, 1892.
C. & A. Johnstone v.
Duthie.

At advising,—

LORD ADAM.—The pursuers are wholesale merchants in Aberdeen, and the defender is a retail grocer there to whom they were in use to supply goods. He had two shops in Aberdeen, and in April 1888 he sold his business in one of them to his brother-in-law Cormack, who had been his manager in that shop.

In order to start Cormack in business, on 2d April 1888 the defender granted to the pursuers a letter of guarantee in the following terms:—"Gentlemen,—In addition to the account of £50 due by me to you for goods supplied to my shop at 50 Summerfield Terrace, I hereby guarantee and undertake to see you duly paid for all goods you may supply from and after this date to the order of J. R. Cormack, to whom I have made over my business there."

The pursuers supplied goods to Cormack under this letter of guarantee until the end of April 1890.

The usual course of dealing was that the account for supplies was rendered monthly, at the beginning of the next month, and squared at the beginning of the next succeeding month by a payment in cash, the balance being carried forward to the next month's account—thus, for example, the account for goods supplied in May was rendered in June, and settled, as I have stated, in July—Cormack, thus in all cases, getting a month's credit. Sometimes, however, bills generally at two months' date, but occasionally at three, were taken for the monthly balance due, and these bills were sometimes renewed, thus extending the credit to five or six months.

It appears that Cormack had become unsteady, and at the end of April 1890 the supplies to him under the letter of guarantee came to an end. The account was closed, and the defender was under no further liability under the guarantee, except for the balance due and unpaid upon that account.

The position which the defender took up at this time as to his liability under the guarantee is material, and is to be found in the correspondence between him and the pursuers, from which it appears clear that the defender at this time denied his liability under the guarantee, although upon a different ground from what now insisted in, and left it to the pursuers to take their own course for recovery of the amount. So far as I see he never departed from this position.

What followed was that Cormack paid for some time £10 a-week, and afterwards £5 a-week, towards reduction of the amount until 10th November 1890, leaving a balance then due of £137, 15s., which is the sum sued for.

On the 26th September, however, the pursuers took from Cormack two bills of three months' date for £99, 17s. 4d. and £70, 18s. 4d. respectively, in order, they say on record, to constitute and settle the amount then due by him to

¹ Petty v. Cooke, 1871, L. R., 6 Q. B. Div. 790, Lord Blackburn, p. 795.

² Dowden v. Lewis, Irish Reps. 1884, 14 Q. B. D. 307.

No. 120. the pursuers, and also to enable the pursuers to have the use of the money by discounting said bills with their bankers.
Mar. 15, 1892. That that was so, there is no doubt, because Mr Alexander Johnstone, one of the pursuers, says,—“The payments went on till November 1890, when Cormack became bankrupt. The amount due by the defender is £137, 15s. At the date of Cormack's failure we had a claim for £12, 9s. 4d. for goods supplied after the arrangement had been made. There are two bills dated 26th September 1890 for £170 odds. These were taken to square up the account, and to make the account operative, so that we could have the use of our money from the bank by discounting the bills.”

C. & A. Johnstone v. Duthie.

It is in these circumstances that the present action has arisen.

The defender denies liability on the ground that it was an implied condition of the agreement that the pursuers should not allow Cormack credit exceeding one month beyond the month of supply, in accordance with custom in the grocery trade, but that, on the contrary, they had allowed him an unreasonable and excessive period of credit outwith the ordinary conduct of that trade.

The Sheriff-substitute has, in effect, sustained that contention and absolved the defender. He finds in point of fact that the ordinary period of credit allowed by the pursuers in the ordinary course of business with persons such as Cormack was about three months, and that they allowed him credit to such extent as five, seven, and twelve months, and he finds, in point of law, that by extending Cormack's credit far beyond the period usual in their ordinary business, they have liberated the defender from his obligations under the letter of guarantee.

It appears to me that the ground of judgment thus adopted by the Sheriff-substitute raises questions of doubt and difficulty, and while I do not say that I differ from him, I prefer to rest the judgment on another, and I think a clear ground of judgment also pleaded by the defender.

As I have already pointed out all transactions under the letter of guarantee came to an end in April 1890.

The account was closed, and the amount alleged to be due by the defender was then ascertained. It is true that the pursuers agreed that Cormack should make certain cash payments to account of the balance due. Whether this was with or without the consent of the defender does not appear to be material, because so far as I can see they did not thereby bar themselves from proceeding at any time to recover the amount due.

But the case is different with regard to the two bills at three months' date taken by them on 26th September 1890 for the balance of the debt then due. They could not have sued Cormack, the principal debtor, during the currency of these bills, and so they gave him time. It is not averred, and is not the fact that the defender consented to their taking these bills. He all along denied liability under the guarantee, and left the pursuers to take their own course.

But it is quite settled law that if the creditor gives time to the principal debtor the cautioner is free. Neither is it necessary for the cautioner to show that he has been thereby *de facto* prejudiced. The case of *Samuel v. Horne*, 1817, 3 Merivale, 272, is an example of that.

It is suggested, however, that where, as in this case, the cautioner denies liability, the creditor is free to take what steps he thinks best for recovery of his debt from the principal debtor, and may give him time without releasing the cautioner. But I know no authority for that proposition.

The creditor can only enforce the obligation he has received from the cautioner.

I do not see that the fact that the debtor in an obligation denies liability can at all alter or affect the extent of his obligation whatever that may be. **No. 120.**

I am of opinion, therefore, that the pursuers by taking the two bills of 27th September 1890 freed the cautioner from his obligations under the letter of guarantee, and that he should be assoilized.

Mar. 15, 1892.
C. & A. John-
stone v.
Duthie.

LORD M'LAREN.—I take a different view of the case, and the ground of my difference admits of being very briefly stated.

When a creditor supplies goods, or (as in the case of a bank credit) advances money, on a continuing guarantee, and the account is eventually closed, the creditor is neither bound to proceed according to the order of discussion, nor to make immediate intimation of his claim to the guarantor. If after the account is closed, and before intimation is made to the guarantor, the creditor grants indulgence, as by taking a bill from the debtor, this is held to be a proceeding contrary to the good faith of the contract of indemnity, and in respect of such breach of faith the guarantor is discharged.

But if the creditor while matters are entire intimates his claim to the guarantor, and the guarantor either repudiates his obligation, or refuses or delays to make payment, then I think that the creditor may make the best terms he can with his debtor, and by doing so does not lose his recourse against the guarantor. This exception, I think, results from the consideration that the defence founded on indulgence given to the debtor is not the effect of a condition of the contract of indemnity, but is a purely equitable defence, and one which, I think, cannot be maintained by a co-obligant who is refusing to perform his obligation. For these reasons, my opinion is, that the pursuers by taking a bill have not discharged their claim under the guarantee.

LORD KINNEAR.—I agree with Lord Adam. I think it is settled law that a creditor who gives his debtor time without reserving his right against the cautioner, thereby discharges the latter. I do not think it is necessary to consider in the present case whether the cautioner was discharged by anything which occurred in the relations between the creditor and debtor prior to 26th September 1890, because I am of opinion that, by taking the bills he did on that date, the creditor gave time, which discharged the debtor. I agree with Lord Adam in thinking that a cautioner cannot be deprived of his right to found upon such a defence merely because he has been reluctant to admit liability under his guarantee, or has refused to pay when called upon. The reason why the giving of time discharges the cautioner is because he is thereby deprived of the chance of considering whether he will have recourse to his remedy against the principal debtor or not, and because it is then out of his power in point of fact to operate the same remedy against him as he would have had under the original contract. This right in the cautioner is one which in its origin perhaps may be founded upon equity, but I think it is strictly legal in its effect, and it is as clearly and effectually a condition of the contract of guarantee as if it was expressed in terms. I am unable to see why the cautioner should be subjected to a different liability from that for which he contracted. If he had done anything to deprive himself of his strict legal rights, the case might be different. But all he did here was to repudiate liability, and that upon a ground on which your Lordships have not, I think, finally decided against him. But whether that ground is good or bad, the effect of the denial of liability is merely to leave the creditor in the same position in which he was

- No. 120.** before he intimated his claim against the cautioner. The latter has done nothing to prevent the creditor enforcing the claim. The only result which would follow from the denial of liability is that when the creditor comes to enforce his claim, the cautioner would have to submit to the consequences of putting the creditor to the expense of bringing an action. I am not aware of any ground by which, because of the refusal to admit the claim, he should be subjected to any different kind of liability from that for which he contracted.

Mar. 15, 1892.
C. & A. John-
stone v.
Duthie.

The LORD PRESIDENT concurred with LORD ADAM and LORD KINNEAR.

THE COURT pronounced the following interlocutor:—"Sustain the appeal; recall the interlocutor of the Sheriff, dated 27th October 1891: Find that the defender, of date 22d April 1888, granted to the pursuers the letter of guarantee . . . by which he undertook to see them duly paid for all goods they might supply from and after that date to the order of J. R. Cormack: Find that the pursuers supplied goods to Cormack under the said letter of guarantee until the end of April 1890: Find that at that date all dealings under the guarantee came to an end, leaving a balance of account due by Cormack to the pursuers: Find that Cormack made to the pursuers various payments on account of the said balance due by him until the 10th of November 1890, at which date there remained a balance due by him of £137, 15s., which is now sued for: Find that on the 26th of September preceding the pursuers took from Cormack two bills at three months' each for £70, 18s. 4d. and £99, 17s. 4d. respectively for the balance of the account then due by him to them: Find in law that by doing so the pursuers barred themselves from enforcing payment of the debt due to them by Cormack during the currency of the said bills: Find that the pursuers thereby discharged the defender from his obligations under the said letter of guarantee, and therefore assoilzie him from the conclusions of the action, and decern."

JAMES MARSHALL, S.S.C.—WISHART & MACNAUGHTON, W.S.—Agents.

- No. 121.** GEORGE MERCER FALCONAR STEWART, Pursuer (Respondent).—*Dundas-Blackburn.*

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

JAMES BRUCE WILKIE AND OTHERS, Defenders (Reclaimers).—*Mackay-C. J. Guthrie—Kinloch.*

MRS ELIZABETH DALYELL OR CORNWALL AND OTHERS, Defenders.

Succession—Condition—Real burden—Repugnancy—Process—Declaration.—The proprietrix of a heritable estate died leaving a *mortis causa* disposition of the estate to A and the heirs of his body, whom failing, to B and the heirs of her body, whom failing, &c., "under this declaration, burden, and condition that in the event of any part of the said lands and estate . . . that may remain unsold at my death being thereafter sold or disposed of or exchanged by any proprietor or possessor of the same, or adjudged, or attempted to be adjudged or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of F as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000."

A, the institute, after succeeding under the destination, died, without heirs of his body, leaving a disposition of the estate to B for her liferent alimentary use only, and the heirs of her body in fee, whom failing, to C, a stranger to the original destination, and the heirs of his body, also strangers.

When B, who was a married woman, and had no heirs of her body, &c.

sixty-three years of age, one of the children of F brought an action against C for declarator that in consequence of A's disposition the provision in the original settlement in favour of the children of F had come into operation.

Held (1) that the action was not premature; (2) that the provision in favour of the children of F was effectual as a condition of the gift to A; (3) on a construction of the whole deed of the testatrix, that A had "disposed of" the estate and so had come under an obligation to create a real burden over it for £10,000 in favour of the children of F; and (4) that C and his heirs, as A's gratuitous disponees, were, on succeeding to the estate, under the same obligation.

No. 121.

Mar. 15, 1892.

Falconar
Stewart v.
Wilkie.

MISS ELIZABETH DALYELL, daughter of Sir James Dalzell, Baronet, of 1ST DIVISION.
Binns, died in 1861, leaving a trust-disposition and settlement, dated 21ST Ld. Kyllachy.
November 1855, and codicils thereto, dated 12TH March 1860 and 3^D
May 1860.

By the trust-disposition and settlement Miss Dalzell, *inter alia*, directed her trustees to hold the estate of Binns for behoof of her brother, Sir William Cunningham Dalzell, in liferent, and on his death to dispoise, convey, and make over the said estate to and in favour of Robert Dalzell (a son of Sir William Cunningham Dalzell, and afterwards Sir Robert Dalzell), and his heirs, whom failing, to and in favour of Osborne Dalzell (another son of Sir William), and his heirs, but with and under this "declaration, burden, and condition, that in the event of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death being thereafter sold or disposed of or exchanged by any proprietor or possessor of the same, or adjudged, or attempted to be adjudged, or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of George Falconar of Carlowrie "as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000 sterling; . . . and with this declaration, that in the event of a sale or exchange of any part of the said lands and estate of Binns and others that may remain unsold at the time of my death, or of the same being adjudged or attempted to be adjudged as aforesaid, the said bequest to the children of the said George Falconar, and their heirs, . . . shall then be real and preferable liens and burdens upon such parts and portions of the said lands and estate, . . . or upon the price thereof if sold: And all these burdens, conditions, and declarations shall be inserted in any conveyance whatever of the same to be made and granted by my said trustees or their foresaids, as above directed, and shall be appointed by them to be inserted in all future transmissions and investitures of the said lands and estate for ever, and shall be inserted in the instrument of sasine to follow upon said conveyance by my said trustees or their foresaids, which instrument of sasine shall forthwith be expedited, completed, and recorded by and at the sight of my said trustees or their foresaids, it being my most earnest wish and desire that the said lands and estate of Binns shall be preserved and maintained whole and entire, in lineal descent in my family, in all time to come, and my full intention to do all in my power to effect that object."

By her first codicil Miss Dalzell revoked the destination of the fee of the estate to Osborne Dalzell and his heirs, and, after declaring that the destination to the heirs of Robert Dalzell was to be understood to mean heirs of the body of Robert Dalzell, she called in succession to them Maria Christina Dalzell or Du Plat, a daughter of Sir William Cunningham Dalzell, and therefore a sister of Robert and Osborne Dalzell, and the heirs of her body, whom failing, Elizabeth Dalzell (afterwards Mrs

No. 121. Cornwall), another daughter of Sir William, and her heirs whatsoever, other than Osborne Dalyell, and his heirs, whom she expressly excluded from the succession.

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

By her second codicil Miss Dalyell revoked the foregoing ultimate destination to the heirs whatsoever of Mrs Cornwall, and in lieu thereof called the heirs of the body of Mrs Cornwall, whom failing, George Falconar of Carlowrie, and the heirs of his body.

After her brother, Sir William Cunningham Dalyell, Miss Dalyell's nearest heirs were his four children just mentioned, and their respective heirs of the body, and failing heirs of the body of the youngest of these children, Mrs Cornwall, the next in order of legal succession to Miss Dalyell was John Wilkie of Foulden, and the heirs of his body, and failing the Wilkies came George Falconar of Carlowrie, and the heirs of his body. The practical effect therefore of the two codicils was, that: whereas the original destination in the trust-disposition followed the legal order of succession to the testatrix, the destination provided by the codicils deviated from that order, in the first place, by excluding Osborne Dalyell and the heirs of his body, and, secondly, by preferring the Falconars to the Wilkies; and in the second codicil the testatrix explained that her reason for excluding Osborne Dalyell was her fear that, if he succeeded to the estate, it would be immediately dissipated, and that she had excluded Wilkie of Foulden because he had intimated his intention, should he succeed to the estate, of at once making it over to Osborne Dalyell, if alive.

Sir William Cunningham Dalyell, the liferenter under Miss Dalyell's settlement, died in 1865, and in April 1872 her surviving trustees, Mr Wilkie of Foulden and Sir Robert Dalyell, executed and recorded a disposition of the estate of Binns, in the terms and under the declarations and conditions of her settlement and codicils.

Sir Robert Dalyell, the institute under the destination, died unmarried in January 1886, having survived his brother Osborne and his sister Mrs Du Plat (both of whom died without issue), but being survived by his sister Mrs Cornwall. He left a disposition of the estate of Binns (dated in 1872, and recorded June 1886), in favour of himself and the heirs of his body, whom failing to Mrs Cornwall in liferent for her liferent alimentary use only, and the heirs of her body in fee, whom failing to John Wilkie of Foulden and the heirs of his body.

On 12th June 1891 G. M. Falconar Stewart of Binny the son and eldest child of George Falconar of Carlowrie (who had died in 1870), raised an action to have it determined whether this disposition by Sir Robert brought into operation the provision in favour of the children of George Falconar in Miss Dalyell's settlement.

The pursuer did not insist that Sir Robert's disposition in so far as it gave the estate to Mrs Cornwall in liferent and the heirs of her body in fee, had any such effect, but he maintained that the ulterior destination to John Wilkie and the heirs of his body was a disposal of the estate within the meaning of Miss Dalyell's settlement and codicils, seeing that under that settlement and codicils the estate was destined to the pursuer's father and the heirs of his body on the failure of Mrs Cornwall and the heirs of her body.

It was further not disputed by the parties that the case was to be taken on the assumption that the destination to the heirs of the body of Mrs Cornwall had failed, she being sixty-three years of age at the date of the action, and childless.

The persons called as defenders were James Wilkie of Foulden the eldest son of John Wilkie of Foulden (who had died in 1884), and John

Dalyell Wilkie and his sisters, the other children of John Wilkie, together with Mr and Mrs Cornwall, and Frances Falconar and Helen Falconar or Collyer, the pursuer's sisters. No. 121.

The primary conclusions of the summons were, briefly, for declarator that the provision in Miss Dalyell's settlement relating to the £10,000 constituted a contingent real burden on the estate of Binns, which became absolute by the recording of Sir Robert Dalyell's disposition in 1886, although not exigible during Mrs Cornwall's lifetime. The Lord Ordinary and the Judges of the Inner-House were unanimously of opinion that there was no substance in this branch of the pursuer's case. The pursuer further concluded alternatively for declarator "that the defenders the said James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, or their heirs, are not, nor any of them, entitled to take possession of the said lands and estate of Binns and others, or any part thereof, or in any way to dispose thereof, or to burden the same, or take benefit under the said last mentioned disposition and settlement, without making payment to the children of the said deceased George Falconar, or to their heirs, of the sum of £10,000 sterling." Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

The pursuer pleaded;—1. The pursuer, as one of the heirs of the body of George Falconar, is, in virtue of the disposition of 1872 granted by Miss Dalyell's trustees, entitled to decree of declarator in terms of the first conclusion of the summons. 3. Sir Robert Dalyell having by the said disposition granted by him, recorded in 1886, disposed of the estate of Binns within the meaning of the said disposition by Miss Dalyell's trustees, the pursuer is entitled to decree in terms of the remaining declaratory conclusions of the summons, or one or more of them. 4. The defenders the children of the deceased John Wilkie are not entitled to take benefit under the said disposition by the said Sir Robert Dalyell without making payment of the sum of £10,000.

The Wilkies alone lodged defences. They pleaded;—3. The pursuer is not entitled to decree in terms of any of the conclusions of the summons, in respect,—(1) That Miss Dalyell was not entitled to burden her estate with the provisions in favour of the children of George Falconar founded on by the pursuer; (2) *esto* that Miss Dalyell was entitled to burden her estate with the said provisions, they are not so expressed as effectually to burden the estate; and (4) that in any event the disposition, recorded on 23d June 1886, did not constitute a disposal of the estate of Binns within the meaning of Miss Dalyell's settlement and the disposition by her trustees dated 10th and 12th April 1872.

On 5th December 1891 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that on the just construction of the trust-disposition and settlement and codicils of the deceased Miss Elizabeth Dalyell, and of the disposition by the trustees of the said deceased Miss Elizabeth Dalyell, both mentioned on record, the defenders James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie, and Eleanor Bruce Wilkie, and each of them, and their respective heirs, are bound, on succeeding to the estate of Binns under the disposition and settlement of the late Sir Robert Alexander Osborne Dalyell, mentioned in the summons, to make payment to the pursuer, and the other children of the deceased George Falconar of Carlowrie, or to their heirs, of the sum of £10,000 sterling, or otherwise, in the defenders' option, to create over the said estate a valid real burden for that amount in favour of the said children of the said deceased George Falconar and their heirs: Therefore finds, declares, and decerns, in terms of the alternative conclusion of the summons, subject to the qualification that the defenders' obligation will

No. 121.

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

be satisfied by their creating a valid real burden upon the estate in favour of the pursuer and the other children of the said deceased George Falconar for the said sum of £10,000: *Quoad ultra* assilizes the defenders from the conclusions of the summons, and decerns.”*

* “OPINION.— . . . In the first place, I do not consider that the pursuer has succeeded in shewing either that any real burden exists in his favour, or that there was any intention on the part of Miss Elizabeth that such real burden should be created. Miss Elizabeth does appear to have intended that, in certain events, the disponent or heirs-substitute succeeding to the estate should be bound to create certain real burdens over it, and particularly one in favour of the pursuer and his sisters. She appears also to have contemplated that her trustees should in some way make provision for certain real burdens emerging so as to affect the estate in certain events,—not including, however, any event which has yet occurred. But it is, I think, quite impossible to hold that any real burden was in fact constituted, or that Miss Elizabeth’s trustees would have been justified in constituting any real burden operative in the pursuer’s favour, in the event which has happened, of a gratuitous disposition of the estate to a stranger to the destination.

“Taking this view, I do not find it necessary to consider how far there is anything in the defenders’ point that a real burden cannot competently be constituted in connection with a contingent debt. Neither do I think it necessary to decide—what might be a question of more difficulty—how far it would be competent to disponent an estate under a real burden, which was not to be a real burden from the first, but only to come into existence on such a contingency as a sale or alienation of the estate. These are points more difficult than any with which I have to deal. Real burdens have, as we know, rules of their own. They require to be not only definite, but to be expressed in the most clear and perspicuous language; and while it may be, as the pursuer argues, that in a question *inter heredes* the intention of the truster, and not the language which her trustees have used, must form the rule, still, I cannot but feel that, even assuming the intention here to be in the pursuer’s favour, there would have been grave difficulties in his way if his case depended on establishing the existence of a real burden, such as would affect the estate on the defenders’ succession, and be good, *e.g.*, in bankruptcy, and in a question with the defenders’ creditors or onerous disponents.

“But while against the pursuer on this part of his case, I have not been able to see a good answer to his second and alternative contention, *viz.*, that the defenders, as gratuitous disponents of Sir Robert Dalrymple, must take the estate subject to the conditions and obligations to which he was subject, and are therefore bound, so soon as his disposition in their favour becomes operative, either to pay the pursuer and his sisters the £10,000 in question, or to execute such deeds as will constitute over the estate a real burden for that amount in their favour. That contention is quite apart from that with which I have been dealing. It is one thing to create a real burden; it is another thing to impose on the heirs of a gratuitous investiture a personal obligation to create such a burden, or pay a sum of money as the alternative of not doing so. There is here (I mean in the latter case) no technical difficulties. There is, so far as I know, no difficulty in imposing on a gratuitous disponent or his gratuitous successors any obligation which the granter may think fit to impose. Nor can I make any difference whether such an obligation is absolute or contingent, whether the contingency is a certain or uncertain event, or whether it depends on some act of the granter or on some outside occurrence. The obligation, if of course become valueless. It may become so by the grantee’s bankruptcy. But it cannot be defeated otherwise by any act of the grantee; and if imposed, I know no principle on which it should be denied effect according to its terms. The only question is whether, on the just construction of the grant, it was intended to be imposed.

“Now I do not think there is much room for doubt that, according to the just construction of Miss Elizabeth Dalrymple’s trust-deed, her brother (the de-

The defenders reclaimed, and argued;—(1) On the question whether **No. 121.**
 Miss Dalyell's settlement by itself created or imposed on her trustees the
 duty of creating a real burden in the pursuer's favour on the estate of **Mar. 15, 1892.**
 Binns the Lord Ordinary's judgment was well founded. What she con- **Falconer**
 templated was that in a certain event what she described as a real burden **Stewart v.**
 should be created; she did not contemplate a burden which should affect **Wilkie.**
 the lands from the first. Further, even if she did contemplate a burden
 which should affect the lands from the first it was a burden of a contin-
 gent nature, to come into operation only in a certain event, and a con-
 tingent obligation could not be constituted a real burden.¹ But (2) the

ponsee) and his heirs-substitute after him were, in the event of their disposing
 of the estate, put under the obligation to pay £10,000 to the pursuer's family,
 or, what comes practically to the same thing, to create a real burden for that
 amount over the estate in their favour. It was not indeed suggested that the
 deed could bear any other construction. The only points made by the defenders
 on this part of the case were two; and I am not sure that they were pressed
 with much confidence.

"It was said, in the first place, that the word 'disposed,' occurring in connec-
 tion with the words 'sold and excambied,' must be read as applying only to sales
 and excambions, and not as applying to gratuitous dispositions. I confess I see no
 reason for this restriction, which would plainly be inconsistent with, and indeed
 destructive of, the whole scheme and object of the truster. The word 'disposed'
 is, I think, really used as in contrast to 'sale,' and I see no meaning it could
 have except as applying to gratuitous dispositions. Moreover, the obligation
 which follows, viz., that £10,000 'shall be paid out of the lands if sold, or
 created a real burden on the lands if they should remain unsold,' while quite
 appropriate if directed against a gratuitous disponent representing the supposed
 disponent, would be quite meaningless if the only thing in view was sale or
 excambion. I put it to the defenders' counsel if they could suggest any mean-
 ing in that view, and they could suggest none.

"It was, however, said further, and this was really the defenders' main conten-
 tion, that—it being the truster's declared object, as expressed in her trust-dis-
 position, 'that the said lands and estate of Binns shall be preserved and main-
 tained whole and entire in lineal descent in my family in all time to come,' and
 the defenders' family being nearer in the legal order of succession than the pur-
 suer's family, and being excluded from the succession, not by Miss Dalyell's
 trust-deed, but only by her second codicil—the disposition to the defenders by
 Sir Robert Dalyell was not a 'disposition' in the sense of Miss Dalyell's trust-
 deed, and did not carry with it the obligation to provide £10,000 to the pur-
 suer's family.

"In my opinion, this is not a sound view of the truster's settlement. The
 trust-disposition and codicils must, I think, be read together; and being so
 read, they prescribe a certain order of succession, which must be held to be the
 order of succession which it was the truster's ultimate intention to maintain.
 That being so, I do not think it possible to treat a disposition which carries the
 estate to persons outside that order of succession as being at all different in the
 sense of the settlement from a disposition in favour of a stranger.

"Altogether, I think the pursuer may obtain decree substantially in the terms
 of his second alternative conclusion. But I shall so express the interlocutor
 that the defenders' obligation will be satisfied either by payment of the money
 or by the creation of an effectual real burden over the estate for the amount.

"I should perhaps add that no objection was taken to the—in some views—
 hypothetical character of the declarator which the pursuer asks. Both parties
 concurred in asking a judgment defining their rights; and in the view that the
 defenders are probably at present fiars of the estate, subject merely to defeasance
 of their title on a practically impossible event, I see on the whole no sufficient
 reason why I should refuse to deal with the question which they have sub-
 mitted for decision."

¹ *Forbes' Trustees v. Gordon's Assignees*, Dec. 14, 1833, 12 S. 219.

No. 121. Lord Ordinary was wrong in holding that the defenders, in succeeding to Binns, would come under an obligation to pay £10,000 to the pursuer and his sisters. In the first place, the condition which Miss Dalyell sought to impose on her disposition of the estate was void for repugnancy.¹ She had attempted to give a right of fee, and yet to prevent the fiars from exercising their ordinary rights as such. The only effectual way of accomplishing that was by a regular deed of strict entail. Miss Dalyell's settlement was really a device for entailing the estate without complying with the Entail Acts, the device being that of imposing a pecuniary penalty for the violation of the prohibitions against the sale of the estate and (as the pursuer maintained) the alteration of the succession to it. It was obvious that if such a device were sanctioned the prohibitions might be made absolute by fixing as the penalty a sum which exceeded the value of the estate. But, in the next place, the pursuer was in error in saying that Miss Dalyell's settlement prohibited the alteration of the succession to the estate. The term "disposed of" was synonymous with "sold," or at least was intended to cover the case of part of the estate being sold, or, if it referred to the alteration of the succession, it was meant to prohibit only the succession of Osborne Dalyell, which was the main object of the testator. It was said that it must mean alteration of the succession generally, because Miss Dalyell contemplated the condition being violated and yet that the estate should remain unsold, but what she provided for that event was the creation of a real burden, and, in that view, the person who was to create the real burden was the person who should alter the succession, *i.e.* Sir Robert Dalyell in the case which had occurred, and as he was dead, it was too late to enforce the condition. The defenders were under no obligation to create the real burden. What the pursuer contended for was a reserved obligation to burden, which was to be construed in the way most favourable to liberty, whereas a reserved faculty to burden was to be construed in the way most favourable for carrying out the power. In the cases cited on the other side in which obligations to burden had been enforced, it was clear who the persons intended to be bound were; that intention could not be said to be clear here. But further, assuming that Miss Dalyell in her original settlement intended to prohibit the alteration of the succession, that prohibition was to be read with reference to the reason assigned for making it, *viz.*, her desire to preserve the estate in the line of the family descent, and as she herself had in her codicils deviated from that line, the prohibition against altering the succession was to be read out of the deed. At all events deviations from the succession ultimately provided by her were not to be held as alterations within the meaning of the prohibition, unless they brought in strangers to the family; but, so far from doing that, Sir Robert's disposition restored the succession to the proper line of the family descent.

Argued for the pursuer;—(1) The trustees in making the conveyance which they were directed to make on the death of Sir William Dalyell, the liferenter, ought to have created a real burden for £10,000 in favour of the children of George Falconar, and ought now to create such a burden. The language of the testator might not be perfectly appropriate, but in carrying out a testator's obvious intention trustees were bound to deviate from his language in order to carry out the end in view. Thus it was settled that while trustees who were directed to

¹ *Dempster v. Dempster*, June 12, 1857, 3 Macq. 62, 19 D. (H. L.) 14, 29 Scot. Jur. 391; *Munro v. Butler Johnston*, Dec. 18, 1868, 7 Macph. 250, 41 Scot. Jur. 153; *Chaplin's Trustees v. Hoile*, Oct. 30, 1890, 18 R. 27.

entail were not entitled to insert in the deed of entail a destination which could be protected under the Entail Acts, when the actual destination provided by the testator could not be so protected, they were bound in the deed of entail to use the appropriate clauses, although the testator's direction might be defective in that respect. It was not an objection to the efficacy of a real burden that it was only to come into operation on a certain contingency.¹ (2) But assuming that no real burden was intended to be created *ab initio*, the defenders were not entitled to take the estate except on condition of paying £10,000 to the pursuer and his sisters (as the Lord Ordinary had held), or at all events the obligation to create a real burden passed with the lands in the same way as a reserved faculty to burden passed, or being an obligation incumbent on Sir Robert, who had contravened the prohibition, passed to the defenders, his gratuitous disponees.² Such a condition was not void for repugnancy or as being a device to evade the Entail Acts. The condition was a condition of the gift, so that a person was not entitled to take the estate and not fulfil the condition. Nor was it easy to see what the Entail Acts had to do with the matter. If they prohibited what Miss Dalzell had directed to be done (but that was not maintained) then of course her direction would be ineffectual; but if they did not so prohibit, then there could be no question of a device to evade them. It was said, however, that Miss Dalzell did not intend to prohibit the alteration of the succession. But the words "disposed of" were presumably intended to have some independent meaning, and what the whole context suggested was that these words referred to the alteration of the succession, for she expressly contemplated the case of the prohibition being violated although the estate remained unsold, and it was difficult to believe that she did not intend to prohibit alteration of the succession when her declared object was to keep the estate in the line of the family descent. Nor did it make any difference that she herself subsequently provided a destination which did not wholly correspond with that of the strict line of the family descent, for her motive in making the alteration in the destination was truly ancillary to her main object of keeping the estate in the family, seeing that she believed that if it came into the possession of a particular member of the family it would have been at once sold, and hence she took measures to exclude that individual.

At advising,—

LORD PRESIDENT.—It is implied in the Lord Ordinary's interlocutor, and it is fully expressed in his Lordship's opinion that, in his judgment, no real burden at present exists in favour of the pursuer over the estate of Binns. The contention that Miss Elizabeth Dalzell by her trust-disposition and settlement either created such a real burden or intended that her trustees in their conveyance to Sir Robert Dalzell should create such a real burden, seems to me to be hopeless. I mention it now because this argument was revived in the debate before us; but the observations of the Lord Ordinary are very adequate for its disposal.

The Lord Ordinary has decided the case in favour of the pursuer upon his second or alternative contention, and I substantially agree in that conclusion. I

No. 121.

Mar. 15, 1892.

Falconar
Stewart v.
Wilkie.

¹ Erskine v. Wright, March 1, 1843, 8 D. 863, 18 Scot. Jur. 5; Stewart v. Gibson's Trustee, Dec. 10, 1880, 8 R. 270.

² Wyllie v. Ross, Nov. 12, 1825, 4 S. 174; Magistrates of Arbroath v. Dickson, March 19, 1872, 10 Macph. 630, 44 Scot. Jur. 347; Storeys v. Paxton, Dec. 7, 1878, 6 R. 293; Bell's Prin. secs. 915-6.

No. 121. think that under Miss Dalyell's settlement and her trustees' conveyance, Sir Robert Dalyell took the estate subject to the condition that in a certain event he should create a real burden for £10,000 in favour of the children of George Falconar. The title and interest to insist for fulfilment of that condition was conferred on those children; it was enforceable primarily against Sir Robert, but equally against his gratuitous disponees. The plain reading of Miss Dalyell's settlement is, that in the event of Sir Robert disposing of the lands (in the sense of the deed) he shall, at the same time that he disposes, burden them. Such an obligation, if incumbent on him, is prestable by his gratuitous disponees. No adequate objection was stated to the legal efficacy of such an obligation so imposed, and when enforced by the persons in whose favour it is imposed.

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

The question remains, whether the event has occurred in which Sir Robert became bound to create the real burden. Have the lands been "disposed of"? Here I entirely adopt the reasoning of the Lord Ordinary. The learned counsel for the defenders suggested several constructions of the words "disposed of" as satisfying them. But even assuming—what, in at least some instances, is doubtful—that the cases so put may fall under the words, that by no means supplies good ground for refusing to apply them also to a case to which they are applicable in their natural sense.

The conclusion therefore to which I come is that the event did occur of Sir Robert Dalyell disposing of the lands; that he was bound, in disposing of them, to create this real burden upon them; and that the obligation to create such burden is incumbent on the defenders as Sir Robert's gratuitous disponees, if and when they are vested in the lands.

The Lord Ordinary's interlocutor however does not seem to me precisely to meet this result; nor do I find in the summons, as it stands, any conclusion which accurately asserts this right of the pursuer. The summons (and of course I refer to the alternative conclusion) proceeds on the theory that the obligation incumbent on the defenders is to make payment of £10,000, instead of what it truly is, to create a real burden for that sum; and the Lord Ordinary has given a declaratory decree in terms of that conclusion, only qualifying it by declaring that the defenders may, if they like, create a real burden. In the finding by the Lord Ordinary, which precedes this decree, his Lordship makes the primary obligation to pay, and the optional alternative to create a burden. But the only obligation stated in the deeds mentioned in the interlocutor is to create a real burden, and although it is true that a solution of the obligation may be found in payment, that does not make payment the right of the creditor in the obligation. I do not think it is necessary to express this mode of solution in the declarator, and certainly not to make it the primary obligation declared.

I am afraid therefore that unless the pursuer amends his summons so as to ask a declarator that in the event stated the defenders are bound to create a real burden, we cannot give him a decree. But probably a proposal to amend will readily be made.

LORD ADAM.—I concur with your Lordship. The first deed which here requires examination is the trust-disposition and settlement of Miss Elizabeth Dalyell to Binns. By it Miss Dalyell directed her trustees to dispose and convey the lands and estate of Binns to and in favour of Sir Robert Dalyell and his heirs, who, failing, to Osborne Dalyell and his heirs, and the conditions under which the conveyance was to be made were that in the event of the lands being sold or

disposed of, or excambed, or adjudged, or attempted to be adjudged, or carried away, then there should be paid out of the price of the lands if sold, or created "a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of the said George Falconar as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000 sterling." It is this clause which raises the question between the parties. The children now in existence of George Falconar claim in the circumstances either payment of £10,000 or that a real burden shall be created upon the estate by those who have succeeded to it, or who will be entitled to succeed to it.

No. 121.
Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

I concur with your Lordship that the meaning of the clause is that if the estates are sold, or if not sold, disposed of or excambed, that the seller, if they are sold, shall pay the sum of £10,000 to the children in existence of Mr George Falconar, but if they are not sold and remain unsold then the condition is that in that case the disposer who personally disposes of them shall create a real burden to that extent over the estates.

Miss Dalyell then goes on to give this reason why she made that provision,—
"It being my most earnest wish and desire that the said lands and estate of Binns shall be preserved and maintained whole and entire in lineal descent in my family." Her intention therefore was to prevent if possible the estates being sold or disposed of, and so taken out of the family, by laying that burden upon the party who should either sell or dispose of them.

Now, the destination in the trust-disposition was, as I understand, a destination in favour of the nearest heirs of Miss Dalyell who would have taken by law, but then by two codicils she makes this change. She desires her trustees to convey the estate in favour of Robert Dalyell—that was her eldest nephew—whom failing, to his sister Mrs Du Plat and the heirs of her body, whom failing to Elizabeth Dalyell, afterwards Mrs Cornwall, and the heirs of her body, and then comes "whom failing to and in favour of the within designed George Falconar of Carlowrie and the heirs of his body." The alteration of the destination was this, that there was an exclusion of Osborne Dalyell, the immediate younger brother of Robert, and the heirs of Osborne, and there was also an exclusion of Mr Wilkie of Foulden and the heirs of his body, although not by name. Mr Wilkie happened to be the next heir after Mrs Cornwall and the heirs of her body, so that the effect of the codicil was to bring in George Falconar of Carlowrie and the heirs of his body before Mr Wilkie and the heirs of his body. These were the changes operated by the codicils, and the reason why Miss Dalyell excluded Osborne Dalyell was this, as she tells us in the end of her codicil, that she thought that if the estate came to Osborne it would have been immediately dissipated. That was also her reason for excluding Mr Wilkie, and not any dislike or anything of that sort to Mr Wilkie himself, Mr Wilkie having intimated to her that if ever the estate came to him under the original destination he would take care that Osborne's family should get it. Therefore, to secure her intention of preserving the estate, she displaces the heir who she thought would, in point of fact, have dissipated it and the heir who, in point of fact, she thought would have enabled that heir to have dissipated it if he had come into it. I advert to this, because Miss Dalyell expressed as her reason for imposing the conditions which she did in her original settlement that she wished to preserve the estate in the lineal descent in the family, and it was said that the alteration subsequently made by Sir Robert Dalyell, which I shall afterwards consider, had not the effect of defeat-

No. 121. ing that intention, but on the contrary of fulfilling it, because the effect of the subsequent change was to replace Mr Wilkie where he was before, and so to that extent to carry out Miss Dalyell's intention by restoring the succession to the estate more in the line of lineal descent.

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

Now, what followed upon that was, that after the death of Sir William Dalyell, who was entitled to the liferent of the estate, Miss Dalyell's trustees executed a conveyance of the estate in terms of her directions. Sir Robert had thus become vested in the estate, and what Sir Robert did, and what raises this question, was this,—By disposition and settlement dated in 1872 he conveyed the estate with a destination in these terms,—“I dispoñe to myself and the heirs of my body”—so far that was quite right—“whom failing to my sister Elizabeth Grace Dalyell, wife of Gustavus Charles Cornwall, secretary to the General Post Office, Dublin, in liferent for her liferent alimentary use only, and to the heirs of the body of the said Elizabeth Grace Dalyell or Cornwall in fee, whom failing to and in favour of my cousin John Wilkie of Foulden, in the county of Berwick, Esq., and the heirs of his body.”

Therefore the alteration upon the destination under which Sir Robert himself held the estate was that he deprived his sister Mrs Cornwall of the fee which was given to her, leaving her only a liferent, and he introduced Mr Wilkie into the destination, thereby cutting out Mr Falconar and his heirs from the succession. That accordingly was a destination not in terms of the destination which Miss Dalyell had provided by her trust-disposition and settlement and codicil.

Now, the question is—was that or was it not a disposition by Sir Robert of that estate contrary to the directions of Miss Dalyell? I think that it was anything but in the words of Miss Dalyell's settlement. It was a disposition not in terms of the disposition in her deed, and therefore it was a disposition with reference to which the condition was attached of paying £10,000, or creating a real burden upon the property therefor. The deed being a gratuitous disposition, which it was, it appears to me that the event which Miss Dalyell had provided for arose. That is my view of the case, and I think that is the only point in the case.

I am accordingly of opinion that the event has occurred, that Sir Robert did dispoñe the estate gratuitously, and that having done so he was bound to have created a real lien upon the estate. And I think it necessarily follows that Mr Wilkie and his children, if they shall ever succeed to this estate, which is not quite certain yet, as gratuitous dispoñees, are bound to fulfil the obligation which was imposed upon the party who dispoñed to them.

It was said that this was not a violation of Miss Dalyell's directions and intentions, because it was not a violation of the destination in the lineal descent. That is quite true, but I do not think that is the proper construction of the deed notwithstanding that the disposition of the estate was made to parties who were perhaps nearer in lineal descent. The question is, whether it was a disposition against the destination which Miss Dalyell had herself prescribed by the deed. I need not point out that Miss Dalyell was herself the first party to call Mr Falconar's heirs before Mr Wilkie, and so was the first party who violated her own wish and intention.

Upon these grounds I think the interlocutor of the Lord Ordinary is right.

LORD KINNEAR.—I agree also with your Lordship. I do not think it at all doubtful that Sir Robert Dalyell has disposed of the estate by his conveyance:

the defenders in a different way from that in which Miss Elizabeth Dalyell's No. 121. trust-deed disposed of it; and I think it follows that the provision for that contingency which is contained in the latter deed has taken effect. I quite agree with your Lordship as to the meaning and legal effect of that provision. If the estate had been sold either by Sir Robert Dalyell or by any gratuitous disponee of his, the pursuer and the other children of Mr George Falconar would have been entitled to £10,000 of the price. So long as it remains unsold they have no immediate claim for payment of the money, but they have a right to require that, so soon as the estate comes into the hands of a disponee other than the heir who would have taken under Miss Dalyell's destination the sum of £10,000 shall be created a real burden upon the lands in their favour. I think a good deal of apparent difficulty which was introduced into the argument, and probably also the error which your Lordship has pointed out in the construction of the summons, has arisen from a failure to advert to the distinction between those two entirely different rights which the children of Mr Falconar are to acquire in different circumstances. The Lord Ordinary has observed that the obligation to pay £10,000, and also the obligation to create a real burden upon the lands to that amount come practically to the same thing. It may be that the distinction is of no practical importance so long as the lands on the one hand, and the debtor on the other, are equally good for the money, but the legal character and consequences of the two obligations are altogether different. There can be no doubt that personal obligations may be made real burdens, because all the conditions of a feudal grant which are so conceived as to affect not only the original grantee and his heirs but also all singular successors into whose hands accordingly the lands may come are quite properly called real burdens, inasmuch as they are carried with the conveyance of the lands themselves whether voluntary or judicial, so that no purchaser or creditor could take the lands except under burden of the conditions. But a real burden does not of itself import any personal obligation whatever, although it may be combined with a personal obligation if the granter so intends to secure it. The law is very clearly stated and laid down by Lord Stair, and has been illustrated by a series of very familiar decisions. Therefore when we find that under a *mortis causa* testament the disponee is directed in a certain event to make a real burden on the lands, we have to look to the terms in which that obligation is laid upon him in order to see whether they impose any personal obligation upon him or upon his successors. It appears to me quite impossible to read the clause here without seeing that there are no words that can possibly be construed into such an obligation in this case. On the contrary, there is to be a distinction very clearly indeed between the two different rights which are to arise to Mr Falconar's children in two different events. In the one case they are to have right to payment of the money, in the other case they are to have a security created in their favour over the lands. Now, if Sir Robert Dalyell had created such a burden upon the lands, or if his disponees when they come into their hands create it, the effect will be that their infestment will be so burdened that no voluntary deed granted by the proprietor so infest, and no real diligence by any creditor, could possibly come into competition with the claim of the creditors in the real burden; but these creditors have no personal action for payment of a sum of money against the proprietor of the lands. I therefore agree with your Lordship that it is impossible to give effect to the conclusion of the summons as it now stands. I think that the Lord Ordinary's judgment is substantially sound, and that if the

Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

No. 121. pursuers are able to frame a conclusion which will give effect to the legal rights as we have now found them to be, they ought to have an opportunity of doing so.
Mar. 15, 1892. I have only to add, with reference to an observation of the Lord Ordinary at
Falconar the conclusion of his opinion, that I entirely agree with it, as I understand
Stewart v. your Lordships also do, that there is nothing in what the Lord Ordinary de-
Wilkie. scribes as being the hypothetical character of the declarator which the pursuer asks which ought to prevent the Court determining the rights in the present action. So long as the estate remains in the possession of Mrs Cornwall, no right can arise to the pursuer, because she takes the right which Miss Dalyell intended for her, subject only to the limitation to a liferent which the pursuer of course does not complain of. Until her death it cannot be known whether the destination of which they do complain, and of which under Miss Dalyell's deed I think they are entitled to complain, will take effect or not. But we are told that although that presents a difficulty, still practically the event upon which they will be excluded from the succession under Miss Dalyell's deed is not likely to occur. If that be so, and if it appears upon the death of Mrs Cornwall that there are no heirs of her body to take the lands, and that no such persons have ever existed, then it will appear also that there has never been anything to stand between the estate and Mr Wilkie and his heirs, and therefore it will follow that they are now in the position in which the deed of Sir Robert Dalyell placed them, although we cannot tell at this moment whether they are so or not. Therefore, as pointed out by your Lordship, there is no difficulty in giving the pursuer decree of declarator, if he can frame the conclusion in such a way as to square with his legal right.

LORD M'LAREN was absent.

The following amendment was thereafter allowed to be made and was inserted as the first alternative conclusion of the summons, viz. :—"Or otherwise it ought and should be found and declared, by decree foresaid that on a just construction of the trust-disposition and settlement and codicils by the said Miss Elizabeth Dalyell, dated respectively 21st November 1855, 12th March 1860, and 3d May 1860, and all recorded in the books of our Council and Session 26th April 1861, and of the said disposition by the said John Wilkie and Sir Robert Alexander Osborn Dalyell, as trustees foresaid, the defenders the said James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet Charlotte Wilkie and Eleanor Bruce Wilkie, and each of them and their respective heirs on succeeding to the said lands and estate of Binns and others under the said disposition and settlement by the said Sir Robert Alexander Osborn Dalyell, or such one or more of them as shall so succeed, are bound to create as at and from the date of such succession over the said lands and estate a valid real burden for the sum of £10,000 sterling in favour of the pursuer and the defenders Miss Frances Henrietta Falconar and Mrs Helen Jane Falconar or Collyer, equally, and their heirs."

THE COURT pronounced the following interlocutor:—"Having resumed consideration of the reclaiming note for the defenders against the interlocutor of Lord Kyllachy, dated 5th December 1891, and heard counsel for the parties, Recall the said interlocutor. Find that, on a just construction of the trust-disposition and settlement and codicils of the deceased Miss Elizabeth Dalyell and of the disposition by the trustees of the said Miss Elizabeth Dalyell both mentioned upon record, the defenders James Wilkie, John Dalyell Wilkie, Henrietta Eleanor Marie Wilkie, Harriet

Charlotte Wilkie, and Eleanor Bruce Wilkie, and each of them and their respective heirs on succeeding to the said lands and estate of Binns and others under the disposition and settlement of Sir Robert Osborne Dalryell, recorded 23d June 1886, or such one or more of them as shall so succeed, are bound to create as at and from the date of such succession over the said lands and estate a valid real burden for the sum of £10,000 sterling in favour of the pursuer and the defenders Miss Frances Henrietta Falconar and Mrs Helen Jane Falconar or Collyer, children of the deceased George Falconar of Carlowrie, equally, and their heirs: Therefore find, declare, and decern, in terms of the first alternative conclusion of the summons as amended: *Quoad ultra* assoilzie the defenders from the conclusions of the summons as amended, and decern," &c.

No. 121.
Mar. 15, 1892.
Falconar
Stewart v.
Wilkie.

RUSSELL & DUNLOP, W.S.—J. A. CAMPBELL & LAMOND, C.S.—Agents.

REV. DAVID SMITH PETERS, Pursuer (Respondent).—*Sol.-Gen. Murray*—*M'Kechnie—M'Lennan*. No. 122.

MAGISTRATES AND TOWN-COUNCIL OF GREENOCK, Defenders (Reclaimers).—*D.-F. Balfour—Sym.* Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

PRESBYTERY OF GREENOCK, Defenders.

Burgh—Church—Minister—Stipend—Obligation to provide a "competent and legal stipend not under" a certain sum.—In 1741 the feuars of Greenock, then a burgh of barony, raised by a voluntary tax on malt a sum of £1000 as part of an endowment for the minister of a new parish they proposed to have erected. The managers of this fund lent it to the baron on heritable security, taking the bond payable to themselves in trust for the whole feuars and householders of the burgh, and of the new parish when erected, "for the special effect and purpose of being part of the benefice, and in trust that such erection being once legally made they shall denude themselves by assigning the bond in favour of the minister first settled and his successors in office" to the intent that the minister and his successors in office may receive the profits thereof. About the same time a contract was entered into between the baron and the feuars and inhabitants of the burgh by which the latter voluntarily assessed themselves in a certain duty on malt for fifteen years for the purposes of the new erection. The managers, as directed by the written instructions of the feuars and inhabitants, raised a summons of disjunction and erection in the Teind Court, setting forth that the erection of a new church was necessary, and was "desired by all the inhabitants, who have provided a sufficient fund for building a new kirk, and endowing a minister with a competent stipend not less than 950 merks of stipend, and 50 merks of communion elements" (together equal to £55 sterling), "towards which the pursuers have already laid out upon heritable security" the sum of £1000, "and have bound themselves by contract to pay a certain contribution yearly for fifteen years, which will be sufficient to complete a fund for the stipend, and to defray the expense of building a church," and setting forth, *inter alia*, the said deeds, and concluding for disjunction of a certain part of the old parish, and for declarator that a new church be erected, and that the managers of the fund and the feuars and elders of the new parish should have the patronage and power of disposing of the seats and uplifting the rents, "with this provision and condition always" that the heritors of the parish should not be liable for the stipend or the erection of the church, "but also that the baillie, feuars, and inhabitants of the burgh be bound and obliged not only to defray the expense of erecting" the church, "but also to provide the minister of the kirk" "with a competent and legal stipend not under 950 merks, with 50 merks for communion elements." On 15th July 1741 the Teind Court pronounced decree in terms of the conclusions of the summons, the decree setting forth the comparance of and the consents of the heritors, and "that the pursuers' procurator for satisfying the Court that there was a suffi-

No. 122. cient sum for building and endowing the church," "as also for a competent stipend to the minister to be settled at the new church, produced" the bond for £1000, and the contract of assessment for fifteen years.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

By a charter of 1751 granted by the baron, the managers of the burgh funds, including those above mentioned, were erected magistrates and council of the burgh, with power to manage its funds and common good, and the set of the burgh was fixed and so continued till the passing of the Municipal Reform Act, 1833.

In 1767 the magistrates and council resolved to take payment of the £1000 in the bond, and to apply it towards payment of the town's debt, and to grant security to the minister of the new parish and his successors "for payment of the legal interest thereof in part of the modified stipend."

The magistrates and council continued to let the seats, and received the revenue thence derived. They paid the minister's stipend, which was originally £80, and which they from time to time raised by "gratuities" personal to individual ministers, till it reached a sum of £320, a sum of £120 being described as "legal stipend," and the remainder as "gratuity." In 1873 the magistrates and council adopted a resolution under which the minister was remunerated as follows, viz., he was to receive out of the seat rents (a) £120, and (b) the balance of the seat-rents after deducting so much of the cost of maintaining the church and manse as exceeded £50, the burgh paying such cost up to that limit.

In an action raised in 1891 by the minister against the Magistrates and Councillors of Greenock, *held* (1) that the decree of disjunction and erection embodied a judicial contract, to which the predecessors of the defenders were parties, and that it fell to be construed according to its terms; and (2) that on a just construction thereof the defenders were bound to provide the pursuer and his successors in office with a "legal and competent stipend suited to the circumstances of the time and the position and duties of the benefice," *dis.* Lord Young, who was of opinion that the pursuers of the action of disjunction were merely trustees holding certain funds for the benefice, and had no power to undertake any obligation except in regard to these funds, and that the magistrates had no liability beyond the trust-funds; and (2) that if there had been an obligation on the burgh *ex contractu* to provide a competent stipend not under 950 merks, a Court of law could not fix or enforce payment of a stipend beyond that sum.

2D DIVISION.
Ld. Kyllachy.

THE REV. DAVID SMITH PETERS, minister of the New or Mid Parish Greenock, raised an action against the Provost and Magistrates of the burgh of Greenock (calling also the Presbytery of Greenock for any right or interest they might have) for declarator "that the pursuer, as the minister serving the cure of the New or Mid Parish Church and district thereof, within the burgh of Greenock, was and is entitled to be furnished and provided by the defenders, and that the defenders were and are bound to furnish and provide the pursuer with a competent and legal stipend, to be paid out of the revenue of the burgh, or out of the other funds, property, and revenues held and enjoyed by the said Magistrates and Town-Council for the special use and behoof of the minister serving the cure of the said church and district, from the date of his ordination and induction to the said cure, and in all time coming, during his lifetime and serving the said cure."

The pursuer also concluded for payment to him, as minister serving the cure, of £320 per annum, from Whitsunday 1880 to Martinmas 1890 under deduction of all payments to account, and decree for payment to him, as such minister, "of the sum of £400 sterling per annum, as a competent and legal stipend from and after the said term of Martinmas 1890, or of such other sum, less or more, as in the circumstances shall appear to our said Lords a competent and legal stipend from and after said term, . . . beginning the first half-yearly payment at the term of Whitsunday 1891, . . . and so forth yearly and termly thereafter (but reserving the right of the pursuer and his successors in the said cure

to apply for an increase of said stipend in the event of the stipend to be decerned for in the process to follow hereon at any time ceasing to be a competent and legal stipend).”

No. 122.
Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

There was also a conclusion for reduction, if necessary, of a minute of meeting of the Town-Council of Greenock relative to the pursuer's stipend, dated 2d September 1873, which is afterwards referred to.

The Mid Parish of Greenock was erected by decree of the Court of Teinds on 15th July 1741, and the pursuer's ground of action was that, according to the terms and meaning of the decree of erection and the prescriptive usage following thereon, the Magistrates of Greenock were liable in payment to the minister of a competent and legal stipend, and that the sums sued for were such stipend.

The facts relative to the erection and history of the church, as they appeared from the documents produced, were as follow :—

Prior to 1741 there was only one church and parish in Greenock—the old or West Parish. The village or town of Greenock was the burgh of the barony of Greenock, which barony was erected in favour of Sir John Schaw, of Greenock, by charter under the Great Seal, dated 11th July 1670.

By a charter granted by Sir John Schaw, his grandson, dated 30th January 1741, Sir John, on the narrative, *inter alia*, that “for the better government and management of the public funds allenarly that has arisen or may arise from any assessment laid on by the inhabitants of the said burgh, with my consent, on themselves upon all malt grounded at the milns of Westward Greenock, it seems just, necessary, and expedient that a certain number of proper persons with necessary power should be appointed for the management and administration of the said funds,” the baillie of the barony being always of their number, granted power to the feuars of Greenock to elect managers of the public funds belonging or which should thereafter belong to the burgh and barony from the voluntary assessment on malt, or other voluntary assessment consented to by him and his successors.

On 7th February 1741 Sir John, on the narrative that he had borrowed £1000 at Candlemas preceding, from the managers so elected, granted to them a heritable bond and disposition in security for the sum of £1000, to be paid to them “in trust for themselves and the whole other feuars and householders of the said burgh of barony, and of the new parish of Greenock, when the same shall be erected, in order to be applied for the special effect and purpose of being part of the benefice of the said parish, when, or in case it shall be erected, and in trust that such erection being once legally made the foresaid persons, or survivor of them, shall denude themselves by assigning and disposing the said bond in security to and in favour of the minister who shall be first settled in the said new erected parish, and to his successors in office in all time coming during the not redemption or until payment, to the intent that such minister and his successors in office may receive the rents and profits thereof during their respective incumbencies, and that the said rents thereof in time of vacancy may be uplifted and applied as accords of the law, and that the minister for the time being shall not have power to uplift or receive the principal sum above written without the consent of the persons above named, or major part of them, or the survivors or survivor of them, or the major part of the said survivors, and failing of them all, without the consent of the Procurator for the Church for the time being, and failing of him, without the consent of the Lord President of Session, or the King's Advocate or Solicitor, or the Dean of the Faculty of Advocates, for the time being, to the end that the said principal sum so uplifted and received may forthwith, or as soon as possible, be employed

No. 122.
 Mar. 16, 1892.
 Peters v.
 Magistrates of
 Greenock.

upon land or annualrent for the same uses . . .” together with the annualrent from Candlemas preceding. Sir John bound himself, in security of said principal sum and annualrent, to infest the grantees or the minister first settled in the parish to be erected, or his successors in office, in certain lands, and in an annualrent of £50, or such sum as should correspond to the said principal of £1000.

In May 1741 written instructions were given by the feuars, and sub-feuars and inhabitants of the burgh, to the managers, to prosecute a process of disjunction and erection of the new parish.

In June 1741 a contract was entered into between Sir John Schaw and the feuars and inhabitants of the burgh of Greenock whereby they voluntarily assessed themselves in a certain duty on malt for fifteen years to come, for the erection of the new parish.

Subsequent proceedings were narrated in the decree of erection which was obtained on 15th July 1741. The decree bore that an action had been brought in the Teind Court at the instance of nine persons (being the persons mentioned in the bond), “all feuars, for themselves and in name of the whole other feuars and inhabitants of the town of Greenock,” with concurrence of the Presbytery and of the Procurator of the Church of Scotland, against Sir John Schaw and other heritors and the minister of the old parish. That the summons set forth, that “whereas by the great increase of the town of Greenock of late years, in trade and people, and consequently of the paroch of Greenock, whereof the town is a part, the erection of the new kirk is become absolutely necessary for the greater success of the Gospell in that place, and is much desired by all the inhabitants thereof, who have provided a sufficient fund for building a new kirk and endowing a minister with a competent stipend, not less than nine hundred and fifty merks of stipend, and fifty merks for communion elements, towards which the pursuers have already laid out upon heritable security on the lands of Kirkmachaeall the sum of one thousand pounds sterling, and have bound themselves by contract to pay a certain contribution yearly for fifteen years, which will be sufficient to complete a fund for the stipend, and to defray the expense of building a church.” Further, that the summons narrated that the written consent of the whole heritors and feuars, and of the Presbytery, had been obtained, and concluded that the Commissioners should disjoin from the parish of Greenock part of the parish described in the summons to be called the New Church and Parish of Greenock, and that it should be found and declared that a new church be erected and a minister settled as the minister of the proposed new parish, and “that the baillie of Greenock and managers of the fund for building and endowing the said kirk, and the feuars and elders of the said new erected paroch for the time being, shall have in all time coming the sole and undoubted right of patronage of the said new kirk and the right of presentation and calling a minister to serve the cure thereat how soon the said kirk should be erected and accommodated for publick worship, and as oft in all time coming thereafter as any vacancy should happen, and of moddling and disposing the said church and hall seats thereof, and bounds within the same, and of setting and uplifting rents for the said seats, and of naming and appointing the beadies, &c. from time to time as they should think fitt, and of disposing during any vacancy of the fund which should be provided by them for a stipend to their ministers, or for communion elements, manse, or schoolhouse, with this provision and condition always, that the patron and others of the parish of Greenock should not be lyable for any expense of paying stipend to the minister of such new parish, or for building, upholding or repairing the kirk, manse, or schoolhouse thereof, or any other parochial

burdens whatever, but should be free of the same in all time coming; but also that the baillie, feuars, and inhabitants of the said burgh be bound and obliged not only to defray the expense of erecting, building, and repairing such kirk, manse, and schoolhouse, and other parochial burdens, but also to provide the minister of the kirk so to be erected with a competent and legall stipend not under nine hundred and fifty merks, with fifty merks for the communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, providing always that the benefice of the then present kirk of Greenock should not thereby be deminished in any sort, but that the same and right of patronage thereof should remain with Sir John Schaw and his heirs of tailzie for ever.”

No. 122.
Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

The decree then set forth the production of, *inter alia*, the various deeds above mentioned “for instructing the points and articles of the libel,” and the granting of decree in terms of the conclusion of the summons. “Because after elapsing of the days of compareance . . . and thereafter upon the day and date of these presents, the said action and cause being called in presence of the said Lords, and both parties comparing by their prors. foresaid, and the said pursuer’s pror. having produced *ut supra*, repeated the lybell and consents lybelled on, and craved decret in terms thereof, and for satisfying the Court that there was a sufficient fund for building and enduing the church to be erected, as also for a competent stipend to the minister to be settled at the new church, produced an heritable bond and infestment by Sir John Schaw of Greenock to the pursuers for the prinll. sum of £1000, as also a contract betwixt Sir John Schaw and the pursuers, whereby they assess themselves in a certain duty on malt yearly for fifteen years to come to be applied to the purposes aforesaid. Whereupon the pror. for the defenders consented to the disjunction and erection lybelled, with and under the condition and provision contained in their consent produced. Which debate above written being considered by the said Lords they decerned in the disjunction and erection lybelled, conform to the conclusion of the lybell, with this condition”—(Here followed the condition exempting the heritors and teinds from liability).

In 1742 the first minister was appointed.

In 1751 an Act was obtained for imposing for thirty-one years a certain duty on ale and beer brewed for sale or imported into Greenock, the proceeds of which were to be employed for various public purposes, and, *inter alia*, the building of the harbour, building of a new church, town-house, &c. The managers of the burgh funds were appointed trustees under the Act for these purposes.

In September 1751 Sir John Schaw, as baron, granted a new charter, giving power to the feuars to elect as magistrates and councillors the nine trustees under the Act, with power to manage the funds and common good of the burgh, in place of the nine managers appointed by the previous charter. The set of the burgh was fixed by this charter.

On 7th November 1758 Lord Cathcart granted to the Magistrates and Council, managers of the funds of the town of Greenock, a feu for the church and manse, and declared “the right of setting the seats and managing and disposing of the fund thence arising” to be in the said Magistrates and Town-Council, burdened always with feu-duty and the expense of repairs of church and manse.

The church was not completed till in or about 1761. The church cost £2388, of which £1058 was obtained from subscription, and the remainder was paid by the burgh. Prior to 1761 the congregation worshipped in a temporary place of meeting. The Magistrates and Council, from the date

No. 122. of the completion of the church, let the seats and paid the stipend of the minister.

Mar. 16. 1892.
Peters v.
Magistrates of
Greenock.

On 11th August 1767, the Council considering that they had previously agreed to receive payment of the £1000 secured for payment to the minister of the Mid Parish as at Martinmas 1767, and that they intended "to apply the sum towards payment of the town's debt, and to grant a security for payment of the legal interest thereof in part of the modified stipend," gave directions, *inter alia*, to have a scroll of the security to be granted to the minister prepared and laid before the Procurator of the Church, and laid thereafter before the Presbytery.

A minute of 10th December 1767 narrated that the Council had received the £1000 and discharged the bond, and ordained the treasurer to pay certain debts therewith and the remainder to the town's credit.

The minimum stipend of 950 merks, with 50 merks for communion elements, was equivalent to about £55, 11s. 1½d.

From minutes of the Town-Council of Greenock, which were produced, it appeared that the stipend had been fixed in 1742 at the sum of £80, being an advance of £24, 8s. 10½d. on the minimum. It was raised to £100 in 1766,* to £125 in 1796, to £180 in 1800, to £220 in 1803, to £270 in 1808, and to £295 in 1812. It was reduced in 1843 to £220, but again raised to £320 in 1861,† and it stood at this last sum until 1873, when the resolution quoted below was adopted. These successive aug-

* The minute of the Town-Council of 26th May 1766 bore :—"The meeting, considering that the present stipend payable by the town to the said Mr Shaw, including the legal stipend and expense of communion elements as ascertained by the decret of erection, and gratuity of £24, 8s. 10½d., agreed to be paid by the then managers of the town of Greenock to him by their Act of Sederunt dated the 6th day of August 1742, amounst in whole to eighty pounds sterling, which the meeting being sensible is not now equal to the annual expense of the said Mr Schaw's family owing to the great increase upon the price of vivers of all kinds within the town for some years past, and that by the great increase of the town within these few years the said Mr Shaw's labour is consequently increased; and the Magistrates and Council being fully convinced of these facts, and the reasonableness of making an additional appointment to the said Mr Schaw living, so as to enable him to support his family supportably and with decency they therefore unanimously agree to pay to the said Mr John Schaw yearly, and each year during his incumbency allanarly, an additional gratuity of twenty pound sterling, commencing from the term of Whitsunday last, out of the first and readiest of the town's revenues, which sum now granted, with the aforesaid legal stipend and gratuity, makes the yearly stipend amount to £100 sterling, now payable to the said Mr John Schaw, but in which is included the fifty merk for communion elements. . . ." The minute contained a clause stating that "this additional gratuity" should not be binding longer than during Mr Schaw's incumbency allanarly.

† Minute of 4th January 1861.—"1st, That seeing the legal stipend attached to the New or Mid Parish does not exceed, with the allowance for communion elements, the sum of £120, and that the church and parish are now vacant and considering that such stipend, with the allowance for the elements, is not such as can now obtain the services of a suitable minister for the proper discharge of the duties attached to the cure, the Council agree that an additional sum of £200 should be allowed to the next incumbent, such additional allowance to be continued during the period he shall hold the cure of the parish. 2d, That the town-clerk be authorised to secure the Corporation or others liable in the payment of the stipend against the liability of paying more than the legal stipend, with the allowance for communion elements, and if he see proper, to consult counsel, so that the Corporation may be properly guarded against any further or additional stipend than the legal stipend attached to the church and parish."

‡ Minute of 2d September 1873.—" . . . That the Town-Council resolve . . .

mentations were always qualified by a declaration that they should be personal to the successive incumbents, and should not import an obligation to continue the same to their successors.

After the date of the resolution of 1873 the minister received out of the seat-rents (a) £120, and (b) the balance of the seat-rents after deducting such cost of maintenance and repairs on church and manse, as exceeded the average £50 paid by the Magistrates and Council under the resolution of 1873.

A vacancy occurred in 1877, and in that year the pursuer was elected. The total amount received by him during the first year of his incumbency was, besides the manse, £385, for the second £355, and for the third £347. From the receipts granted to the chamberlain of Greenock it appeared that of these sums £120 in each year was paid as "legal stipend," and the remainder as "balance of seat-rents . . . granted by the Town-Council as a supplement to the legal stipend of Mid Parish, personal to the presentee, all conform to the resolution of 2d September 1873, and such supplement is in no way to be held as constituting a claim for the same or any similar allowance for the said Town-Council."

The minister having subsequently declined to grant receipts in these terms except under protest, the Magistrates refused to make the payments. The minister raised the present action in 1891.

The pursuer averred ;—(Cond. 7) "The pursuer, as minister of said New or Mid Parish Church, is legally entitled to receive from the defenders a fixed yearly stipend of competent and adequate amount, regard being had to the circumstances existing at the time. For the period from Whitsunday 1880 to the present time the amount of said competent and legal stipend is the sum of £320 per annum, being the sum modified when the last augmentation of a fixed stipend took place in 1860. The said stipend was barely adequate at the time when it was fixed. Since it was fixed thirty years ago, the cost of living has become much greater, the population of the said New or Mid Parish has largely increased, and the demands on the time and energy of the minister have been extended in many ways. A competent and legal stipend, in view of existing circumstances, amounts to not less than £400, and accordingly the pursuer seeks to have his stipend for the future modified at that sum. The defenders have ample funds available for augmentation of the pursuer's stipend."

The pursuer pleaded, *inter alia* ;—(1) According to the terms and meaning of the decree of disjunction and erection of the New or Mid Parish Church of Greenock, and to the usage and prescriptive use and enjoyment following thereon, the defenders, as representing the community of the burgh of Greenock, are liable in payment of a competent and legal stipend to the pursuer as minister of the said church. (2) The pursuer is entitled to decree for payment of the stipend of £320 first concluded for, from the term of Whitsunday 1880 to Martinmas 1890

that the legal stipend and communion element money payable to the next incumbent shall be £120 per annum, with the use of the manse, and that the presentation shall contain an obligation to pay the next incumbent, as a supplement personal to himself, the balance of the seat-rents which may during his incumbency be competently levied, after providing for that stipend and communion element money, and for the cost of the maintenance of the church fabric and manse, and for the necessary repairs and alterations thereupon, and similar charges, so far as such cost may exceed an average amount of £50 a-year; but it is hereby declared that this obligation shall not infer any warrandice, but shall only confer upon the incumbent right to the balance of such seat-rents as the Town-Council are legally entitled to levy."

No. 122.

Mar. 16, 1892.

Peters v.
Magistrates of
Greenock.

No. 122. (under deduction of the sums paid to account), in respect that the same was not more than a competent and legal stipend, and was recognised and paid as such to the pursuer's predecessors in the cure from the year 1860 to 1873. (3) The pursuer is entitled to decree for payment of the stipend of £400 second concluded for, from and after Martinmas 1890, in respect that the same is a competent and legal stipend in the circumstances condescended on. (4) The resolution adopted by the defenders on 2d September 1873 having been, in the circumstances stated, *ultra vires* and illegal, the pursuer is entitled to reduction of the minutes of the defenders' meeting at which the said resolution was adopted, in so far as necessary to give effect to the other conclusions of the action. The defenders pleaded, *inter alia* ;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action. (3) The pursuer having been paid, or tendered, sums exceeding the whole sums due to him in name of stipend, the defenders should be assolizied. (4) The sum which the defenders are legally bound to provide to the pursuer, as minister of the New or Mid Parish, in name of stipend and communion elements, not being in any view more than £120 per annum, and the stipend paid, so far as in excess thereof, having merely been voluntarily paid out of the common good, in the discretion of the Magistrates and Council for the time, the action cannot be maintained. (5) It is incompetent to augment the stipend of the pursuer out of the funds of the burgh. (6) *Separatim*, The Court of Session has no jurisdiction to augment the pursuer's stipend. (7) The resolution of the Town-Council of 2d September 1873 which is sought to be reduced having been competent and legal, *et separatim*, having been for the interest of the pursuer and of the benefice, the defenders ought to be assolizied from the reductive conclusions.

The Lord Ordinary (Kyllachy), on 23d June 1891, pronounced this interlocutor :—" Finds that the obligation libelled contained in the decree of disjunction and erection, dated 15th July 1741, is binding on the defenders : Finds that upon a just construction of the said obligation the defenders are bound to provide the pursuer and his successors in the New or Mid Parish Church of Greenock with a legal and competent stipend suited to the circumstances of the time, and the position and duties of the benefice : Therefore finds, declares, and decerns in terms of the first declaratory conclusion of the summons : *Quoad ultra* appoints the cause to be enrolled that parties may be heard as to the petitory conclusion and reserves all questions of expenses ; grants leave to reclaim." *

* " OPINION.— . . . The decree of disjunction and erection of 1741 must, I think, be read as expressing a judicial contract, to which the predecessors of the defenders were parties, and under which the church of the New or Mid Parish of Greenock was erected by the Court of Teinds. It is therefore a document which, at least upon the parties to it, was and is binding according to its terms, and which requires to be construed on the same principles as any other contract. Accordingly, the first question is, What is the true construction of the obligation contained in the decree whereby the predecessors of the defenders became bound, *inter alia*, 'to provide the minister of the new church to be erected with a competent and legal stipend not under 950 merks, and fifty merks for communion elements, payable at two terms in the year, Whitsunday and Martinmas, by equal portions' ?

" Now, in considering that question, it becomes important to keep in view that the predecessors of the defenders who undertook the above obligation did so, not gratuitously, but for more or less onerous considerations—(1) They received a sum of £1000 sterling, provided by the principal heritor, or raised by voluntary contribution, and which sum, it is admitted, although originally put out on bond, was subsequently mixed with the town's funds and applied to . . .

The defenders reclaimed.

Argued for them ;—The defenders were willing, as they had always

No. 122.

Mar. 16, 1892.

Peters v.
Magistrates of
Greenock.

general purposes ; (2) they further obtained the patronage of the new church ; and (3) they obtained the right to levy and appropriate the whole of the seat-rents, or at least to appropriate so much of them as was not required for the repair and upkeep of the fabric. In return they became bound to provide the minister with 'a legal and competent stipend,' not under the sum mentioned, which, including communion elements, amounted when converted into sterling money to £55, 11s. 1½d.

"In these circumstances I find difficulty in adopting either of the constructions of the decree which were at the debate suggested by the defenders. I do not, for example, think it is possible to hold that the obligation undertaken with respect to the stipend was limited to the minimum of £55, 11s. 1½d., and that anything beyond that was to be in the discretion of the defenders' predecessors. If that had been meant, it would, I think, have been expressed, and it is in my judgment scarcely conceivable that it should have been meant, seeing that the sum in question—£55, 11s. 1½d.—did little more than represent the income of the £1000 which, as I have said, the defenders' predecessors received and spent. Nor would it, I think, have been altogether consistent with the onerous character of the contract that the debtors in the obligation should have been made the judges of the amount which they should pay. It is, perhaps, a more feasible proposition that a legal and competent stipend was to be fixed once for all, and that the parties to the contract being satisfied with the stipend as originally fixed, there was no room for recurring augmentations. But if the stipend was to be fixed once for all, one would have rather expected that it would have been so fixed in the decree. And on the other hand it can, I think, scarcely be doubted that a stipend to be modified from time to time, according to circumstances, was not only more in accordance with the language used, but also much more in accordance with the nature of the transaction, and with the probable requirements of the Court of Teinds,—not to speak of the elastic character of the revenue to be drawn by the town from the seat-rents.

"It is, moreover, I think, impossible in this connection to disregard the usage which has followed on this decree for upwards of a century. The stipend appears to have been fixed in 1742 at the sum of £80, being an advance of £24, 8s. 10½d. on the minimum. It was raised to £100 in 1766, to £125 in 1796, to £180 in 1800, to £220 in 1803, to £270 in 1808, and to £295 in 1812. It was reduced in 1843 to £220, but again raised to £320 in 1861, and it appears to have stood at this last sum until 1873, when the new arrangement now complained of was sought to be made, and the present dispute may be said to have arisen. No doubt—as set forth in the defenders' statement—these successive augmentations were always qualified by a declaration that they should be personal to the successive incumbents, and should not import an obligation to continue the same to their successors. But no augmentation once granted was ever in fact withdrawn, except in 1843, and then only to the extent which I have mentioned, and the later minutes from 1843 onwards contain regularly an acknowledgment that to the extent at least of £120 the stipend was a legal stipend for which the town was bound. How this last sum was reached does not appear, but it will be observed that it at least exceeds considerably the original stipend, and is not therefore consistent with the contention that the original stipend satisfied the town's obligation under the decree.

"I appreciate the argument that this is a case of contract, and not of trust, and that there is always a certain presumption against an obligation which is indefinite, and involves a reference to the Court from time to time. I observe also, on referring to the decree itself, that it appears to have been at least anticipated that a sum should be raised by a voluntary tax continuing for fifteen years, sufficient (with the £1000 already raised) to build the church and provide completely for the stipend. But it does not appear how far this tax was levied, or what it produced ; nor has it been suggested that by reference to this tax the means exist for now defining the stipend. In truth, the uncertainty of this

No. 122. been, to hold themselves bound in £120 per annum as stipend. That
 Mar. 16, 1892. was more than double the proceeds of the original £1000. With regard
 Peters v. source of income was, I think, not improbably the reason why the parties to
 Magistrates of the disjunction and erection, including the Court of Teinds, thought it necessary,
 Greenock. instead of resting satisfied with a prospective endowment, to impose on the
 town in general terms the obligation to provide a legal and competent stipend.

"I am, on the whole, therefore of opinion that the defenders' predecessors came under an enforceable obligation to provide such a stipend to the minister as should be legal and competent according to the circumstances of the time—the amount, in case of dispute, being from time to time fixed by the Court, and I am greatly fortified in this opinion by being able to appeal to so excellent an authority as a judgment of the late Lord Wood. I refer to his Lordship's judgment (practically acquiesced in) in the case of *Cesar v. The Magistrates of Dundee*, June 9, 1848, and reported in 20 D. 859. The obligation in that case was in terms identical with the present, and was contained in a similar decree of disjunction and erection. It was granted by the Magistrates of the burgh of Dundee, and its construction having come into question under circumstances very similar to the present, Lord Wood pronounced the following interlocutor:—'Finds that the sum of £105 which was originally fixed as the amount of stipend to be paid to the minister of the Cross Church of Dundee, of which the pursuer is now the incumbent, was thereby made the permanent amount of the stipend for that charge in all times thereafter, so that the obligation imposed on the burgh by the decree 1788 was exhausted as regarded the amount of the stipend which could be claimed from the burgh, and all demand for any increase absolutely excluded, however inadequate the sum might subsequently, under existing circumstances, come to be for the support of the clergyman for the proper discharge of his duties, and for the maintenance of his position in society, and therefore to that extent repels the defences and decerns, and before further answer appoints the cause to be enrolled.' A similar judgment was pronounced in the action which shortly followed at the instance of the other ministers of Dundee against the magistrates, reported in the same volume of Dunlop; but the question there was as to the administration of a trust, not as to the enforcement of a contract, and accordingly it is not of course a precedent of equal authority.

"It remains only to consider whether the obligation undertaken in 1741 by the baron bailie and feuars of Greenock has now transmitted to the defenders. I confess I do not think that this can well be doubted. Greenock was up to 1832 only a burgh of barony, but between 1742 and that date it had gradually acquired a municipal constitution, and there can, I think, be no doubt that the managers of the burgh previous to 1832, and the Magistrates and Town Council since that date, have accepted the position of representing their predecessors and adopting their obligations. They have all along paid the stipend in question, and performed the other obligations imposed by the decree of disjunction and erection; and they have, on the other hand, drawn the seat-rents and taken the benefit of their predecessors' funds, including the £1000 in Sir John Schaw's bond. They seem also to have exercised up to 1874 the patronage which was by the decree granted to their predecessors, and altogether I do not think that the case can be taken otherwise than as if the present Magistrates and Town-Council had been the municipal authority in 1741, and, indeed, do not gather that this was seriously disputed at the debate.

"I propose, therefore, to pronounce the following interlocutor (*supra*).

"If the parties cannot agree, it will be for after consideration how and what principles the amount of stipend shall be fixed. It may be that the stipend fixed in 1861 may form a standard, or it may be (though I should deprecate such a result) that some inquiry may be necessary. As at present advised, however, I do not see that any inquiry is necessary as to the funds of the burgh. In the view I have expressed, this is not an action for administering a trust, but for constituting a debt; and decree must therefore go out as for any other debt, without reference in the meantime to the circumstances of the debtors.

No. 122.

to what exceeded that, their position was that they could lawfully pay to the minister out of the common good, whether the seat-rents or not, a sum in their discretion.¹ This they had done, and the documents shewed that the pursuer's income had never fallen below £263, 17s. 2d. in any year. But the usage and the terms in which every addition had been made established that all beyond the legal stipend was voluntary addition, and indeed it would have been *ultra vires* for them to bind themselves. It was said that they were bound to add to the stipend whatever the Court might think fit, to make it "legal and competent," according to the circumstances of the time, or, in other words, that the Court of Session was to give the pursuer an augmentation—indeed, any number of them. That must either be because of contract or trust. If it were the latter, the Court would only interfere if a breach of trust were shewn. So long as the matter remained in the discretion of the defenders as trustees, the Court had no jurisdiction. It was true that the original £1000 was long ago spent, but the defenders had been paying the proceeds and much more out of their revenue. At all events, if that was a breach of trust, it fell to be answered by the representatives of those who committed it. The minister could not maintain that the seat-rents were a trust for him. But both the Lord Ordinary and the pursuer took the view that the case was one of contract, and that the town of Greenock had undertaken an obligation capable of indefinite expansion according to the view of a Court of law. The obligation was to pay "a competent and legal stipend not under" 950 merks. According to the ordinary principles of construction the 950 merks gave a measure of taxing the obligation. It was to be observed that at the date of the decree (1741) the law was understood to be that new augmentations could not be granted. It was not till the case of *Mitchell*² that these were introduced. At all events, an obligation so imposed did not import an indefinitely increasing obligation. Indeed, the administrators of a public fund could not lawfully undertake such an obligation. It would be contrary to the principle of the law which restrained them from alienations.³ It was said on the authority of the case of *Cæsar*, quoted by the Lord Ordinary, that the funds of the burgh could be made available for this increase of stipend as for a debt. But that was an Outer-House decision. The case was subsequently compromised. And it was very worthy of notice that when the decision was before the Inner-House in one branch of the relative litigation about the funds of Queen Mary's Hospital in Dundee,⁴ the Inner-House expressed the view that the increase the pursuer there was found entitled to was to be paid not out of the ordinary funds of the burgh but out of the hospital funds. That deprived the case of *Cæsar* of most of its supposed importance.

The only fund for an augmentation was teinds. Burgh ministers had no teind, and therefore even in the Teind Court could not bring an augmentation.⁵ If any were to be given it must be because a trust-fund was shewn, as in the case of the *Presbytery of Dundee*.⁴ The expression "legal

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

¹ Magistrates of Kilmarnock v. Aitken, May 31, 1849, 11 D. 1089, 21 Scot. Jur. 416.

² Mitchell v. Officers of State, May 22, 1789, 3 Pat. Ap. 140.

³ Brice on *Ultra Vires*, pp. 104, 129, 231; Oswald v. Ayr Harbour Trustees, Jan. 24, 1883, 10 R. 472, aff. July 23, 1883, 10 R. (H. L.) 85; Clapperton v. Magistrates of Edinburgh, July 14, 1840, 2 D. 1385.

⁴ Presbytery of Dundee v. Magistrates of Dundee, March 19, 1858, 20 D. 849, 30 Scot. Jur. 452, aff. July 24, 1861, 4 Macq. 228, 23 D. (H. L.) 14, 33 Scot. Jur. 707.

⁵ Ersk. i. 5, 23; Wishart, &c. (Minister of Edinburgh) v. Magistrates of

No. 122.

Mar. 16, 1892.
 Peters v.
 Magistrates of
 Greenock.

and competent" stipend was too vague to justify the demand for augmentation. The pursuer surely had one. Even if he had only the £120 and a manse, that was more than the minimum of a competent and legal stipend, which, under the Act of 1844, enabled the Church Courts and the Teind Court to establish a *quoad sacra* parish.

Argued for the pursuer;—It was clearly settled that common good could be employed in augmenting the stipend of a minister of a burgh of barony. Kindred cases had been decided on the subject of education. If this case were to be regarded as one of trust, the principle of the case of the *Probytery of Dundee* applied. But it was truly a case of contract. The defenders' predecessors had received £1000 and a right of patronage, and had undertaken to provide a "legal and competent stipend." That it was to be not under a certain sum did not shew it was not to be much over, if that were needed to make it "competent." It must be "competent" according to the circumstances of the time. Lord Wood's judgment in *Cesar's case*, 20 D. 859, was sound in its reasoning, and was directly in point to that effect. If this were a case of obligation it did not matter that the defenders said they had no power to assess the inhabitants to fulfil it. Even if it were true that they had expended their available common good, or some of it, on other purposes, that would not hinder decree going out against them. Such arrangements as were made at the erection of this parish were frequent in last century, and quite competent.¹ The appeal must be to a Court of law, because it was a question, not of teinds, but of a particular contract. The town had spent the original fund, but the obligation remained!

The usage shewed the construction the defenders' predecessors put upon the expression "competent" stipend. They had always tried to make it suit the circumstances of the time. It was in vain that they had introduced saving clauses in doing so.

At advising,—

LORD TRAYNER.—I think the interlocutor of the Lord Ordinary submitted to review should be affirmed, and I concur in the views expressed by his Lordship in the opinion he has given. Had nothing been argued before us beyond what seems to have been argued before the Lord Ordinary, I should have contented myself with simply expressing my concurrence in the judgment which has been pronounced, for I could not add usefully anything to what the Lord Ordinary has said. But two questions were submitted by the reclaimer in argument before us with which the Lord Ordinary has not dealt, and with regard to each of them I think it right to make one or two observations. The first of these questions is, whether the obligation in question was not *ultra vires* of the persons who undertook it, and if so, whether it is binding on the defenders! The Lord Ordinary has pointed out that the defenders now represent the persons who in 1741 (the date of the obligation) had the management and administration of the municipal affairs of Greenock, and therefore the defenders will be liable for the due fulfilment of the obligation if it was validly contracted. I see no reason for doubting that the obligation in question was one which it was

Edinburgh, Feb. 17, 1766, 2 Pat. Apa. 118; *Magistrates of Dundee v. No.* Nov. 18, 1829, 8 S. 66.

¹ *Magistrates of Kilmarnock v. Aitken*, May 31, 1849, 11 D. 1089; *School Board of Perth v. Magistrates of Perth*, Oct. 19, 1878, 6 R. 45; *School Board of Greenock v. Magistrates of Greenock*, June 19, 1890, 17 R. 969; *Presbytery of Dundee v. Magistrates of Dundee*, 20 D. 849.

² *Connell on Parishes*, 65, 86; *Moffat v. Magistrates of Port-Glasgow*, decided by Lord Robertson in 1846, not reported.

within the power of those representing the inhabitants of the burgh at the time to grant or undertake. Such obligations appear not to have been at all unusual about the middle of last century. Several examples are given by Connell of similar obligations granted under similar circumstances and for a like purpose (Connell on Parishes, 86, *et seq.*); and Erskine (i. 5, 23) speaks of them as one of the modes by which provision may be made for the stipend of the minister of a newly erected church "either where there are no tithes, as in boroughs, or where the tithes have been already exhausted." The question whether a burgh or the representatives of a burgh could not validly grant such obligations does not seem to have been at all questioned in the times of the authors I have cited. But the question was distinctly raised in the case of the *Magistrates of Kilmar-nock v. Aitken*, 11 D. 1089, where it was held that an obligation similar in all its important features to that now under consideration was not *ultra vires* of the magistrates of the burgh who undertook it. There is no authority to the contrary, and that being so, I take it to be settled by authority that the obligation in question was not *ultra vires* of the granter.

No. 122.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

The second question argued before us was, whether it was competent to the defenders to pay the pursuer's stipend out of the common good of the burgh? Now, that question was also decided—and decided in the affirmative—by the case of *Aitken*, above cited. And it is difficult to see how any other conclusion could be reached. If the obligation was one which the magistrates of a burgh could validly grant, it is only out of the property of the burgh that the obligation can be met. The obligation does not bind the magistrates personally; it binds that which in their official capacity they are administering.

Another view was suggested in the course of the argument, if not maintained, to the effect that the obligation now sued on is in itself not a valid or lawful obligation, or one which the Courts of law would or were bound to enforce. This view, as I understand, proceeds upon the consideration that the obligation in question is one for an uncertain—that is, an unfixed—amount which may vary from time to time. After the best consideration I have been able to give this matter, I am unable to concur in this view of the obligation before us. I am disposed to regard the obligation as one the extent and quality of which is quite fixed and determinate. It is to provide a "legal and competent stipend." The value or extent of that obligation in money may vary with circumstances, but the obligation does not vary. It is an unvarying obligation to provide a certain thing each year, but which may cost more or less each year as circumstances change. An obligation to aliment is of the same character. The obligation to provide suitable aliment is one which does not vary; the amount of aliment to be provided under the obligation frequently does and always may. That the thing to be provided under the obligation is minister's stipend does not appear to me to affect the question. We are not dealing in the ordinary sense with an augmentation of stipend. Augmentation of stipend in that sense is only competent out of teind, and can only be granted by the Court of Teinds. We are now and in this Court dealing with the construction and effect of a civil obligation, and it no more affects the result that it concerns something to be paid and provided to a minister than if it was something to be paid or provided to a wife, a child, a parent, or a stranger. That it is so becomes apparent from the fact that we could as competently listen and give effect to a demand on the part of the defenders for a reduction of the amount being paid under the obligation as we can now listen to the pursuer's demand for an increase. In the Teind

No. 122. Court such a course could not be followed. We are therefore dealing with a matter of purely civil contract.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

Whether the Courts of law are under obligation to enforce such an obligation as that now before us, may, perhaps (since it has been questioned), be doubtful. I should humbly think they were. But the Court has already entertained and decided an action similar to the present in the case of *Cesar*, 20 D. 859, and I am prepared to follow the same course.

A great part of the argument addressed to us related to the question of fact whether there is any common good in the burgh of Greenock available to meet the pursuer's claims if these were given effect to. I think that argument cannot be considered by us at present. The Lord Ordinary has still to determine to what extent the pursuer is entitled to decree under the petitory conclusions of the summons, and until that has been determined the defenders cannot say whether they are in a position to meet the pursuer's claims or not. It would be premature, in my view, to say anything in the present state of the case as to whether the defenders have or have not funds which may be made available or liable to meet the pursuer's demands.

LORD JUSTICE-CLERK.—I have had an opportunity of reading the opinion of Lord Trayner. I concur in it, and I have nothing to add.

LORD YOUNG.—I am in such a hopeless minority here that I must have the greatest misgivings as to the soundness of the views which I take of this case. I have considered and re-considered them accordingly, knowing that I differ from your Lordships as I do from the Lord Ordinary, but that difference of opinion on my part, and the distrust which I necessarily have of its soundness, makes it all the more necessary that I should explain distinctly the grounds of my opinion. The particular case is not one of any considerable importance. It is peculiar in many respects, but the general views upon which the Lord Ordinary has proceeded, and which are concurred in by Lord Trayner as by the rest of your Lordships, are of the very highest importance, and as I am unable to concur in them, thinking them quite fallacious, I must explain distinctly the grounds upon which I do so.

The Lord Ordinary says at the conclusion of his note—and it is really the keynote of the ground of judgment from which I dissent—"This is not an action for administering a trust, but for constituting a debt, and decree must therefore go out as for any other debt, without reference in the meantime to the circumstances of the debtor." In my view the case is one of trust—of the administration of a trust, and nothing else. So that here, to start with, I altogether differ from the view of the Lord Ordinary. We have of course to consider the import and meaning of the decree of disjunction and erection of July 1741, and to see what obligation or duty, or whatever be its legal character, it imposes upon anyone enforceable in this action, and to that end we must—who were the parties to the proceeding which resulted in that decree, which was really an arrangement among the parties to the proceeding. It was not a proceeding before a Court of law, but a parliamentary commission. Nevertheless we must read and construe it in order to ascertain its import and meaning and any obligation or duty which it imposes upon anyone. To that end the first thing to be considered is, who were the parties to it, and what was their position?

Now, this leads me to notice what is brought pretty prominently out in

course of these proceedings, that the management of the affairs of Greenock in the first half of the last century, and perhaps the whole of the latter half also, was very primitive. I do not suppose the case is unique; I daresay many other similar cases could be found, but we must regard their proceedings as very primitive indeed. The town, or village as they called it then, had no revenue—no property. The inhabitants were feuars or tenants of feuars of the baron—that is, the landed proprietor, the owner of the barony of Greenock. They do not seem to have had any sources of revenue whatever at that time, and such money as they needed was collected by what I must regard as voluntary subscription—simply subscription. They did it in an odd enough way, by imposing a voluntary tax upon themselves. A tax, which at first at least I think was pretty consistently persevered in, was imposed upon malt. It was a voluntary tax upon malt, whereby they collected such money as they required for any purpose which they had in view. It does not seem to have occurred at first to the superior or baron, Sir John Schaw, that his consent to the inhabitants and feuars voluntarily taxing their own malt was needed, but this seems to have been suggested to him by somebody. It involved the preparation of a deed at least, and latterly he consented to their voluntarily assessing themselves by taxing their own malt. I suppose the view on which it was suggested to him that his consent was necessary was, that if they paid a tax upon their malt they would be so much the less able to pay him feu-duty. I do not know any other reason that could be suggested. Accordingly he gives his consent, and authorises them to appoint proper persons to administer the proceeds of the voluntary tax or subscription, as I should call it. The first deed we have as containing anything about it is in 1741, but the produce of that tax or subscription with which we are interested, amounting to the sum of £1000, existed at that date. They had voluntarily assessed themselves by a tax on malt, and had put the result, £1000, in the hands of persons appointed by themselves in 1741. By his deed—a charter it is called—of 30th January 1741 Sir John Schaw says,—“Considering that for the better government and management of the public funds allanarly that has arisen or may arise from any assessment laid on by the inhabitants of the said burgh with my consent on themselves upon all malt grounded at the milns of westward Greenock, it seems just, necessary, and expedient that a certain number of proper persons with necessary power should be appointed for the management and administration of the said funds,” and so on. He authorises the feuars to appoint nine persons to manage the produce of such voluntary assessment. They are to be managers and administrators of the whole public funds belonging to the burgh, “or which shall hereafter pertain and belong to the same, either arising from the above specified voluntary assessment with my consent on malt or any other voluntary assessment that shall be consented to by me,” and the expression “voluntary assessment” recurs repeatedly through the deed.

Now, the first we know about it is, that in February 1741—they had been appointed before, plainly—these managers were in possession of £1000 as the produce of a voluntary assessment upon malt. We know that, because in February 1741 those persons who were in possession of the money invested it, and invested it upon a deed which specifies a trust very distinctly. They lent the money, the produce of this voluntary assessment, to Sir John Schaw himself, and took from him a heritable bond dated 7th February 1741. We have not got that bond here, but we have the instrument of sasine proceeding upon it in the print of

No. 122.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

No. 122.
Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

documents. The notary who gave sasine is said to compare "having and in his hands holding one heritable bond, dated at Sauchie Lodge, the seventh day of February current, made, granted, and subscribed by Sir John Schaw of Greenock, in favour of the persons before named"—that is, those nine persons who had the produce of the voluntary tax for themselves—a bond to and in favour of those persons "for themselves and in trust in manner underwritten, whereby the said Sir John Schaw grants him at the term of Candlemas last to have borrowed and received from the said persons, all feuars and subfeuars in Greenock, and who have had the management of the funds arising from a certain duty on malt voluntarily imposed by them and the other feuars and inhabitants of the town of Greenock, with the said Sir John Schaw's consent, or themselves for themselves, and in the name of the whole feuars and householders of the burgh of barony of Greenock, all and haill the sum of one thousand pounds sterling money," which sum he bound and obliged himself to pay to those persons. Now, look at the words—they seem to me to be very important,—“In trust for themselves and the whole other feuars and householders of the said burgh of barony, and of the new parish of Greenock, when the same shall be erected,”—that is, it is exclusively of those in the new parish—when “the same shall be erected in order to be applied for the special effect and purpose of being part of the benefice of the said parish, when or in case it shall be erected, and in trust that such erection being once legally made, the foresaid persons, or survivor of them, shall denude themselves by assigning and disponing the said bond in security to and in favour of the minister who shall be first settled in the said new erected parish, and to his successors in office in all time coming during the not redemption, or until payment, to the intent that such minister and his successors in office may receive the rents and profits thereof during their respective incumbencies, and that the said rents thereof in time of vacancy may be uplifted and applied,” and so on; and he comes under an obligation to give them a yearly annual rent of £50 in return, and he conveys certain lands in security to these nine persons, “or the survivors or survivor of them, in trust for themselves and whole other feuars and householders of the said burgh of barony, and of the new parish of Greenock when the same shall be erected,”—that is to say, as I read it, confined to that parish when it shall be erected—“in order to be employed for the special effect and purpose of being part of the benefice of the said parish”; and it goes on “when or in case it shall be erected, and in trust that such erection being once legally made, the forenamed persons shall denude themselves by assigning and disponing this bond in security to and in favour of the minister.” Now, I put here only to ask, is it doubtful that this is a trust, and nothing else, and that those nine persons were trustees, and that this fund of £1000 was so invested and the purposes of it declared in the deed of investment? I cannot think that doubtful for a moment, indeed it does not admit of doubt. This was in February 1741. Now, it seems that they were then, and had from the month of June preceding been in course of collecting a further sum by a similar voluntary assessment upon malt. I shall allude to that by-and-by, when I come to notice, as I proceed to do, the decree of disjunction and erection which is dated in the month of July 1741, and which is the deed more immediately in question.

Now, who were the pursuers of that process for a decree of disjunction and erection? The trustees under the deed from which I have just read were the pursuers of that process. They come forward and they state to the Court the Teind Commission that the inhabitants of Greenock desire to have this put

erected, and it is narrated,—“And whereas by the great increase of the town of Greenock of late years, in trade and people, and consequently of the parish of Greenock, whereof the town is a part, the erection of the new kirk is become absolutely necessary for the greater success of the Gospel in that place, and is much desired by all the inhabitants thereof, who have provided a sufficient fund for building a new kirk and endowing a minister with a competent stipend, not less than 950 merks of stipend and 50 merks for communion elements, towards which the pursuers have already laid out upon heritable security on the lands of Kirkmichael the sum of £1000 sterling, and have bound themselves by contract to pay a certain contribution yearly for fifteen years, which will be sufficient to complete a fund for the stipend, and to defray the expense of building a church.” The first and most prominent deed mentioned here is the deed of trust investment which I have just read, and the other is what I referred to already as the arrangement which had been come to, and was in process of being carried out, of a further tax upon malt, the produce of which was to be applied in a certain way. Accordingly, the narrative of this decree proceeds, that the case being called, the parties came before the Court, and “for instructing the points and articles of the libel, produced in presence of the said Lords a consent by the whole heritors of the parish of Greenock to the disjunction and new erection libelled,” and, what is most important, they produced—“Item, heritable bond by said Sir John Schaw of Greenock, Baronet, to the said managers of the funds of the town of Greenock for the principal sum of one thousand pounds sterling, with interest from Candlemas last,” to be applied towards making up a stipend to the minister of the new erected church, dated 7th February 1741. It is not doubtful, therefore, in my opinion, that the pursuers of this process put forward as the most prominent part of their title this trust-deed under which they acted as trustees of the fund of £1000, and put forward most distinctly that the beneficiary in the trust was the benefice of the new erected parish, and no other beneficiaries—not the town of Greenock, not the municipality of Greenock, but the benefice of the parish, the erection of which they were praying for. That was the only beneficiary in the trust. The deed, I repeat, does not admit of dispute with respect to that. Then they produced the instrument of sasine following upon the bond, from which instrument I have already read. Then—“Item, principal contract betwixt the said Sir John Schaw and the feuars and inhabitants of the burgh of Greenock, whereby the said feuars and inhabitants do voluntarily assess themselves in a certain duty on malt for fifteen years to come for the purposes of the said new erection, dated the 20th and 29th June last bypast.” Now, that is June 1740, and they were in course of collecting the second and the only other fund narrated to have been provided for the erection at that time. We have not got a very satisfactory account of what was the result of this new voluntary tax upon malt. I rather infer that it was not very successful, for the church of this benefice which was erected in 1741 was not built for sixteen years according to one of the parties, the pursuer here, and not for twenty years according to the other. They required this sixteen or twenty years—it does not signify which—in order to get money sufficient to build the church. This voluntary tax upon malt which began in June 1740, I rather infer, was not successful from the fact that after the lapse of about ten years they had to get an Act of Parliament to impose a compulsory tax upon malt, one of the purposes being to erect this church. Now, how much was recovered under the statute by the tax upon

No. 122.

Mar. 16, 1892.
 Peters v.
 Magistrates of
 Greenock.

No. 122. malt which was to endure for thirty-one years from 1751? What was recovered under that we do not know. There were a great many purposes to which it might be applied, and the nearest approach to information which we have on the subject is in the answers for the respondent to the minute of the reclaimers. In the answers he says that the church—that is to say, this church—was built in 1757, that is sixteen years after the decree of erection. He says—"It cost £2388, 17s. 8½d., of which £1058, 5s. 9d. was defrayed by subscription and the remainder paid by the Corporation." The remainder paid by the Corporation—I suppose out of the voluntary tax—would therefore be £1330. It is not suggested—there is not a hint of it—that any other funds than this source existed. There were no other funds set forth in the decree or set forth by the pursuers in the action than those I have mentioned. The trust money was invested upon a very proper deed of trust expressing very distinctly and minutely the purposes of the trust for a thousand pounds, and the intention which was in course of being carried out of getting further sums by an assessment upon malt, which resulted as I have stated. I can find nothing else, and I do not find anything in the deed suggesting that the pursuers—those nine individuals—had power to undertake any obligation beyond those funds, or that they undertake any obligation beyond those funds, or that they had any power or authority, or represented that they had any power or authority, to undertake an obligation of debt beyond those funds and make the burgh of barony of Greenock liable as debtors without any limit as to funds or with reference to anything except those trust funds to which I have referred. I find nothing in it to suggest that idea. They undertake to pay the minister and to pay for communion elements "not less than" a thousand merks, and that was what we are told, £55, 11s. 1½d. They had an annual rent of £50, and with regard to the £5, 11s. 1½d., unless the second effort to raise more money by subscription was successful they had nothing to meet it except the seat-rents; but it would be a very unsuccessful church, built at an expense of between £2000 and £3000, if the seat-rents would not supply the £5. And is it not manifest to everyone—I confess it is very manifest to me—that that specification of the thousand merks had reference to the income from this trust money of £1000?

Now, when the erection was made had that any effect upon this trust? It was a trust which was created for the benefice of the parish, which was erected in 1741. Now, just suppose that the trust money had been re-invested, the trustees holding the fund ought in pursuance of the trust-deed, when the benefice was created and a minister appointed, to have transferred the trust to him as trustee. The heritable bond of 1741 specifies that very distinctly—I refer to the instrument of sasine. The trust is to be transferred to the minister at the time being, and to pass from one to another with very anxious care upon their administration, for they are not entitled to interfere with the existing investment or any future investment without the consent of the Procurator of the Church, or the Lord Advocate or the Lord President of the Court of Session. It is a check put upon the administration of this trust money of which the benefice was the beneficiary. Now, suppose the trust funds had been invested in such a way as to produce more than a thousand merks. I had myself at a very early period of my professional life a case which came before the Court upon an application for a scheme in connection with a charity fund—not for endowing a benefice, but for promoting education.

the sum involved being exactly £1000. The pious donor was a Dr Hutton, No. 122. who had been a doctor of Queen Anne, but in the beginning of last century he left £1000 to trustees, in a parish in Galloway, for the promotion of education and other pious purposes there. That was invested by the trustees early in the century in the purchase of a barony in the parish in Galloway, so that when the case was brought before this Court about 1842 or 1843 it was yielding an income of over £1000 a-year. It was invested so as to yield an income in excess of the original capital in the first half of the present century, and I think it must now be yielding over £1500 a-year. That must all go to the beneficiaries of the trust; and if this had been similarly disposed of to profit, is it doubtful that the benefice would have been the beneficiary? Or can it be said that it was just a case of simple debt, not a trust administration at all, and that they must have, not necessarily 1000 merks or 950 merks of stipend, but a legally competent stipend without reference to the produce of the trust-estate? I cannot assent to that; it is not sound. On the other hand, as has happened, and is not unlikely to happen again, if the trust funds are invested so that the return is diminished, would they not equally suffer in that case as they would have gained in the other, for the same reasons—that they are the beneficiaries in the trust? Now, that is the meaning which I attach to this decree. Suppose the trust had been transferred to the minister, as the trust-deed requires that it should. It was not so transferred. I do not know how this was neglected both by the original trustees and by the minister of the parish and his successors; I cannot account for it, and there is no explanation given. It was a neglect to carry out the terms of the trust-deed. But suppose the trust had been transferred to the minister, would there have been a debt upon the prior trustees for anything, or would he not have been entitled to every farthing that was drawn—the fruit of the trust? If there had been any money collected by the second attempt beginning in June 1740, that must have gone to the same trust; it was for the same purpose, and it is so expressed in the narrative of the decree—in trust for the benefice—but it produced nothing. I am assuming it produced nothing, and that when the Act of Parliament was passed ten years later they made no more money out of it or applicable to this purpose than was applied to this purpose in building the church.

Now, what is the position of the Magistrates and Council at the present time? The trust-estate which I have referred to was brought to rather a sad end a long time ago, as I shall notice; but suppose it had continued, either upon the investment which was made in 1740 or upon another investment which was substituted, what would have been the position of the Magistrates and Council of Greenock now? Would they not just have come in place of the original trustees? There is no other *locus standi* for them in this case. They came as trustees in room and in place of the original trustees, in trust not for the town and burgh of Greenock, but for this benefice and nothing else. There is nothing new in this; it is the most familiar thing in the world that the magistrates and council of a burgh may be trustees for any limited purpose you like. They might be trustees for erecting a monument to the memory of Sir Walter Scott, or for any place of public recreation or instruction, or any limited purpose you like which they choose to accept. Generally speaking, the magistrates and council of a burgh would decline to accept the trust except for some purpose in which some part at least of the community of the burgh was interested. But they would have been trustees for this benefice and for nothing

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

No. 122. else if that trust had continued, and I know of no other position which they occupy now. We are told that in 1761,—that is, exactly twenty years after this trust-investment was made—the trust money was simply uplifted by the trustees and spent. It is said it was spent in paying off some debts of the town of Greenock. Well, nobody will doubt that that was a most unwarrantable proceeding, and those who were guilty of it—the trustees who violated their trust—and their estates should be responsible for the misappropriation or misapplication, which is the same thing, of the trust funds with which they were charged for a particular purpose, but as it happened a century and a-quarter ago the money has hopelessly disappeared; there is no possibility of recovering it.

Mar. 16, 1892.
 Peters v.
 Magistrates of
 Greenock.

How shall the town of Greenock of the present day be in the least degree responsible for the breach of trust by the nine individuals, or any number you please, in the year 1761? I am afraid that in many, if not in most burghs in Scotland there has been great misappropriation of trust property—property in the hands of the magistrates and council in trust for any purpose you like to name which is a lawful purpose. If you read the history of Edinburgh you will find very grave grounds for the conclusion that a great amount of trust property in the hands of the Magistrates and Council—and they cannot have it otherwise than in trust—was most scandalously misapplied—lent or conveyed away, really without any consideration at all, to the effect of diminishing public ground, and making it the property of private individuals; but there is no remedy for that now. There might have been a remedy against those who were guilty of it, but when the thing has been accomplished a century and a-quarter ago, there is no such remedy now. This trust-estate of £1000 disappeared in 1767. There was nothing except the seat-rents, and looking with all anxiety I cannot find any trust-estate whatever in the hands of these trustees who are now before us—and we have none but trustees before us—except seat-rents. I think they are bound to apply the seat-rents in accordance with the trust, and that you find the purposes of the trust in this deed of erection. They are always referred to as trustees. See how the right to let seats and to draw rents is given to them. The declaration of the decree is,—“That the baillie of Greenock and managers of the fund for building and endowing the said church, and the feuars and elders of the said new erected parish for the time being have, in all time coming, the sole and undoubted right of patronage of the said new church, and the right of presentation and calling a minister to serve the cure thereof, how soon the said kirk shall be erected and accommodated for public worship and as often in all time thereafter as any vacancy shall happen,” and “of setting and uplifting rents for said seats, and of naming and appointing beadles.” So the right to exact rents is by the decree given to the managers of the fund for building and endowing the church and the feuars and elders of the new parish. These are the people who are to collect seat-rents. It is not the Magistrates and Town-Council of Greenock as the Magistrates and Town-Council of Greenock but as trustees coming in place of the original trustees as the managers of the fund for building and endowing the church, and it is in that capacity—and in that capacity alone—that the right is given to them to impose the seat-rents and to exact them, and they came into their hands as funds for the church. I can find no funds of the trust available except the seat-rents. For a great many years back at all events those seat-rents have been sufficient to uphold the church in a state of repair and to pay the church officers, and to afford to

minister a stipend of between £200 and £300 a-year. That is a pretty good fund. It is a trust-fund in the hands of these trustees for the benefice, and they are able to keep up the benefice with it. But then it is said,—“Oh, but here is no trust or trust administration at all; we have nothing to do with the trust; it is an action for debt; there is simply a debt imposed upon the town of Greenock which is to be recovered without the least reference to the trust or trust-funds.” I cannot agree in that. I cannot see any indication of it in the decree.

No. 122.
Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

And now that is sufficient for the disposal of this case—sufficient for sustaining the defences and assailing the defenders from the conclusions of the action. The minister has been in receipt, I suppose, of all that which the trust funds in the hands of these trustees can afford, or if he has not—if he thinks that the trustees have misapplied the trust-funds and not given him the whole of these to which he is entitled—he has an action against them as trustees, but just as trustees. It is the very opposite of what the Lord Ordinary says it is; it is an action for trust administration, and it may be very greatly to his advantage. I do not know whether this is a popular preacher or not, but a popular preacher may fill the church and crowd the church, and may get a great amount of seat-rents, though I think these seat-rents would be trust funds for the benefice in the hands, as the decree expresses it, of the managers of the fund for erecting and endowing the church, and it may be greatly to the advantage of the minister, or the advantage of his successor, to have an action against those managers who have the seat-rents to administer them as trust funds according to the direction of the trust-deed. But we have nothing to do with that. It is an obligation for a legal and competent stipend. If there had been no trust here, and no trust funds here, but an obligation to provide and pay a stipend—a legal competent stipend “not under” 1000 merks—I should be clearly of opinion that 1000 merks was the limit of the obligation. I quite agree with Lord Trayner that there is no distinction between the minister and anybody else. We have nothing to do with augmentation, or with what is a mere statutory and unique proceeding,—with nothing analogous to it or in the least degree resembling it in this or any other country. The statutory Commissioners are allocating stipend out of teinds from time to time. I agree, therefore, that there is no distinction with regard to an obligation of the kind I am now imagining between a minister and anybody else; and I repeat that I am very clearly of opinion that if an obligation is come under to pay a minister of the Established Church, or of a dissenting Presbyterian Church, or a bishop, or an incumbent of an Episcopal Church, a legal and competent stipend or income of “not less than” £50, that is the measure of the legal obligation, and that, with the exception of the case *Cæsar*, in which Lord Wood’s opinion is quoted—and it is only the opinion of a single Judge—there is no case in which such a thing is even suggested. I do not think his opinion would have extended to anybody but a minister, and I cannot help feeling that his views, from which I entirely dissent, are influenced, as I think the Lord Ordinary’s are—indeed, he says it—by the analogy of augmentations in the Court of Teinds.

Take the case of aliment. Suppose anybody came under an obligation to furnish a legal and competent aliment to a person of not less than £50, could the Court increase it? Or would it depend on whether the person was the son or daughter of a Duke or of a millionaire? Would that have to be inquired into? Is anybody acquainted with any statute or rule of common law which

No. 122.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

will inform this Court what is a legal and competent aliment to anybody you choose to instance? What is a legal and competent stipend to a minister of the Church of England? There is no statute which defines it—no rule of common law which defines it; there is the most infinite variety in stipends. In England £50 is rather a large stipend. There are a great many stipends much under that, and on the Continent a great many do not exceed one-half of it. But what is the measure of a legal and competent stipend? Is not that really just general loose language? Is £250 legal and competent, or is £1000 illegal and incompetent? A suggestion was made that the Court could determine it, but we can only determine according to the statute and common law of the land. There is no statute or any law of the land applicable to such a matter. A father—let him be a millionaire—is bound to aliment his children. It is not in the power of the Court to fix from time to time, according to changing circumstances, the amount of aliment. The rule is simply this, that he must keep them from being public charges,—that is to say, he must keep them off the poor's fund. There is no other way; and if you wish to get an obligation for aliment, or stipend, or salary, you must have the sum specified, and if it is specified, and we think that it is, to be not less than so and so, then that is the amount of the legal obligation, and I am not in the least prepared to affirm—taking the case of aliment as an illustration—that if a man came under an obligation to give a legal and competent aliment to A, B, or C of not less than £50 a-year, by the law of Scotland that might be increased or reduced. It is said there was no augmentation here, and that it might not only be increased but diminished according to changing circumstances. I am not prepared to affirm that the law of Scotland is in accordance with any such proposition, or that decree could be given for more than the sum specified as the least that the party to the contract was bound for. I think that language is not the language, properly speaking, of legal obligation, and indeed such a decree as this decree of erection is not a proper instrument of obligation at all. It is mere familiar language, and means only that we will give you more if we conveniently can, and if the administration of the funds in our charge will afford it. If a Dissenting congregation entered into an arrangement with their minister to give him a stipend of not less than £200 a-year, I have no idea that he could come to this Court as upon a matter of debt, and say—"I wish this raised, for it must be a suitable stipend according to changing circumstances, and I am entitled to the judgment of the Lord Ordinary, of the Inner-House, and of the House of Lords upon that." It is said that the Court might refuse. I really think they would. They not only might do it, but they must do it. The Court can have no will in the matter. If it is a legal debt the Court must consider it in the best way they can, and decide it. The Court can never exercise its option, and if it is not a matter of legal obligation they are not entitled to consider it. How should we judge of it? Are we to take the evidence or advice of men of skill? Of what are we to allow evidence? Are we to consider what is an average stipend? I entirely dissent from such a view. In reviewing and reconsidering my opinion, in reference to the fact that I am, as I have expressed it, in such a hopeless minority, which renders it likely that there is some error pervading my views, I must adhere to them, and conclude by saying that I do adhere to them. I apologise for having detained the Court at so great length, but it was incumbent on me to explain my views as fully and as clearly as I could.

LORD RUTHERFURD CLARK.—I concur in Lord Trayner's opinion.

No. 122.

THE COURT adhered, and remitted the cause to the Lord Ordinary to proceed.

MILLER & MURRAY, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

Mar. 16, 1892.
Peters v.
Magistrates of
Greenock.

PATRICK SIM, Pursuer (Respondent).—*Dickson—M Lennan.*

No. 123.

HENRY ROBINOW, Defender (Reclaimer).—*Dundas—William Thomson.*

Mar. 17, 1892.

Jurisdiction—Forum non conveniens.—The plea of *forum non conveniens* will not be sustained, unless the Court is satisfied that there is a Court in another country which has jurisdiction to try the action and in which it ought to be tried as being more convenient for all the parties and more suitable to the ends of justice.

Sim v.
Robinow.

In an action by one of two joint adventurers against the other for count, reckoning, and payment of the proceeds of the joint adventure, which, the pursuer alleged, had been wound up by the defender, with a balance due to the pursuer in the hands of the defender, the defender on the merits averred that the accounts had been squared up and settled, and further pleaded *forum non conveniens*. The parties had entered into the joint adventure, which related to certain South African mining shares, when they were both resident in South Africa. The summons was served on the defender in Scotland after he had resided for more than forty days there, the pursuer being then resident in London. The defender averred that he was domiciled in South Africa, that he intended to return there, that the pursuer likewise intended to return to South Africa (this the pursuer denied), and that the whole books of the joint adventure were in South Africa, and also most of the witnesses. The Court, holding that the question depended on a mere balance of the convenience of a trial in this country as compared with one in South Africa, *repelled* the plea of *forum non conveniens*.

On 3d September 1891 Patrick Sim, designing himself as residing at No. 4 Hanover Street, Hanover Square, London, brought an action of count, reckoning, and payment against Henry Robinow, designed as "merchant, presently residing at Braemar, in the county of Aberdeen."

1ST DIVISION.
Lord Low.

The defender pleaded, *inter alia*;—(1) No jurisdiction. (2) *Forum non conveniens*. He did not seriously insist in the first of these pleas.

The pursuer averred,—(Cond. 1) "The pursuer and the defender, who are Scotsmen by origin, were, until recently, both in business in Kimberley, South Africa. The defender was a merchant and commission-agent there. The pursuer presently resides at No. 4 Hanover Street, Hanover Square, London, and the defender presently resides, or until lately resided, at Braemar, in the county of Aberdeen. With reference to the answer, it is not known and not admitted that the defender is still in business in South Africa. He was continuously resident in Scotland, and had his place of residence at Braemar from on or about 29th July 1891 until the service of the present action on 16th September 1891, a period upwards of forty days. He is still resident in Scotland, and has taken an active interest in local questions at Braemar. It is believed that he has no immediate intention of returning to South Africa. *Quoad ultra* the answer is denied."

The defender answered,—(Ans. 1) "Denied that the defender presently resides at Braemar, or that he is still resident in Scotland. Explained that he is still a merchant and commission-agent at Kimberley, South Africa; that his stay at Braemar, which was only a temporary visit for the benefit of his health, is now ended, and that he is about to return to his business in South Africa. *Quoad ultra* admitted."

The defender further stated that he had a duly authorised attorney in Kimberley who had power to accept service of any summons raised

No. 123. against him in the Courts of Cape Colony; and also (what the pursuer denied) that the pursuer was about to return to South Africa.

Mar. 17, 1892.
Sim v.
Robinow.

The pursuer further stated that when he and the defender were resident in South Africa they became interested in a joint adventure in South African mining shares; that most of these shares were disposed of, and the accounts between the parties adjusted, in November 1887, but that certain of them remained undisposed of until 1888, when they were sold by the defender, and that as he had refused to account to the pursuer for the price, the present action became necessary.

In answer to these averments the defender stated that the whole accounts in connection with the shares "were long ago squared up, paid and settled by the parties, and there is now no sum due by the defender to the pursuer in connection therewith."

On 16th February 1892 the Lord Ordinary (Low) repelled the first and second pleas in law for the defender, and allowed a proof.*

* "OPINION.— . . . In these circumstances, while the jurisdiction of this Court is not disputed, the plea of *forum non conveniens* is urged. The defender maintains that the proper *forum* for trying the questions which are raised is in South Africa, because the joint adventures which are the subject-matter of the action were carried on there, and the books and the witnesses necessary to the determination of the matter in dispute are also there.

"In my opinion, the considerations of convenience in this case are not sufficiently strong to justify me in sustaining the plea. Where there is jurisdiction, the Court cannot, I apprehend, refuse to entertain an action, unless the circumstances make it plain that there is another tribunal to which not only the convenience of all the parties, but the justice of the case, point as the proper *forum*. Actions of accounting against a foreign executry or a foreign partnership are properly brought in the Courts of the domicile of the executry or the partnership, and these form the most familiar examples of the kind of case in which the plea of *forum non conveniens* has been sustained (*Clements v. Macaulay*, 4 Macph. 583, Lord Justice-Clerk (Inglis) p. 592). The plea, however, is not confined to that class of cases, but applies wherever it can be shewn that the case cannot, consistently with fairness and justice, be tried in this country. Thus, where a gentleman in Scotland brought an action of damages against the manager of his estates in Jamaica for alleged mismanagement and neglect of duty, it was held that the Courts of Jamaica, where the estate, the books, and documents, and the witnesses were, was the proper *forum* (*Tulloch v. Williams*, 8 II. 657). Again, in *Williamson v. North-Eastern Railway Company*, 11 E. 596, it was held that an action of damages against an English railway company for an accident occurring in England, and in circumstances which raised a question of an English right of way, could not be maintained in the Scotch Courts. The question, therefore, is one for the discretion of the Court in view of the circumstances disclosed—the general rule, however, being, as I have already said, that the Court must exercise its jurisdiction unless there are very clear and weighty grounds for refusing to do so.

"In the present case, I am of opinion that such grounds are not present. The action is not one of general accounting in regard to a former partnership business. The . . . action is for an accounting for the price realised by the sale of specific shares. . . . I therefore do not see that there will be any necessity for a general investigation into the business books of the defender. At the most, excerpts from the books of the entries relating to the joint speculations is all that can be required. Then the fact that some witnesses may require to be examined upon commission in South Africa does not appear to me to create a difficulty, especially as the questions at issue must turn rather on the state of the accounts in regard to certain specific transactions than upon matters of fact to be established by parole evidence. Further, I do not think that any specific question of South African law is raised. . . . I shall therefore, repel the plea of *forum non conveniens*."

The defender reclaimed, and argued ;—The plea of *forum non conveniens* No. 123. was one which depended on the discretion of the Court, but it would be sustained wherever the trial of the case in Scotland amounted to practical injustice to the defender, with no counterbalancing justice or right on the side of the pursuer. It was not necessary that there should be an actually depending process between the parties in the foreign Court. It was enough that there was another Court, which was more convenient for the trial of the cause than the Scots Court.¹ Here there was such a Court in South Africa—a branch of the Cape Supreme Court sat at Kimberley. The books of the joint adventure were at the Cape, the contracts which were in question had been entered into and carried out there, and most of the witnesses were there. The single circumstance to the contrary was that the defender had come to Scotland on a visit, which lasted long enough to give the Scots Courts jurisdiction over him. But when jurisdiction had been “snatched” in this way, the Court would listen favourably to the plea of *forum non conveniens*.² The probability was that before the trial both the pursuer and the defender would have returned to South Africa, in which event there could not be a pretence in favour of the Scots Court being the convenient *forum*.

Argued for the pursuer ;—The plea of *forum non conveniens* raised something more than a mere question of comparative convenience or inconvenience. There must be practical injustice in trying the case in Scotland. Nothing of that sort occurred here. There would be no difficulty in trying the question between the parties in the present action. To sustain the plea would really mean that the Court would in all cases refuse to exercise its jurisdiction whenever the defender happened to be a foreigner.

At advising,—

LORD KINNEAR.—There is here an action of count, reckoning, and payment, in defence to which the defender has stated two preliminary pleas,—1. No jurisdiction ; 2. *Forum non conveniens*. The Lord Ordinary has repelled both these pleas, and there can be no doubt that the plea of no jurisdiction has been rightly repelled. That this Court has jurisdiction is beyond all question. But it is said that this jurisdiction ought not to be exercised, because this is not a competent or convenient *forum* for determining the questions at issue between the parties, and that the only proper *forum* is in the Cape Colony in South Africa.

The summons is based upon a perfectly relevant averment that while the pursuer and defender were resident in South Africa they became interested in a joint adventure in the shares of a limited company ; that the share certificates and other documents were entrusted to the defender, who had power to dispose of them, that the shares were realised early in 1888, and that the defender has failed to account for his intromissions. The defence on the merits is that the whole accounts “were long ago squared up, paid, and settled by the parties.”

The only averments on which the plea of *forum non conveniens* is rested appear to be that the transactions were carried through in South Africa,

¹ Brown v. Palmer, Dec. 17, 1830, 9 S. 224, 3 Scot. Jur. 146 ; Macmaster v. Macmaster, June 7, 1833, 11 S. 685, 5 Scot. Jur. 414 ; Tulloch v. Williams, March 6, 1846, 8 D. 657, 18 Scot. Jur. 334 ; Longworth v. Hope, July 1, 1865, 3 Macph. 1049, 37 Scot. Jur. 435 ; Martin v. Stopford Blair's Executors, Dec. 4, 1879, 1 R. 329 ; Williamson v. North-Eastern Railway, Feb. 28, 1884, 11 R. 596.

² Clements v. Macaulay, March 16, 1866, 4 Macph. 583, 38 Scot. Jur. 309, per Lord Barcapple, p. 589.

No. 123. that the defender's books and documents are in South Africa, and that the defender himself is about to return there. The defender further states that the pursuer also is about to return to South Africa, but this averment he denies, and it is one into which we cannot inquire. We must deal with the case on the same footing as any other action brought in this Court by a resident Englishman. In regard to the remaining averments in support of the plea of *forum non conveniens*, I agree with the Lord Ordinary that they are not sufficient to justify the Court in dismissing the action.

Mar. 17, 1892.
Sim v.
Robinow.

These averments certainly suggest that the matters in dispute between the parties might be speedily and conveniently tried in South Africa, if both of them had been resident in that country; and it is very probable that an inquiry in this country cannot be carried through without considerable expense, as some of the witnesses, and the books and documents which must be examined, are now in South Africa. But then the parties, who will probably be the principal witnesses, are not now in South Africa; and even if we were entitled to assume, what I think we can hardly take to be certain, that the defender will have returned to South Africa by the time the inquiry comes to be made, the result simply comes to be a question of the balance of convenience and inconvenience between an inquiry in this country and inquiry in South Africa, and we are asked to decide that question in favour of South Africa. Now, I am not aware that the Court has ever refused to exercise its jurisdiction upon the ground of a mere balance of convenience and inconvenience, and the reason is that such a ground of judgment would make it necessary for the Court to proceed upon facts and circumstances the full force of which it cannot appreciate without an inquiry into the whole merits of the case. But further, in the present case the alleged inconveniences are such as necessarily arise in the daily business of a Court which is called on to adjudicate upon mercantile transactions carried through in all parts of the world. The Court recognises that it may be called upon to enforce contracts wherever they are made, and between whatever parties, provided it has jurisdiction to entertain the action; and therefore in such a case something more is required than mere practical inconvenience in order to sustain the plea of *forum non conveniens*. The general rule was stated by the late Lord President in *Clements v. Macaulay*, 4 Macph. 593, in the following terms:—"In cases in which jurisdiction is competently founded a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. *Judex tenetur impertiri judicium suum*;" and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence." And therefore the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

I do not think that any of the cases cited to us in which the plea of *forum non conveniens* was sustained are applicable to the present case. The cases of *Brown v. Palmer*, 9 S. 224, and *Macmaster v. Macmaster*, 11 S. 685, were cases of executry administration, in which foreign executors were called to account in this country for the executry estate situated abroad, and the ground upon which the Court in these cases went in sustaining the plea of *forum non conveniens* is very clearly explained by the Lord President in *Clements v. Macaulay*, when he says,—“In these cases the question always was, whether it was more for the true and legitimate interest of the executry estate and all

the claimants that the distribution should take place where the executors have had administration. There is of course in most cases a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases." The same principle regulates actions relating to partnerships, in which there is a manifest expediency that questions relating to the partnership estate should be tried before the tribunal which has jurisdiction over the partnership as a whole. The case of *Williamson v. North-Eastern Railway Company*, 11 R. 596, was of a different character, but the grounds on which the Court there held that they ought not to exercise their jurisdiction were very strong. It was an action against an English railway company, on account of a fault committed in England, and it involved questions of English law; besides which there could of course be no question as to the competency and ready accessibility of the Courts in England for the trial of the case. The jurisdiction there was founded upon arrestments to found jurisdiction, and in deciding the case the Judges laid stress on the peculiar method by which the jurisdiction of the Court had there been established; but apart from that specialty the judgment of the Court proceeded on the ground that it was more convenient in the interests of both the parties and for the ends of justice that the trial should take place in England instead of before this Court. The case of *Tulloch v. Williams*, 8 D. 657, was very exceptional, and I do not think it is a precedent which we ought to follow. The Judges went mainly on the ground that the pursuer had no interest to prefer this Court to the Court of Jamaica, but the action was not dismissed, but was merely sisted in respect of the special circumstances of the case, and in respect that the defender had declared his readiness to answer in the Court of Jamaica, and offered bond to that effect. The defender here makes no such proposal, but if he had I should not have been of opinion that to sist process was an expedient course to follow, for, if this Court is not a convenient *forum* for the trial of the cause, then the action ought to be dismissed, but, if this Court is a convenient *forum*, then I can see no reason why the action should not go on in the ordinary way.

In all these cases there was one indispensable element present when the Court gave effect to the plea of *forum non conveniens*, namely, that the Court was satisfied that there was another Court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice. But I cannot say that I am able to discover this element in the present case at all; it might have been present if the defender had gone abroad and had now returned to South Africa; but all that he says is that he intends to go there. I do not think that the pursuer can be asked to wait till the defender carries out this intention, or that he ought to be sent to a Court which may be unable to exercise any jurisdiction over the defender in consequence of his continued absence from South Africa. It seems to me therefore that it is neither expedient for both the parties, nor proper in the interests of justice, that the action should be dismissed. I am therefore of opinion that we should adhere to the Lord Ordinary's judgment.

LORD ADAM concurred.

LORD M'LAREN.—I also concur. I think it results from the examination of the authorities which Lord Kinnear has made that in all or almost all the cases in which the plea of *forum non conveniens* was sustained there was another Court in another country which had jurisdiction over the parties interested and

No. 123.

Mar. 17, 1892.
Sim v.
Robinow.

No. 123. the whole subjects of the action, while as regards this Court either some of the parties were not subject to the jurisdiction, or a question of foreign law came to be involved, or there was some difficulty which prevented this Court from giving final judgment without the aid of the Court of another country. Such certainly was the ground of decision in the executry and partnership cases to which we were referred, and it is very difficult to see how any case could arise in which we would sustain the plea when the action is a simple personal claim for payment of a sum of money. No doubt more or less inconvenience may be caused to a defender by obliging him to answer in the Courts of his temporary domicile, but it is impossible to determine that until the case itself is tried, and therefore mere inconvenience does not appear to be an appropriate ground for rejecting an action when the jurisdiction of the Court to try it is clear.

Mar. 17, 1892.
Sim v.
Robinow.

The LORD PRESIDENT concurred.

THE COURT adhered.

JOHN CAMERON, S.S.C.—REID & GUILD, W.S.—Agents.

No. 124. ALEXANDER MACDONALD (Clerk to Commissioners of Police of Govan),
First Party.—*Salvesen*.

Mar. 17, 1892.
Police Commissioners of
Govan v.
Mickel.

ROBERT MICKEL AND OTHERS, Second Parties.—*Shaw*.

JOHN M'INTYRE, Third Party.—*C. N. Johnston*.

Police—Burgh—Assessment—Sewer-rate—Commissioners' power to borrow—General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101), secs. 196 and 384.—The General Police and Improvement Act, 1862, sec. 196, gives powers to the Commissioners of Police to borrow “for the purpose of making . . . sewers, and on the security of the special sewer-rate,” such money as the Commissioners deem necessary, and declares that the provisions of the Act, with respect to borrowing money and granting bonds therefor, “shall be applicable to the borrowing of money for the purpose of making . . . sewers.” Section 384 of the Act is the only section which makes provision for the borrowing of money and granting security therefor. That section authorises the Commissioners “to borrow and take up for any of the purposes of this Act, other than the construction . . . of sewers as hereinbefore provided, or for repayment of any moneys borrowed for such purposes” under the Act, such sum as the Commissioners deem necessary, provided that it shall be lawful for them to assess owners of property liable in the several assessments under the Act in such additional assessment as to produce a sinking fund for the extinction of the debt in twenty years.

The commissioners of a burgh borrowed money on the security of the special sewer-rate to pay for the construction of sewers, and assessed the proprietors at a rate sufficient both to pay the interest and repay the capital in twenty years. *Held* that the assessment was lawful, because, assuming that section 384 did not apply to borrowing for the construction of sewers, sec. 196 authorised the commissioners to borrow for the construction of sewers, and did not forbid such a system of borrowing as would pay off the capital by a sinking fund.

Police—Burgh—Assessment—Sewer-rate—General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101), secs. 96, 100.—Section 96 of the Act authorises Commissioners of Police when they shall resolve to make a new sewer: charge all the owners of lands and premises liable to contribute to the rates with a special sewer-rate, and sec. 100 provides that where in the Commissioners' judgment any premises “were sufficiently drained before the making of such new sewer, the owners thereof shall be entitled to have a deduction made from the special sewer-rate to which they would otherwise be liable in respect of the making of such new sewer, having regard to the cost of making such new

sewer, and to the value and efficiency of such old sewer." The Commissioners of Police of a burgh constructed a new sewer, and imposed a rate of 1s. 5d. per £1. To the proprietors whose properties were already sufficiently drained, and who did not therefore use the new sewer, they allowed a deduction of 1s. 4½d. per £1, leaving a farthing payable by them, while from those whose properties were drained by the new sewer they exacted the full rate.

No. 124.
Mar. 17, 1892.
Police Commissioners of Govan v. Mickel.

Held that the assessment was legal, and that the deduction was warranted.

THE COMMISSIONERS OF POLICE OF THE BURGH OF GOVAN served upon 2^D DIVISION. Robert Mickel and others, proprietors of houses in Elder Park Street, Govan, a notice of assessment, calling upon them to pay for the years 15th May 1890 to 15th May 1891, and 15th May 1891 to 15th May 1892, a special sewer-rate of 1s. 5d. per £ (amounting in the case of Mickel to £178 for the two years), in order to pay for certain new sewers, in addition to the general sewer-rate for maintaining the sewers, which was ¾d. per £.*

For the same years the Commissioners served upon, *inter alios*, John M'Intyre, Helen Street, Govan, a notice of assessment imposing upon him (besides the general sewer-rate) special sewer-rate also at the rate of 1s. 5d. per £, but subject to a deduction of 1s. 4½d. per £, being ¾d. per £, payable by him. In all, 3s. 1d. was the sum claimed from him.

Questions having arisen as to the legality of these assessments a special case was stated for the opinion of the Court, to which case the first party was the clerk to the Commissioners, the second parties Mickel and others, and the third party M'Intyre.

The following were the circumstances in which the question arose:—

The burgh of Govan was divided into separate drainage districts. Both the second and third parties were in No. 1 district. In 1883-4 and 1884-5 the special sewer-rate was 2d. per £. In the year 1884-5 the Commissioners formed at a cost of £3080 a sewer at Fairfield and a sewer at Langlands Road, both in No. 1 district, in order to drain portion of the district then and at the date of this case mainly unbuilt upon. These sewers drained certain tenements in Langlands Road. In order to raise money to meet the cost a special sewer-rate was imposed for 1885-6 of 6d. per £1, the whole rate being payable only by proprietors who used the sewers, and the others being allowed an abatement of 5½d. per £, leaving payable by them ¼d. per £.†

* The General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101), enacts, section 96,—“Whenever the Commissioners shall resolve to make any new sewer, they may charge the owners of all the lands or premises liable to contribute to the rates for making the same with special sewer-rates over and above any other assessment or rates to which such persons may be liable under this Act, and such rate shall, for the purposes of this Act, be called the ‘Special Sewer-Rate.’” Section 97.—“The Commissioners shall, if necessary, impose a sewer-rate to be called, for the purposes of this Act, the ‘General Sewer Rate,’ distinct from any other rate which they are authorised to make under this Act, to be applied in maintaining and clearing the sewers, and all other expenses connected with such sewers not herein otherwise provided for, or which may not be fully defrayed by the special sewer-rate, and for securing and paying off any moneys which may be borrowed on the security of the special sewer-rate under the provisions of this Act, and the interest of such monies which the special sewer-rates shall be insufficient to defray.”

† Section 100 of said Act provides,—“Where, in the judgment of the Commissioners, any premises were sufficiently drained before the making of such new sewer, the owners thereof shall be entitled to have such deduction made from the special sewer-rates to which they would otherwise be liable in respect of the making of such new sewer, having regard to the cost of making such new

No. 124.

Mar. 17, 1892.
Police Com-
missioners of
Govan v.
Mickel.

In 1889 the new sewers were extended, and the additional cost brought up the whole cost to £4000.

The Commissioners resolved to borrow money upon the security of the special sewer-rate to pay off the £4000, under the General Police and Improvement Act, 1862, and to create a sinking fund which would repay in twenty years the capital sum required to construct the sewers, with interest.* They fixed the assessment at 1s. 5d. per £. In arriving at this assessment they had it in view to make the ratepayers whose property drained into the new sewer and its branches, and those whose property did not drain into the new sewer, bear the cost on the following principle, viz., the former to pay the full rate of 1s. 5d. per £, and the latter to pay that rate under deduction of 1s. 4½d. per £, leaving them to pay the rate which they had been formerly paying, viz., ½d. per £ upon the rental of their properties. The assessments were made accordingly.

The second parties' properties drained into the new sewer, and they were charged the rate of 1s. 5d. without deduction. The third party's property did not drain into it, and he was therefore assessed subject to the deduction.

The third party, however, objected to the rate imposed upon him upon the following ground:—But for the construction of the new sewers above described the special rate of 2d. per £ would have ceased by the year 1889. Therefore the ½d. per £ levied upon him and other proprietors

sewer, and to the value and efficiency of such old sewer; and whenever any old sewer is enlarged, or open sewer closed, the expense of such enlargement, or of closing such open sewers, shall be defrayed in like manner as if it had been incurred in making a new sewer."

* Section 196 of the Act enacts,—“It shall be lawful for the Commissioners to borrow for the purpose of making, enlarging, reconstructing, and maintaining sewers, and on the security of the said special sewer-rates and general sewer-rates, such sums of money and at such times as the Commissioners shall deem necessary for that purpose, and to assign the said special sewer-rates and general sewer-rates in security of the money to be so borrowed; and the provisions of this Act, with respect to the borrowing of money and the granting of bonds therefor, and the transference and recording of such bonds, shall be applicable to the borrowing of money for the purpose of making, enlarging, reconstructing, and maintaining sewers."

But section 384 enacts,—“It shall be lawful for the Commissioners to borrow and take up, for any of the purposes of this Act other than the construction, alteration, or maintenance of sewers as hereinbefore provided, or for repayment of any monies borrowed for such purposes under this or any former Acts, which shall have fallen due to the lenders thereof, such sum or sums, and at such times or times as the Commissioners shall deem necessary for such purposes: Provided always that in all cases where it shall be necessary to borrow any sum or sums for the said purposes of this Act, it shall be lawful for the Commissioners and they are hereby authorised and required at their first annual meeting to assess after such borrowing, if the respective rates of assessment then levied do not amount to the respective maximum rates by this Act authorised, to assess all owners or occupiers of premises within the burgh respectively liable under the several assessments under this Act in such additional assessments beyond the sums necessary for such respective purposes as will produce a fund equal to five per centum per annum upon the sum or sums so borrowed respectively, and also to the annual interest of such borrowed sum or sums, which sum of five per centum per annum the Commissioners shall annually appropriate, set apart, and invest, at the highest rate of interest which can be had for the same, in the public funds, or in any chartered or other bank, or on heritable security, as a sinking fund, applicable, and to be applied by the Commissioners from time to time to the repayment of the monies borrowed until the respective debt shall be extinguished."

whose properties were sufficiently drained and were not connected with the new sewers would go to relieve the ratepayers whose properties drained into the new sewers. He contended that, in these circumstances, the Commissioners had no power under the Act to levy upon him any portion of the rate required for these new sewers.

No. 124.

Mar. 17, 1892.
Police Commissioners of
Govan v.
Mickel.

These questions were stated for the opinion of the Court,—“(1) Are the assessments of 1s. 5d. per £ of rental imposed by the first parties legal assessments, and are the second parties bound to make payment of the same to the first parties? (2) Is the said assessment of 1s. 5d. subject to an abatement of 1s. 4½d. imposed by the first parties upon the third party a legal assessment, and is the third party bound to pay the same to the first parties?”

The second parties admitted that the rate of 1s. 5d. was fair, if the proprietors who drained into the sewer and its branches were alone bound to defray all the cost, if the borrowed money must be repaid in twenty years, and if they must meet both principal and interest. They, however, maintained that section 100 of the Act applied only to the case of a sewer constructed in place of an already existing sewer, and that the abatement of 1s. 4½d. per £ allowed by the Commissioners to the majority of the ratepayers in the district was not authorised by that section, and that if authorised, the section did not sanction an abatement which virtually amounted to a total exemption. Further, that in respect that the sewer was constructed to supply the wants of a district which was yet to a great extent unbuilt upon, it was *ultra vires* of the Commissioners to throw the whole expense of the sewer on the few proprietors who had buildings at present within the district; that it was not expedient nor equitable on the part of the Commissioners to limit the period for repaying the borrowed money to twenty years, and that there was no obligation upon the Commissioners by statute or otherwise so to limit it. On the contrary, they pointed out that section 384, while it provided for a sinking fund to repay borrowed money, expressly excepted money borrowed for the purpose of defraying the cost of construction of sewers, and contended that in any case an assessment to provide a sinking fund was a separate assessment from special sewer-rate assessment, and must be levied equally from the ratepayers within the burgh, and at all events within the district. They also contended that even if the Commissioners were bound to repay the borrowed money in twenty years, they were entitled and bound to relieve the second parties and those ratepayers in the same situation as much as possible; that the statute did not impose an obligation upon the Commissioners to repay money borrowed to defray the cost of construction of sewers out of the special sewer-rate alone, and that the Commissioners were entitled to give the relief asked for by levying part of the cost of construction of the sewer as “general sewer-rate.”

It was stated by counsel for the first party, with reference to the amount of the deduction allowed, that in consequence of the number of proprietors in the same position as the third party, and represented by him, about two-thirds of the total assessment would be paid by them, and the other third by the second parties.

At advising,—

LORD TRAYNER.—The questions submitted to the Court under this special case relate to certain rates or assessments which the first party has imposed on the second and third parties in respect of new sewers which have been laid down within the burgh of Govan. No question is raised as to the regularity of the proceedings adopted by the first party either as to making the sewers or impos-

No. 124. ing some assessment therefor. The point raised by the first question is as to the right of the first party to impose an assessment for the new sewer at such a rate as will enable them to pay off the whole expense incurred in connection therewith in twenty years; and the second question relates to the deduction allowed off the assessment so imposed to persons whose property was sufficiently drained before the new sewer was made.

Mar. 17, 1892.
Police Commissioners of
Govan v.
Mickel.

The answer to the first question depends upon the meaning and effect of sections 196 and 384 of the General Police Act of 1862, which has been adopted (at least as far as concerns questions of drainage) by the burgh of Govan. The first of these sections (196) makes it lawful to the first party to borrow money for the purpose of making sewers on the security of the sewer-rates, and declares that the provisions of the Act with respect to the borrowing of money and granting security therefor shall be applicable to the borrowing of money for the purpose of making new sewers. The only clause of the Act which makes provision for the borrowing of money and granting security therefor is the 384th, and it authorises persons in the position of the first party in fixing their assessments with a view to pay off the expenditure made or debt incurred to impose such additional assessments (under a certain limit which has not here been exceeded) "beyond the sums necessary for such respective purposes as will produce a fund equal to 5 per cent per annum upon the sum or sums so borrowed respectively,"—that is, in other words, to impose such assessments as will enable them to create a sinking fund, which in twenty years will be sufficient to pay off their debt, and interest thereon. If this clause is applicable to the expense incurred by the making of new sewers, then the first party has acted admittedly within the powers conferred by the Act, and the first party has, as is stated in the case, acted on the footing that that section is applicable. But this clause (384) commences with the declaration that it applies to the borrowing of money "for any of the purposes of this Act (other than the construction, alteration, and maintenance of sewers) as hereinbefore provided," which makes it difficult to hold that the provisions of that clause apply to the borrowing of money for the purpose of constructing sewers, which is in terms excepted from the operation of the clause. The Act therefore presents this difficulty—it authorises the borrowing of money for making sewers, according to the provisions made with reference to the borrowing of money for other purposes under the Act, and in the clause making these provisions it excepts from its operation the borrowing of money for the construction of sewers. I suppose the exception in clause 384 was inserted *per incuriam* under the idea that the matters there excepted had already been specially provided for in an earlier clause. However that may be, I think this peculiarity in the provisions of the Act does not present any formidable difficulty in reaching the proper answer to the first question. Either clause 384 applies to the matter of borrowing money for making sewers or it does not. If it does, there is an end of the question. The first party, in that case, have acted strictly according to the direction or provision of the Act. If it does not, then under section 196 the first party is authorised to borrow money to meet the expense of making sewers, and to pledge the sewer-rates therefor without any direction whatever as to the manner of borrowing, or the time within which the borrowed money is to be repaid. In that case, the proceedings of the first party in imposing an assessment sufficient to pay off the borrowed money by means of a sinking fund in twenty years is not forbidden by statute, and as an act of administration would be within their power, and does not in itself seem open to any good objection.

The second party further objects to the full assessment being laid upon them, No. 124. while a mere fraction of the assessment practically is imposed upon other proprietors or ratepayers in the same drainage district; while these last-mentioned proprietors or ratepayers (represented by the third party) object to their being burdened with any part of the assessment. This brings me to the second question. Mar. 17, 1892.
Police Commissioners of
Govan v. Mickel.

The power of the first party to impose the special sewer-rate in respect of the construction of any new sewer on all owners within the drainage district where the new sewer is made cannot be questioned. Such power is directly conferred by section 96. The whole assessment in question could therefore have been validly imposed on the class represented by the third party, unless they could shew that in the circumstances they were entitled to some deduction therefrom. But section 100 provides for such a deduction. It provides that the owners in the drainage district in which the new sewer is made, and whose premises were, "in the judgment of the Commissioners," sufficiently drained before the making of the new sewers, shall be entitled to a deduction from the assessment, and in fixing upon the amount of the deduction to be allowed the Commissioners are directed to have regard to the cost of making the new sewer, and the value and efficiency of the existing drainage. Now, it appears to me that the first party have acted in precise conformity with these statutory directions. They have imposed the assessment upon all the owners in the drainage district, but to those whose drainage was in their judgment sufficient before the new sewer was made they have allowed the deduction which the statute authorises. It would appear at first sight as if the Commissioners in the present case have allowed such a large deduction in favour of the third party as to amount to an exemption practically from the assessment altogether. Even had this been so, I think the Court could not have interfered with the judgment and discretion of the Commissioners in that matter—a matter left to their judgment by the statute, and one which they are better able to determine, from local knowledge, than the Court could be. But, from explanations given at the bar, it appears that the class represented by the third party actually pay (in the reduced assessment) about two-thirds of the whole assessment, while the second parties, burdened with the whole rate, only pay the remaining third. On the whole matter, therefore, it appears to me that the proceedings of the first party have been quite regular and within their competency, and that both questions put to us should be answered in the affirmative.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT answered both questions in the affirmative.

MARCUS J. BROWN, S.S.C., Agent.

JOHN MORTON LAWRIE AND OTHERS, Pursuers (Reclaimers).—
D.-F. Balfour—Dundas—Christie.

No. 125.

JAMES WILSON LAWRIE AND OTHERS (Lawrie's Trustees) Defenders
(Respondents).—*Asher—Jameson—Wallace.*

Mar. 17, 1892.
Lawrie v.
Lawrie's Trustees.

Trust—Ultra vires—Partnership—Contract between one of trustees and the trustee.—Testamentary trustees were empowered to carry on any business in which the truster might be engaged at the time of his death, or to continue his interest in any business in which he might then be partner. At the time of

No. 125. his death the truster had a retail spirit business in Glasgow, which was managed by A, his brother, who, however, asserted that by arrangement with the truster he had right to half the profits and to half the goodwill. The trustees, of whom **Mar. 17, 1892.** **Lawrie v. Lawrie's Trustees.** A was one, after taking legal advice as to A's claim, resolved to carry on this business under A's management, and the trustees allowed A to receive, as a partner, half the profits. After the business had been sold certain of the beneficiaries brought an action to have the profits so paid restored to the trust, alleging that the payments were *ultra vires*, on the ground that A had not been partner with the deceased, but merely manager, with a salary of half the profits. A proof was allowed. There was no written contract of copartnership, but A deponed that the truster had agreed to give him half the profits of the business, besides a share in the goodwill, in consideration of the trouble which he had had in putting the business on a satisfactory footing, the truster not having been able to look after it personally. A law-agent whom the truster occasionally consulted deponed that the truster "distinctly led me to understand his brother was a partner to the extent of one-half the business." *Held* that the partnership had in fact been established, and therefore that the trustees, having continued the business, were bound to allow A half the profits.

Question, whether the trustees would have been entitled to enter into a compromise of their co-trustee's claims.

1st Division. **JOHN LAWRIE**, wine and spirit-merchant in Glasgow and Rothsay died in 1876, leaving a trust-disposition and settlement, dated in 1870 by which he conveyed his whole means and estate, heritable and moveable, to James Wilson Lawrie, his brother, David Lawrie, and James Birrell, the son and son-in-law respectively of James Wilson Lawrie, as trustees for behoof of his children. Among the special powers conferred upon the trustees in carrying out the purposes of the settlement was a power to carry on, on account of the estate, for such time as they might think proper, any business in which the testator might be engaged at his death, or to continue for such time as they might think proper his interest in any business in which he might be a partner at his death.

The deceased at the time of his death had two wine and spirit businesses in Glasgow, one in Bath Street and the other in Queen Street. These businesses the trustees resolved to continue under the management of James Wilson Lawrie, one of their number, who received one-half of the annual profits of the Queen Street business, on the footing that he was entitled thereto as having been the partner of the deceased in that business. Both businesses were sold in 1885, and the sums received for their goodwill were credited to the trust-estate.

In 1891 certain of the children of the deceased brought an action against the trustees for count, reckoning, and payment, and for declaration that the defenders were not entitled to make payment of any part of the proceeds of the Queen Street business to James Wilson Lawrie, and were liable personally to restore the sums so paid to the estate, and for decree ordaining them to do so.

The pursuers averred;—(Cond. 4) " . . . The whole business belonged to the testator, who was alone interested in the profits derived therefrom. After his death the trust-estate was entitled to be credited with the whole profits accruing from the business. As to the explanation in answer, it is admitted that the testator had at his death a wine and spirit business also in Bath Street, Glasgow. Admitted that when the Queen Street business was sold the whole goodwill was credited to the deceased's estate. The defenders are called upon to produce any document instructing the said alleged arrangement. *Quoad ultra denied.*"

The defenders denied these averments, and "explained that the testator had two wine and spirit businesses in Glasgow, but being unable to give them personal attention, he agreed with his brother, the defend-

James Wilson Lawrie, to take charge thereof under an arrangement by No. 125. which he was to receive one-half of the profits of the Queen Street business. This arrangement was entered into several years prior to the truster's death, and was in force at that time and binding upon his representatives. The arrangement was therefore continued, the defender James Wilson Lawrie taking charge of both businesses as before, and receiving one-half of the profits of the Queen Street business. The estate benefited largely by the shops being carried on, and if Mr Lawrie had not been prepared to take charge of them, the businesses must have been at once sold. When the Queen Street business was sold he voluntarily gave up his interest therein, and the whole goodwill was credited to the estate."

Mar. 17, 1892.
Lawrie v.
Lawrie's Trustees.

The pursuers pleaded;—(2) The defenders not having been entitled to make payment to the said James Wilson Lawrie of any portion of the said sums paid to him by them, the pursuers are entitled to declarator, count, reckoning, and payment as concluded for.

The defenders pleaded;—(3) The defender James Wilson Lawrie having a right to a half of the profits of the Queen Street business, the defenders were entitled to make payment of the same to him.

A proof was allowed. The evidence was almost entirely parole. The material portions of this evidence are given below.* It also appeared

* James Wilson Lawrie, who was seventy-six years of age, deponed,—“ . . . My brother had a wine and spirit business in Rothesay, and two in Glasgow. . . . He attended to the business in Rothesay himself. In the beginning of 1869 he asked me to give him some assistance in the Glasgow businesses, and I agreed to do so. . . . About the end of October or beginning of November 1869, about the end of the first year after I had been taking charge, the businesses were improving, and my brother came up and stayed with me all night. Next morning we walked over to the shops and had a look over. He was pleased with the progress they were making, and said, ‘James, you have had a good deal of trouble with the job, and I think it would be fair for me to give you half of the profit of the Queen Street business, and besides a share in the goodwill if it comes to be sold.’ I accepted that arrangement, and took up the business. He did not say what was to be the exact share of the goodwill, just a share, but I understood it to be a half. He did not say it was to be a half. I was not to have any interest in the Bath Street shop. I was to manage it as well. I did not ask for any remuneration—he volunteered it. From that time on I continued to manage both businesses until his death. . . . The position I stood in in reference to the Queen Street business was laid before the law-agent of the trust, and after considering matters there was a minute prepared to the effect that we should go on with the businesses. I continued to act in connection with them after my brother's death just in the same way as I had done during his life, down to the time when they were sold in 1885. . . . When the shops were sold I made a claim for a share of the goodwill of the Queen Street shop, which I considered I was entitled to. I claimed a half of the amount received for goodwill, and I held to that to the last. My view was that I was entitled to a half. I insisted upon my claim at first, but there was a scruple about it, and I said I would rather give them the benefit of it and take nothing than have it considered that I was exorbitant. . . . (Q.) Did your brother speak to you several times about giving you payment for the work you were doing? (A.) Not to begin with, but after that it was understood. (Q.) And the way in which you were to be paid was by your getting half the profits of the Queen Street shop? (A.) Yes, and a share of the goodwill, which I understood was one-half. (Q.) You were to be paid for your work by getting those two things? (A.) Yes. There was no one present at the meeting between me and my brother when that arrangement was made.”

Thomas William Alexander, writer in Rothesay, deponed,—“I was well

No. 125. that during the trust management there were losses on the Queen Street business amounting to £57, and that Mr James Wilson Lawrie bore no part of these losses. The goodwill of the Queen Street business was stated in the inventory of the deceased at £200.

Mar. 17, 1892.
Lawrie v.
Lawrie's Trustees.

On 11th December the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the payment of profits to Mr J. W. Lawrie is not, in the circumstances, open to challenge; therefore repels the second plea in law for the pursuers, and decerns."*

acquainted with the deceased Mr John Lawrie. . . . He frequently consulted me on matters of business. He mentioned to me an arrangement that he had with his brother, Mr James W. Lawrie, as to the management of his Glasgow shops. I cannot remember the details of the conversation, it is so long ago; but he several times mentioned to me in the course of conversation that his brother was managing his Glasgow shops, and that on that account he had given him a share in one of them. He said he had given him a half share in the Queen Street shop. As far as I recollect that was a phrase he used. . . . Cross.—" . . . I just remember the general terms of the conversation (Q.) In fact, anything he said to you might be quite consistent with Mr James Lawrie managing the business and getting half the profits as salary? (A.) No, there was nothing said about that; he distinctly led me to understand his brother was a partner to the extent of one-half in the business."

David Murray (of Messrs Maclay, Murray, & Spens, writer in Glasgow, deponed that he was law-agent of the trustee and of the trustees:—"At the meeting of the trustees on 30th May 1876, the arrangement which had subsisted prior to Mr John Lawrie's death, between him and his brother, was explained to me. It had been explained to me two days before that by Mr David Lawrie. At the meeting of trustees it was again explained by Mr James Lawrie. . . . It was arranged that I should make some further inquiries. . . . What was put to me by the trustees was, that it was of great importance that the business should be carried on, and the trustees had in their minds that it would require to be carried on in that way or given up. They did not see their way to put the business in the hands of an outside person. It was explained to me that the importance of carrying on the business was because the income otherwise would be short. There were a number of children, and it was stated that the family could not be maintained and educated without the assistance of the business, and the sole effort was to see whether or not the business could be carried on as before, to provide additional income for the benefit of the family. I put myself into communication with Mr Alexander, writer, Rothesay, . . . It was by one of the defenders that I was referred to Mr Alexander, . . . and after I received Mr Alexander's letter and had considered it and the other information I had got, and had made up my mind, I advised Mr David Lawrie, and through him, I understood, the trustees as a whole, that Mr James Lawrie was entitled to this share of the business, and that the trustees could carry on on the same footing as before." Cross.—" (Q.) On what footing did you understand at the time he was receiving the half of the proceeds? (A.) My view of the legal relationship at the time was this, that Mr James Lawrie had got a half interest in this business, and that the trustees could not dispose of that business without his consent, and could not let it drop without his consent, and that if they carried on they were bound to give him a half interest. (Q.) Was the only reason for your coming to that conclusion, that you had been told that he had got from his brother half the profits of one of the businesses? (A.) And likewise that he had got the half interests; that is how it was put by Mr Alexander. (Q.) What meaning did you attach to half interest? (A.) What I have said just now. (Q.) That he was a partner to the extent of one-half. (A.) It would come to that legally but the word 'partner' was not used."

* "OPINION.—This is an action of accounting brought by beneficiaries against trustees, but the only question which I require to decide has reference to the

The pursuers reclaimed, and argued;—It was not disputed that a trustee, who had a legal claim against the truster, was not precluded from

No. 125.

Mar. 17, 1892.

Lawrie v. Lawrie's Trustees.

profits of a certain public-house business in Glasgow, which profits were, after the truster's death and until the business was sold some years afterwards, divided between the trust-estate and one of the trustees, the defender Mr J. W. Lawrie. The present pursuers are some of the children of the truster. They challenge the action of the trustees in dividing or permitting the division of the profits, alleging that the business belonged to the truster, and that it was illegal for the trustees to make any arrangement, whether with respect to its management or otherwise, which involved making or continuing payments out of the profits to one of their own number.

"The action belongs to a class where there is always more or less delicacy, and where it is necessary for the Court to be on the one hand jealous of any attempt to get behind the salutary rule that a trustee must not make a profit out of his trust, and on the other hand, to take care that this rule is not applied in circumstances to which it is not properly applicable. In the present case, the whole facts have now been ascertained by a proof, and the result has been to satisfy me that the action of the trustees was not inconsistent with the strictest principles of trust law.

"I do not think it necessary to recapitulate the facts, but I think the division of the profits complained of was legitimate upon two grounds, either of which would, in my view, have been sufficient.

"In the first place, I am satisfied, upon the evidence, that the defender J. W. Lawrie is speaking the truth when he states that during the truster's life, and shortly after he (the defender) took the oversight of the truster's two shops, it was agreed between them that he (the defender) should, in consideration of his doing so, have a joint interest in the profits and goodwill of one of the shops, viz, the shop now in question. The agreement was no doubt verbal, but it was natural and probable in itself. It was acted on for years, and up to the truster's death, and its terms are not only spoken to by Mr Lawrie himself, but also by Mr Alexander, the truster's agent in Rothesay, to whom the truster communicated the arrangement he had made with his brother. I saw no reason to doubt the evidence of either of those witnesses. They both impressed me as speaking the truth, and Mr Alexander, besides being a quite impartial witness, has this also in his favour, that on being applied to at the time of the truster's death, he made to the agents of the truster, by letter, exactly the same statement as he made in the witness-box. It is not enough, I think, to detract from this direct and positive evidence that the precise share of the goodwill was not expressed, or that J. W. Lawrie, while insisting on his right to half of the business, waived, at his son's request, his claim to a half of the goodwill when sold. One is always disposed to be critical of explanations given *ex post facto* in such matters, but I am bound to say that on the whole I see no reason for distrusting this part of the defender's evidence.

"If this be so,—that is to say, if Mr J. W. Lawrie had a joint interest in the business in question,—there is, of course, an end of the case. So long as the business was carried on, and the trustees had power to carry it on, Mr J. W. Lawrie was entitled to one-half of the profits, and his co-trustees, in continuing the arrangement which had been in force up to the truster's death, made no concession and did nothing which they could help doing if they were to carry on the business at all.

"But in the second place, I am not prepared to reject the alternative argument also submitted by the defender. Supposing it to be held that the evidence is insufficient to prove the alleged joint interest in the business, the fact still remains that J. W. Lawrie claimed that interest, and pressed his claim, and did so on at least reasonable grounds, and in entire good faith. What in these circumstances were the trustees to do? Were they bound to litigate the question, sacrificing in the meantime the business, which, if carried on at all, could only be carried on with Mr J. W. Lawrie's assistance? I should hesitate to affirm that proposition. But if not, what better could they have done in the interest

No. 125. enforcing that claim against the trust merely by reason of the circumstance that he was a trustee; but in order to take a case out of the rule that a trustee was not entitled to act *in rem suam* in reference to trust matters, a contract entitling him to claim against the trust must be very clearly established.¹ The proof here failed to establish that Mr J. W. Lawrie was the partner of his brother, the truster, in the Queen Street business. A written contract of partnership was not alleged, and the proof of the alleged partnership consisted entirely of the evidence of Mr J. W. Lawrie himself and Mr Alexander, for the other trustees and Mr Murray spoke only to what they had heard from one or other of these two. Now, neither Mr J. W. Lawrie nor Mr Alexander said that the deceased had in so many words assumed his brother as his partner in the Queen Street business; it was rather their inference from what he told them. Mr Lawrie's account—which was the stronger of the two for the defenders—came to this, that he was to have half the profits and “a share” of the goodwill “if it comes to be sold.” The fair meaning of that was that he was to be paid half the profits of the Queen Street business as his remuneration for managing the two Glasgow businesses, on the understanding that he was to have such a share of the goodwill as his brother might determine, if his brother thought fit to sell the business. In other words, he was to be manager, not partner. The actings of the trustees bore out that view, for Mr J. W. Lawrie did not receive a share of the goodwill, and while he continued to receive half the profits he bore none of the losses. In any view the partnership was no more than a partnership at will, which terminated by the death of the truster; so that the trustees were truly entering into a new partnership with one of their own number—that was to say, they were creating a new contract, not merely fulfilling the obligations of a contract which already existed when they came into office. In substance therefore the case was identical with *Mackie's case*,² where it was proposed to increase the share of the trustee-partner. But it was said—and this was the Lord Ordinary's alternative ground of judgment—that even if Mr J. W. Lawrie should be held not to have been his brother's partner, his position was so doubtful as to make it a fair subject of compromise with the view of avoiding litigation. It might be that it was a fair subject for compromise had the question been with a stranger to the trust; but for trustees to enter into a compromise with one of their own number was nothing else than to enter into a contract

of the trust than they did do? They placed the matter in the hands of their law-agent, Dr Murray, than whom nobody stands higher in his profession, and he made inquiry and came to the conclusion that the claim was good, whereupon the trustees, acting on his advice, arranged with their co-trustee that both the truster's businesses should be carried on as formerly under his oversight, he receiving the same share of profits of the one business which he had received all along. It is admitted that in result this arrangement was greatly to the benefit of the trust, and provided an income on which the beneficiaries were brought up and educated, and I am not able to say that, although made with one of their own number, it was in the circumstances beyond the trustees' powers. If trustees compound or transact a claim made by one of their number, they must, I admit, either shew that it was a good claim in law, or, that being more or less doubtful, they made a settlement of which the Court can approve. But I am not prepared to say that the latter may not sometimes be as good a defence as the former.”

¹ Crosskill v. Bower, 1863, 32 Beav. 86, per Lord Romilly, M. R., 98; *Barnard v. Hartley*, 1866, L. R., 2 Eq. 789; *Mackie's Trustees v. Mackie*, Jan. 15, 1875, 2 R. 312; *McLaren on Trusts*, i. p. 212.

² *Mackie's Trustees v. Mackie*, Jan. 15, 1875, 2 R. 312.

with him, which was *ultra vires*. It was not indeed clear wherein the compromise here consisted, for Mr J. W. Lawrie simply continued to manage the business and to receive half the profits, which was all that he claimed.

Argued for the defenders;—The evidence established that Mr J. W. Lawrie had been assumed by his brother as his partner in the Queen Street business. The right to profits was *prima facie* evidence of a partnership,¹ and the other evidence corroborated this presumption. It was immaterial that it was a partnership at will, for it gave Mr Lawrie certain rights; if the trustees resolved to continue the business they could do so only on the footing of recognising these rights. They had power to continue the business, and no question was raised as to the propriety of doing so as an act of trust management. It was at all events a fair act of trust administration for the trustees to enter into a compromise of Mr Lawrie's claims. To hold that trustees could under no circumstances transact with one of their own number was to stretch the rule which prohibited trustees from entering on their own account into contracts with the trust beyond all reasonable limits, for that would oblige trustees to litigate every matter in which one of them had interest adverse to the trust, unless his right was clear beyond all dispute. The present was a case in which the trustees, acting on all the advice and information which they could obtain, had come to the conclusion that the business ought to be continued on the footing on which the truster had left it; and so acting they had done well in the interests of the beneficiaries, and would be protected.

At advising,—

LORD PRESIDENT.—This is a difficult case, but I am of opinion that the Lord Ordinary's interlocutor should be adhered to, on the ground that at the death of John Lawrie the defender was his partner in the Queen Street business. That is the view which was acted on by persons of whom it is to be observed that if some were interested, all are believed by the Lord Ordinary to be honest men. Moreover, his Lordship, apart from any presumption arising from those actings, is satisfied by the testimony given before him on the main issue of fact. I should be slow to differ from a conclusion so arrived at, and I have come to be satisfied that it is correct.

The case of the pursuers consisted of an attempt to make out that the true position of Mr J. W. Lawrie was that of a manager, paid by a share in profits; and if this were so, he would have been disqualified from taking such remuneration for his services from the trust-estate while he acted as trustee. The evidence, however, does not seem to support the pursuers. When the truster died, Messrs MacLay, Murray, & Spens, who had prepared his settlement, and were acting for his trustees, applied to Mr Alexander, a writer in Rothesay, who had been on intimate terms with the deceased, to inform them of what he knew of the arrangement between the deceased and Mr J. W. Lawrie as to the Glasgow shops. Mr Alexander replied that the deceased had more than once mentioned the arrangement in general terms, and that he had given Mr J. W. Lawrie a half interest in the Queen Street business. Mr Alexander is examined in this case; he is a witness of unquestioned credit and impartiality, and he says the deceased told him he had given his brother James a half share of the Queen Street shop. In cross-examination, the pursuer's counsel put to Mr Alexander the theory of

No. 125.

Mar. 17, 1892.
Lawrie v.
Lawrie's Trustees.

¹ Pooley v. Driver, 1876, L. R., 5 Chan. Div. 458, per Jessel, M.R., 470-74.

No. 125. the arrangement which they now contend for, and he explicitly negatives it
 Mar. 17, 1892. "(Q.) In fact anything he said to you might be quite consistent with Mr James
 Lawrie v. Lawrie managing the business and getting half the profits as salary? (A) No,
 Lawrie's Trustees. there was nothing said about that; he distinctly led me to understand his brother
 was a partner to the extent of one-half in the business." This is therefore plain
 and unambiguous evidence of a partnership, as distinguished from a managership
 with a salary of one-half of the profits.

The pursuers, however, have fastened upon certain expressions in the evidence of Mr James Lawrie, in giving his account of the interview at which the arrangement between him and his brother was made, as supporting their theory. Applying to one part of his deposition a rather strict construction, they say that he represents his brother as having agreed to give him one-half of the profits and a share of the proceeds of the goodwill when sold. It is pretty plain that if what was given was a half share of profits and a share of the goodwill, the pursuers' case would be most arduous; for on that state of facts Mr James Lawrie could hardly have escaped liability to third parties as a partner. But if Mr James Lawrie's evidence be read as a whole (and he is seventy-six years of age), it is plain enough that in the passage in which they occur the words "if it comes to be sold" are not meant to qualify the words "besides a share in the goodwill," but rather point to the event in which his share in the goodwill would sound in money. Indeed, the pursuers themselves have helped to clear his meaning by their cross-examination, for when they asked him, "And the way you were to be paid was by your getting half the profits of the Queen Street shop?" he replied "Yes, and a share of the goodwill, which I understand was one-half."

Such is the direct evidence of the agreement between the brothers. Mr James Lawrie and his son David Lawrie seem to have acted frankly and above board in placing the facts before Mr Murray, the experienced and able adviser of the deceased and of his trustees; he made independent inquiry, as already stated, and Mr James Lawrie's position as a partner was recognised till the business was sold, the trustees having elected to exercise the powers expressly conferred by the truster to continue for such time as they might think proper his interest in any business in which he might be a partner at his death. He was a partner in none if not in this; and this provision has, in the result, proved admirably advantageous to the truster's children, some of whom are now challenging the actings of the trustees in this regard. The pursuers have made several points on the actings of the parties in the administration of the trust as bearing against the existence of a partnership. Only two of these require notice,—(1) that the trust-estate bore certain losses in the Queen Street business, and that Mr James Lawrie did not bear his share; (2) that he did not claim any part of the proceeds of the goodwill when it was sold. The same explanation answers both points. An arrangement was come to by which Mr James Lawrie waived his claim to a share of the goodwill, and the estate bore the loss. As the loss was only £57, and the goodwill, even for inventory purposes, was valued at £200, it is not surprising that the point about the losses was not put in cross-examination to Mr James Lawrie.

My opinion is that James Lawrie was a partner of his brother in the Queen Street business; and this entitles the defenders to the judgment which the Lord Ordinary has pronounced.

It is right to add that I do not adopt the alternative ground of judgment.

stated by the Lord Ordinary. His Lordship speaks of the trustees compounding or transacting or making a settlement. In fact, the defenders did none of these things. What they did was, they simply admitted the claim on the footing that it was well founded. I think that the claim was well founded, and therefore that they were right. I am not called on therefore to decide whether three trustees, father, son, and son-in-law, could in law defend their admission of a claim by the father on any ground short of this. Still less is it necessary to do more than express a reservation of my opinion as to the conditions under which the compromise of such claim by trustees so situated could be successfully defended.

No. 125.
Mar. 17, 1892.
Lawrie v. Lawrie's Trustees.

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. I would just wish to call attention to this fact, that under the deed of trust there was a power to the trustees to carry on any business in which the truster might be engaged, either alone or in partnership. Therefore if at the time of his death it was found that there was a subsisting partnership between him and his brother, the trustees were not under any disability in consequence of the ordinary rules of trust administration from continuing to leave the truster's money in its then state of investment. But no doubt this was technically a partnership at will, because there was no written contract, and therefore strictly speaking it came to an end at the truster's death. But then it came to an end under the condition that—if we are to accept the evidence as to the terms of partnership—the brother would have been entitled to have the business sold and the goodwill divided. Now, in these circumstances it appears to me to be quite consistent with sound principles of trust administration that with a power to continue the business the trustees should enter into a renewal of the partnership arrangement which had subsisted, taking care to give no increase of interest to the partner who was one of their own number. There are many cases in the books in which the question of the propriety of trustees entering into partnership with one of their own number has been discussed; but I know of no case where it has been held objectionable to continue the partnership arrangement where there was a power given to the trustees to invest money in trade, and no greater interest given to the deceased's partners than they had before. If it had been proposed to give a larger share as a consideration for the additional trouble in the management of the business, that would have raised a very different question, and one which probably we would not have been able to decide in the same way as we have done the present case. I agree with your Lordship's analysis of the evidence. I think the evidence leaves no doubt that this was a proper partnership, and not an arrangement which is no doubt quite legal but rather unusual, especially in businesses of a small class, that of appointing a manager with a salary proportioned to his share of the profits.

LORD KINNEAR.—I concur with your Lordship, and also with Lord M'Laren, and have nothing to add.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—J. & J. ROSS, W.S.—Agents.

No. 126. MARY BENVIE OR ANDERSON, Pursuer (Appellant).—*Strachan—Craigie*.
 Mar. 18, 1892. R. S. W. LEITH (Anderson's Trustee), Defender (Respondent).—*M'Lennan*.
 Anderson v. Anderson's Trustee.

Bankruptcy—Husband and Wife—Property of wife entrusted to husband—Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 1, subsec. (4).
 —The Married Women's Property Act, 1881, enacts with regard to a wife's separate estate on the occasion of bankruptcy of the husband (sec. 1, subsec. 4), that any estate of the wife, "lent or entrusted to the husband," shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend after the claims of other creditors have been satisfied.

A husband whose wife had separate estate delivered to his wife a sale-note whereby, on the narrative that from time to time he had received from her separate estate sums amounting in all to £225, he sold to her in consideration of that sum the whole furniture in the house they occupied, conform to inventory. About seven months afterwards the husband's estates were sequestrated. The wife then sought to interdict the husband's trustee from interfering with the furniture.

After a proof the Court refused interdict, the Lord Justice-Clerk, Lord Young, and Lord Trayner holding that, on the assumption of a *bona fide* sale by the husband to the wife, the furniture was estate of the wife entrusted to the husband, Lord Rutherford Clark holding that no *bona fide* sale had been proved.

2D DIVISION.
 Sheriff of
 Caithness.

THE estates of the Reverend William Anderson, minister of the *parish of Pulteneytown*, were sequestrated on 4th September 1891.

The trustee, Mr R. S. W. Leith, having proposed, for the purposes of the sequestration, to make an inventory of the furniture in the house occupied by the bankrupt, Mrs Anderson, the bankrupt's wife, who maintained that the household furniture was her property, raised an action in the Sheriff Court at Wick to interdict the trustee from making an inventory of or selling or interfering with the furniture.

The pursuer stated that she had separate means derived from her father, and that on 9th December 1890 her husband sold and delivered to her the household furniture for £225, conform to sale-note produced further, that £225 was a full and just price, and was truly paid.

The sale-note was as follows:—"I, William Harley Anderson, AM minister of Pulteneytown, residing at Rosemount, Wick, hereby acknowledge that I have received from Mrs Mary Benvie or Anderson, my wife, out of her separate estate the sum of two hundred and twenty-five pounds sterling (£225), which has been paid to her at various times since the death of her father, . . . by the agents for his trustees; . . . in consideration of which sum of £225, paid by her to me, I have sold to her all my moveable goods and effects, consisting of the furniture and plenishing of this my house, situated at Rosemount, Wick, a particular statement of which follows."—(An inventory followed.)

The defender denied that the furniture was pursuer's, and denied the *bona fides* of the alleged transaction. He pleaded;—(4) The deed in question having been granted by an insolvent to a conjunct or confidential person, to the prejudice of his prior creditors, and without true and necessary cause, and without payment of a just price therefor, is *ab initio* null and void. (5) The deed in question having been made by the bankrupt, and received by the pursuer in the knowledge of the bankrupt's insolvency, and having been made gratuitously and with intent fraudulently to defeat the rights of the bankrupt's creditors, is voidable at the defender's instance, and falls to be set aside. (6) The household furniture and effects referred to not having been delivered but allowed to remain in the bankrupt's possession and use, the alleged sale is invalid.

Proof was led. The bankrupt and the pursuer deposed that the latter from time to time handed over the separate income she was receiving from her father's trust to the former on condition that the furniture was to be

hers when the value of it was paid up; that this occurred in December 1890, when the last instalment of £225, which was the true value, was paid, and that the bankrupt then wrote out the sale-note. The furniture remained as before in the possession of the spouses.

No. 126.

Mar. 18, 1892.
Anderson v.
Anderson's
Trustee.

The Sheriff-substitute (Mackenzie), on 18th February 1892, pronounced this interlocutor:—"Finds that in the end of 1885 or beginning of 1886 the pursuer and the said Reverend W. H. Anderson entered into an agreement by which the pursuer was to pay money from her separate estate to the value of the household furniture belonging to her said husband, in return for which the furniture was to be sold by him to her: Finds that payments to an amount exceeding the sum of £225 were so made by her to him at various times from the 4th January 1886 till the 8th December 1890: Finds that on 9th December 1890 the said Reverend W. H. Anderson wrote and handed to the pursuer the document No. 5 of process [the sale-note]: Finds that subsequently to that date the furniture remained in the joint use and enjoyment of the pursuer and her husband: Finds in law that a contract of sale was entered into between the pursuer and her husband, which is set forth in the said document: Finds that no delivery of the furniture followed upon said contract: Finds that the said furniture has been 'lent or entrusted' by the pursuer to her said husband and 'immixed with his funds,' in the sense of sec. 1, subsec. (4), of the Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. cap. 21):* Finds therefore that under sec. 2, subsec. (2) of the said Act, the only claim which the pursuer can have, if she any have to the said furniture, is a claim in terms of the subsection of the said Act first above mentioned: Finds it is inexpedient to decide in this process the validity or value of such claim, as it is in any view insufficient to entitle the pursuer to interdict as concluded for: Finds that the pursuer is not entitled to interdict in terms of the prayer of the petition: Therefore recalls the interim interdict granted on 28th September last: Assolutes the defender from the conclusions of the action."

The pursuer appealed, and argued;—The *bona fides* of the sale was proved, and the Sheriff had affirmed it. The subjects were transferred by writing. There was all the delivery that the subjects were capable of. They were the articles used in the dwelling-house, and the pursuer could not have been expected formally to remove them.¹ As to the Married Women's Property Act, the furniture had not been lent or entrusted to the husband by remaining in the only place in which she could keep it, if they were to live together and use it.²

The defender argued;—The transaction was not *bona fide*. It was the pretended sale shortly before bankruptcy of the bankrupt's furniture to

* The Married Women's Property Act, 1881 (44 and 45 Vict. c. 21), enacts, sec. 1, subsec. 3.—"*Liability to Arrestment*.—Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband."

Subsec. (4).—"Bankruptcy.—Any money or other estate of the wife lent or entrusted to the husband or immixed with his funds shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after, but not before, the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

¹ Sim v. Grant, June 3, 1862, 24 D. 1033, 34 Scot. Jur. 517.

² Scott v. Scott's Trustees, Feb. 20, 1889, 16 R. 504.

No. 126.

Mar. 18, 1892.
Anderson v.
Anderson's
Trustee.

a conjunct and confident person, and without delivery. The Mercantile Law Amendment Act* did not apply to such a case, as the case of *Sim* shewed, for there was not only left with the seller the "custody," but the use and possession. Assuming the sale, it was clear that the pursuer "entrusted" the bankrupt with the furniture. Anyone buying it from him before the sequestration would have had a good title.

LORD JUSTICE-CLERK.—If it were necessary in this case to decide whether the transaction between the bankrupt husband and his wife, the appellant, was a *bona fide* transaction, I must say I should have difficulty in holding that it was. My impression at present is decidedly to the contrary. But the Sheriff-substitute has decided that it was, and it is unnecessary to form an absolute opinion upon it, for I agree with the Sheriff in this, that whatever is the truth of the transaction, this furniture was certainly "entrusted to the husband." It remained after the transaction (which I am assuming to convey it *bona fide* to the wife) in the house in which the husband resided, and continued to be used by the spouses as before. In these circumstances, I think it does not fall under the protection afforded to the wife's property from the husband's creditors under the Married Women's Property Act, but under the clause making an exception from such protection. As it was furniture of the wife entrusted to the husband in the sense of the Act of 1881, sec. 1, subsec. (4), I do not think that either of the spouses is entitled to interfere with the husband's creditors obtaining possession of it.

LORD YOUNG.—I am of the same opinion. *Prima facie*, and in the absence of anything to the contrary, I think that the trustee for creditors is entitled to take possession of this furniture. The question is whether this pursuer, who desires to interdict him, has proved anything to the contrary. I think she has not. The furniture was originally the husband's. The wife says that in 1880, a few months before the sequestration, the furniture was sold to her. She is entitled to a small income (between £40 and £50 per annum) from her father's estate, and she says that during ten years before his bankruptcy the husband drew that income and spent it. The allegation is that when the spouses reckoned up matters in 1890 it was found that the husband had thus got £225, and it was agreed that the furniture should be sold to her by a bill of sale for that sum, which was a "full and just price," and "truly paid" by Mrs Anderson for the furniture. Now that may have been an honest enough transaction, but at first sight I am not favourably impressed by it. The husband was embarrassed in his circumstances and owed money to various tradesmen when he arranged with his wife that she should be the purchaser of the furniture, which was thus to be put beyond reach of these tradesmen. It has not *prima facie* an honest aspect, and certainly appears to have been intended to frustrate these honest creditors of their right to obtain payment by diligence against the husband's effects. My

* The Mercantile Law Amendment Act, 1856 (19 and 20 Vict. c. 60), enacted, sec. 1, that "where goods have been sold but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent to any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser."

opinion is that the transaction ought not to be sustained as an honest lawful sale to the wife, and therefore that we do not require to consider questions which have been raised under the Mercantile Law Amendment Act and under the Married Women's Property Act. I doubt if the former of these Acts applies to such a case. In considering that Act we are in the region of fine distinctions. The cases on that Act and the considerations arising in them create fine distinctions.

No. 126.

Mar. 18, 1892.
Anderson v.
Anderson's
Trustee.

But if we assume the integrity of the transaction, and that the wife honestly bought the furniture from her husband, intending it to be used of course by her husband and herself and their children—there is no indication of delivery—that was not a transaction within the meaning and spirit of the Mercantile Law Amendment Act. You may get words in the Act to cover that, but *qui hæret in litera hæret in cortice*. It may be only within the Act in a very formal sense, and not within the intendment of it at all.

As to the Married Women's Property Act, I think this is a case of entrusting the husband with the furniture. It was the only furniture in the house. He had a duty to keep his house furnished and habitable for his wife and children. He would not fulfil that duty by providing them with the bare walls of an unfurnished house. He ought to have a furnished house. The furniture was entrusted to him in order that he should perform this duty. That exposes it to the diligence of the husband's creditors.

My opinion is that the judgment of the Sheriff-substitute is right, and ought to be adhered to.

LORD RUTHERFURD CLARK.—I am of opinion that the furniture should go to the creditors, and I put my opinion on the ground that I am not satisfied that there was a *bona fide* transaction by which the wife acquired a right to it.

LORD TRAYNER.—I agree in the conclusion reached by the Sheriff. I am not prepared to say whether there was a *bona fide* sale or not. There is much, I think, to be said on both sides of that question. Assuming the *bona fides* of the transaction, I agree with Lord Young on the question of the application of the Mercantile Law Amendment Act.

THIS interlocutor was pronounced:—"Find in fact in terms of the findings in fact in the interlocutor of Sheriff-substitute appealed against: Therefore dismiss the appeal, and affirm the interlocutor appealed against: Find the defender entitled to expenses in this Court; remit," &c.

ALEX. MUSTARD, S.S.C.—THOMAS LIDDLE, S.S.C.—Agents.

ARTHUR JOHN RAIT (Arbuthnott's Executor-nominate), First Party.— No. 127.

Johnston—Fleming.

WALTER CHARLES WARNER ARBUTHNOTT, Second Party.—C. J. Guthrie— Mar. 18, 1892.

Dundas.

Rait v.
Arbuthnott.

Succession—Fee or liferent—Gifts of liferent to parent and of fee to children.
—A testator by his will directed his executor to pay to his widow the free income of the residue of his estate during her life, and after her death "I leave and bequeath the liferent of the said residue or remainder to" his son "during the whole days of his life; and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in

No. 127. such manner as he may think right, and failing such apportionment the said fee shall be payable amongst the said children equally, share and share alike." The son survived his parents and had issue. *Held*, upon a sound construction of the above direction, that his right to the residue was limited to a life-ent, and that he was not entitled to demand a conveyance of the residue from his father's executor to be held by him for his own and his children's respective rights of life-ent and fee.

Mar. 18, 1892.
Rait v.
Arbuthnott.

Succession — Legitim — Satisfaction — Provision in marriage-contract.—A father in his son's antenuptial marriage-contract bound himself to leave to his son's marriage-contract trustees one full third part in value of the residue of his estate. The provision was not declared to be in satisfaction of the son's legitim. By his will, the father directed his executor to carry out the marriage-contract obligation. *Held* that the provision in the marriage-contract being a debt due by the father at his death, not expressed to be in satisfaction of legitim, the son was not thereby barred from claiming legitim.

2D DIVISION.

ON 5th January 1891 the Honourable Walter Arbuthnott, a domiciled Scotsman, died survived by his wife and two children, Major Walter Charles Warner Arbuthnott, and Mrs Kathleen Georgina Arbuthnott or Rait, both of whom had issue. The widow of the deceased died intestate on 17th March 1891.

The deceased left a will and testament dated 27th July 1886, by which he nominated and appointed Lieutenant-Colonel Arthur John Rait of Anniston, Forfarshire, to be his sole executor, with full power to him to intromit with his whole moveable estate.

The deed contained the following directions :—"To pay and perform the obligations undertaken by me in antenuptial contract of marriage between the said Arthur John Rait and my daughter Mrs Kathleen Georgina Arbuthnott now Rait; in the third place, to pay and perform the obligations undertaken by me in the marriage-settlements entered into on the marriage of my son Walter Charles Warner Arbuthnott and Miss Emma Marion Hall Parlby; in the fourth and last place, in regard to the residue or remainder of my whole means and estate, I hereby direct and appoint my said executor to pay to my said wife the free income thereof during the whole days of her life, and after her death or after my death, if she shall predecease me, I leave and bequeath the life-ent of the said residue or remainder to the said Walter Charles Warner Arbuthnott during the whole days of his life; and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment, the said fee shall be payable amongst the said children equally, share and share alike."

Major Arbuthnott's marriage-contract, here referred to, was dated 14th January 1878, and was executed in English form. By it the father bound himself, in the event of his son or his son's wife or any issue of the marriage surviving him (the father), to "well and effectually give, devise, and bequeath unto, or otherwise cause to be vested in the trustees, one full third part in value at least of the residue, after payment of his funeral and testamentary expenses and debts, of all the heritable and moveable property and other real and personal estate to which he the said Walter Arbuthnott, or any person or persons in trust for him, shall at his death be entitled, in possession, reversion, remainder, or expectancy, or otherwise howsoever," but subject to any provision which he might make out of the income thereof for his (the deceased's) widow, "and that in case he, the said Walter Arbuthnott, shall not in any manner, and subject only as aforesaid, well and effectually give, devise, and bequeath unto or otherwise cause to be vested in the trustees, one full third part in value

at least of such residue as last aforesaid, then one-third part in value at least of such residue as last aforesaid shall immediately after the death of him the said Walter Arbuthnott, and at the cost of his estate, and subject only as aforesaid, be assured and transferred by his heirs, devisees, executors, and administrators, and all other necessary parties, if any, unto or otherwise vested in the trustees." No. 127.
Mar. 18, 1892.
Rait v. Arbuthnott.

The trustees were directed to pay the income of the funds so to be provided by the deceased to his son, Major Arbuthnott, during his life, to his wife, Mrs Emma Parlbay or Arbuthnott, on survivance, for her life, and to pay the capital to the issue of the marriage, and failing such issue, to Major Arbuthnott, his executors, administrators, and assignees. This provision was not declared to be in satisfaction of Major Arbuthnott's legitim.

In the marriage-contract of Mrs Rait (also referred to in the above clause in the will), and which was in Scots form, there was this provision,—"And the said Honourable Walter Arbuthnott hereby binds and obliges himself and his heirs, executors, and successors to make payment at the first term of Whitsunday or Martinmas after his death to" the marriage-contract trustees "and their foresaids, as trustees aforesaid, for the ends, uses, and purposes hereinafter written, one just and equal third part of the whole property, heritable and moveable, real and personal, which shall belong to him, the said Walter Arbuthnott, at the time of his death." The deed contained no reference to legitim.

Questions having arisen upon, *inter alia*, the construction of the bequest in the will in favour of Major Arbuthnott, a special case was presented to the Court by (1) Colonel Rait; and (2) Major Arbuthnott. The first party maintained that the effect of the bequest was to give the second party a mere *lifereit* interest in the residue or remainder of the means and estate of the deceased, and that it was his, the first party's, duty, as executor of the deceased, to retain the residue and remainder, paying the income thereof to the second party, and holding the fee for behoof of the second party's children. On the other hand, the second party maintained that the terms of the bequest in his favour were such as to entitle him to the fee of the residue, and that the first party was bound to hand over to him the said residue or remainder as his own absolute property; or alternatively, that if he, the second party, had no right to the fee of the said residue and remainder, the first party was not entitled to retain the said residue and remainder, but was bound to hand over the same to the second party for behoof of himself and his children, according to their respective rights of *lifereit* and fee.

Further, in the event of its being found that the bequest in favour of the second party conferred upon him merely a *lifereit* right, he maintained that, in addition to the trustees under his marriage-settlement being entitled, by virtue thereof, and of his father's will, to receive one-third of his father's estate, he himself was entitled to claim legitim out of the estate remaining, after deducting the amounts payable, under the obligations undertaken by his father, in his own and his sister Mrs Rait's marriage-contracts. The first party, on the other hand, maintained that any claim for legitim by the second party was excluded by the provision made by his father for him in his marriage-settlement.

The questions of law for the opinion of the Court were:—(1) Whether the bequest in favour of the second party, contained in the fourth purpose of the said last will and testament, confers upon him a right to the fee of the residue and remainder of the estate of the Honourable Walter Arbuthnott? (2) In the event of the foregoing question being answered in the negative, whether the first party is bound to retain the said residue

No. 127.
Mar. 18, 1892.
Rait v.
Arbuthnott.

and remainder in his own hands until the death of the second party, paying to the latter only the income thereof; or, whether the first party is bound to pay over said residue and remainder to the second party for behoof of himself and his children, according to their respective rights, and if so, on what terms and under what conditions, if any? (3) Whether the second party, in addition to the performance of the obligations undertaken by the Honourable Walter Arbuthnott in his, the second party's, marriage-settlement, is entitled to legitim out of the residue of his father's estate remaining after performance of the obligations contained in the second party's marriage-settlement, and in the marriage-contract of the first party and Mrs Kathleen Georgina Arbuthnott or Rait?"

Argued for the first party;—(1) The rule laid down in the case of *Frog's Creditors*,¹—that a gift to a parent in liferent and to his children *nascituri* in fee imported a fee in the parent,—which was said to be applicable to the destination in the fourth purpose of the will, was very technical, and had not been viewed with much favour. At most it only applied to destinations by which the granter of a conveyance was so completely divested of the fee that a feudal necessity arose for the application of the rule. It had no application where there occurred a direction to hold, *e.g.* to continuing trusts, or where the testator shewed an obvious intention to limit to a liferent by using the word "allenary" or in some other way.² In the present destination there was no divestiture of the testator. The direction to pay the liferent was quite separate from the direction to pay the fee. Moreover, the father had a power of apportionment which was quite inconsistent with his taking the fee. In short there was here a continuing trust,³ and not a trace of a direction to the executor to pay over the whole estate at once. The second party's interest then in the residue was limited to a liferent. (2) Being entitled to receive one-third of his father's estate in virtue of his marriage-contract and the will, the second party was not also entitled to legitim out of the residue. A child's claim to legitim might be discharged in three ways,—(1) by the parents so providing in their antenuptial marriage-contract; (2) by the child agreeing to discharge it; and (3) by the child's accepting a provision given in lieu of legitim, *e.g.*, in a general settlement. Now the obligation contained in the son's marriage-contract was one to make such a provision, and that having been made and accepted, the second party's claim to legitim must be held to have been discharged. The fund of which the provision was to be one-third was the whole moveable estate.

Argued for the second party;—(1) The rule established by *Frog's Creditors*, whether good or bad, was fixed and applied in terms to the bequest in his favour in the will. The rule had been applied in later cases.⁴ When such a rule was established and recognised its justice or injustice in the abstract was of less importance to the community than that the rule itself should be constant and invariable.⁵ There was nothing here resembling a continuing trust, except perhaps the direction to pay the liferent to the widow, a payment which ceased at her death. The destina-

¹ Creditors of Robert Frog v. His Children, Nov. 25, 1735, M. 4262; Ross' Leading Cases, Land Rights, vol. iii. pp. 602 *et seq.*

² Per Lord Chelmsford in *Ralston et al. v. Hamilton et al.*, July 19, 1862, 4 Macqueen's App. p. 419.

³ Napier & Crombie v. Scott and Others, May 14, 1827, 2 W. and S. 550.

⁴ Bell's Prins., sec. 1710 *et seq.* and cases cited; *Beveridges v. Beveridge's Trustees*, July 20, 1878, 5 R. 1116.

⁵ Per Lord Chancellor (Westbury) in *Ralston v. Hamilton*, 4 Macqueen's App. p. 405, *vide supra*, note 2.

tion was in short a direction to pay to all intents and purposes the same as that in *Frog's Creditors*, and imported a fee in the second party. (2) Should it be held that the bequest only conferred upon him a liferent, he was entitled to reject it and to claim legitim. There was no actual discharge of his legal rights, and no room for presumed discharge. The obligation contained in the marriage-contract being for an onerous consideration was a debt due by the testator, and therefore must be deducted from his estate before the legitim fund was ascertained. The obligation was not in any sense a testamentary provision in a general settlement of the testator's effects.¹

No. 127.
Mar. 18, 1892.
Rait v.
Arbuthnott.

At advising,—

LORD JUSTICE-CLERK.—The late Honourable Walter Arbuthnott had a son and a daughter, both of whom were married during his lifetime. In their marriage-settlements, to which he was a party, he bound himself to leave to each one-third of the value of the residue of his estate, subject to any income he might leave to his widow out of the annual proceeds of his residue. By his testament, which is dated 27th July 1886, he appointed the first party to be his sole executor, and directed him to fulfil these obligations in the children's marriage-contracts. He then directed his executor as follows:—"In the fourth and last place, in regard to the residue or remainder of my whole means and estate, I hereby direct and appoint my said executor to pay to my said wife the free income thereof during the whole days of her life, and after her death, or after my death, if she shall predecease me, I leave and bequeath the liferent of the said residue or remainder to the said Walter Charles Warner Arbuthnott during the whole days of his life; and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment the said fee shall be payable amongst the said children equally, share and share alike." The first question which arises on this clause is whether the second party is entitled to the fee of the residue. It appears to me that the answer to that question is not doubtful. The words of the deed are express and unambiguous. They effectually and separately dispose of the liferent and of the fee by two separate bequests. There is here no question of a fee left hanging in doubt; it is expressly bequeathed to others than the person to whom the liferent is bequeathed. The words of the deed are too clear for doubt.

The second question proceeds upon the assumption that the answer to the first question is as I have already answered it, and relates to the control of the fee during the subsistence of the liferent. Is the first party to hold it, or must he hand it over to the second party? The answer to that question seems to me to be equally clear. The second party having no right to the fee, but only a right of apportionment, to take effect on the lapse of his liferent, I hold that the first alternative of the second question must be answered in the affirmative, and the second in the negative.

The third question is whether the second party is entitled to claim legitim out of the residue of the estate remaining after the marriage-contract obligations have been fulfilled. I see no principle upon which he can be excluded from demanding his legal rights should he be advised to do so. The sum payable to

¹ Breadalbane v. Chandos, Aug. 16, 1836, 2 Shaw and Maclean's App. 377; Somerville's Trustees v. Dickson's Trustees, June 3, 1887, 14 R. 770.

No. 127. his marriage-contract trustees is a debt due under contract by the father's estate, and not a bequest in any way to the second party so as to compel him to give up his legal rights to a share of the residue left after contract obligations have been met. There is nothing in the deed which can debar him from claiming these rights. I therefore propose to answer the third question in the affirmative.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT pronounced this interlocutor:—"Find and declare in answer to the first question, that the bequest there mentioned in favour of the second party does not confer upon him a right to the fee of the residue and remainder of the estate in question: In answer to the second question, that the first party is bound to retain the said residue and remainder in his own hands until the death of the second party; and *quoad ultra* answer the second question in the negative; answer the third question in the affirmative . . ."

R. C. BELL & J. SCOTT, W.S.—MYLNE & CAMPBELL, W.S.—Agents.

No. 128. ROBERT GRAY, Pursuer (Reclaiming).—*Watt—M'Lennan.*
MISS ELLEN SMART, Defender (Respondent).—*John Wilson.*
Mar. 18, 1892. ALEXANDER M'DONALD, Defender (Respondent).—*F. T. Cooper—*
Gray v. Smart. *T. B. Morison.*

Reparation—Wrongous diligence—Small-debt decree—Finality—Diligence—Small-Debt Act, 1837 (1 Vict. cap. 41), secs. 30 and 31—Citation Amendment Act, 1871 (34 and 35 Vict. cap. 42), sec. 3—Citation Amendment Act, 1882 (45 and 46 Vict. cap. 77), sec. 3.—A tenant, whose furniture had been sold under a small-debt decree of sequestration for rent, which contained a warrant for sale after forty-eight hours' notice, brought an action of damages against his landlord and the sheriff-officer by whom the proceedings had been carried out, alleging that neither the summons nor the inventory and appraisement, nor the charge on the decree, had been duly served on him, in respect that the executions bore that copies of the summons, the inventory and appraisement, and the decree and charge, had been sent to the pursuer in a registered letter addressed to him at the house which contained his furniture after he had removed to a house in another town, and that the defenders knew of his removal, and knew, or could easily have ascertained, his new address. He further stated that he was entirely ignorant of the whole proceedings until some time after the sale had taken place. The defenders stated that the registered letters had been sent to the last address known to them, and therefore that there had been due service in terms of the Citation Amendment Act, 1882.

Held (1) that the action in so far as founded on the alleged irregularities in the service of the summons and of the inventory and appraisement was incompetent, all review of a small-debt decree, including procedure leading up to the decree, being excluded by the 30th section of the Small-Debt Act, 1837. (2) that the action in so far as founded on the alleged want of notice prior to sale was competent, the Small-Debt Act not protecting diligence following a small-debt decree, and (*rev. judgment of Lord Low*) that the pursuer's averments were not irrelevant for want of specification.

1ST DIVISION. ON 6th July 1891 Robert Gray, journeyman baker, Crockenzie, brought an action against Miss Ellen Smart, proprietrix of the house No. 10 High Street, Musselburgh, and Alexander M'Donald, sheriff-officer, Edinburgh, concluding for £100 as damages for certain alleged wrongous proceedings, and for reduction of these proceedings.

Lord Low.

The pursuer averred that at Whitsunday 1890 he became tenant for a year of the house No. 37 High Street, Musselburgh,—(Cond. 2) “In the end of December 1890 the pursuer obtained employment with a master baker at Cockenzie, and, as he found it inconvenient to walk from Musselburgh to Cockenzie daily, he, after a week or two, resolved to take a house at Cockenzie, and to remove there with his wife and family, consisting of three children. Having secured a house at Cockenzie, he, on the morning of 6th January 1891, proceeded to carry out his removal. He possessed a considerable quantity of furniture and other effects, and required a lorry for their removal. He was engaged in loading it with his furniture, when certain police-officers came up and officiously and illegally ordered him to desist. They also went for Mr Newlands, factor for the defender Miss Smart. Mr Newlands came, and, although the pursuer explained the above-mentioned circumstances of his removal to him, he, in his capacity as factor for Miss Smart, . . . compelled the pursuer to replace the furniture and effects in the dwelling-house. The pursuer . . . was, however, permitted to lock the door of the house, and to take the key away with him.” (Cond. 3) “At the time of his removal, as aforesaid, the pursuer was due to the defender Miss Smart about £1, 3s. 6d. as arrears of the rent due at Martinmas for the said house. Shortly after removing to Cockenzie, on or about 21st February 1891, he remitted £1 to Mr Newlands, the defender’s factor, in part payment of the rent. Thereafter, on or about 25th February 1891, finding the want of his furniture and effects very inconvenient, the pursuer and his wife proceeded to Musselburgh, in the expectation that Mr Newlands would then permit them to remove the whole, or at least a part, of the furniture and effects in the house there. They called at the house, and to their surprise found the door unlocked, and on entering discovered that the house had been entirely emptied of the furniture, clothing, and all its other contents.” (Cond. 4) “Thereafter, the pursuer discovered, from inquiries made by a law-agent whom he employed to investigate the matter, that on the very day of his removal, namely, 6th January 1891, the defender Miss Smart had raised a summons of sequestration against him for the sum of £1, 3s. 6d. of rent in the Small-Debt Court at Edinburgh. . . . The defender Miss Smart employed the defender Alexander M'Donald, sheriff-officer, Edinburgh, to execute the said summons, and to inventory and appraise, and thereafter to sell, the furniture and effects in the said house. The said defender M'Donald returned a pretended execution of citation, sequestration, and appraisement, dated 7th January 1891, but in executing the same he made no attempt to comply with the provisions of the said Act 34 and 35 Vict. c. 42.* . . .

* The pursuer founded on section 3 of the Citation Amendment Act, 1871 (34 and 35 Vict. cap. 42), which enacts,—“Where an officer of any Small-Debt Court is satisfied that the defender named in any summons, complaint, decree, and warrant, or other order of such Small-Debt Court, or writ following upon such summons or complaint, is refusing access or concealing himself to avoid citation or service, or has within a period of forty days removed from the house or premises occupied by him, his place of dwelling for the time not being known, it shall be lawful for such officer, after he has affixed to the gate or door of such house or premises, or left in the hands of an inmate there, the said summons, complaint, decree and warrant or other order or writ, to send to the address which after diligent inquiry he may deem most likely to find the defender, or to his last known address, a registered letter by post containing a copy of such summons, complaint, decree and warrant or other order or writ; and the affixing or leaving of such summons, complaint, decree and warrant or other order or writ, and the posting of such intimation shall constitute a legal and valid citation or service: Provided always that the execution to be returned by

No. 128.

Mar. 18, 1892.
Gray v. Smart.

No. 128. Although it was well known to the said defender M'Donald and to the said J. R. Newlands, the factor of the other defender, that the pursuer had removed from the said house to Cockenzie, and although his address there was known to or could have been readily ascertained by them, and further, although the defender M'Donald found the house locked and deserted and required to force the door open, no attempt was made to effect legal execution of the said summons, inventory, and appraisement, and no execution thereof was returned by the defender M'Donald in the form prescribed by the said Act. The pretended execution returned by him is null and void. It bears that the service copy summons, with citation thereon, and a copy of the inventory and appraisement of the sequestrated effects, was left for the present pursuer 'upon a table within the dwelling-house of the said defender, there being no person therein to whom the same could be delivered.' No copy of the summons, &c., was affixed to the gate or door of the house; but the pretended execution bears that a copy thereof was sent by registered post letter to the present pursuer, addressed to said house, which of itself discloses the defender's knowledge of the pursuer's removal. The said pretended execution does not state that the defender endeavoured to effect service at the pursuer's last known dwelling-place, and the circumstances that prevented it, and in fact no such endeavour was made." The pursuer then stated sundry objections to the manner in which the inventory and appraisement had been carried out,—(Cond. 7) "On 21st January 1891 the defender Miss Smart obtained decree against the pursuer in said action of sequestration for payment of the sum of £1, 3s. 6d., and expenses.* . . . On said 21st January the defender M'Donald, acting on the instructions of the defender Miss Smart, gave the pursuer a pretended 'lockhole' charge under the said decree. The pretended execution of said charge returned by the defender M'Donald bears the charge was given 'by leaving a just copy of the foregoing complaint and decree, and a charge thereto annexed, subscribed by me for the said defender, within the lockhole of the most patent door of his dwelling-house, in 37 High Street, Musselburgh, and that after giving six audible knocks on said door, because I neither could get access to the said dwelling-house, nor find himself personally, and also by posting a like full copy in a registered letter, addressed Robert Gray, 37 High Street, Musselburgh.' The said pretended execution of charge is *funditus* null and void, the recited provisions of the said Acts

such officer shall state that he endeavoured to effect service at the defender's last known dwelling-place, and the circumstances that prevented it, and shall be accompanied by the post-office receipt for the registration."

The Citation Amendment Act, 1882 (45 and 46 Vict. cap. 77), sec. 3, was founded on by the defenders. It enacts,—“In any civil action or proceeding in any Court . . . any summons . . . or warrant of service or judicial intimation, may be executed in Scotland . . . by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation . . . a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation.”

* The decree, which was produced, bore,—“Decerns and ordains execution to pass hereon by sale of the effects on the premises where the same are, after forty-eight hours' notice to defender, all in terms of the Act of Parliament.”

being applicable to charges on decrees, as well as to service of summonses, &c. On 24th January 1891, without any intimation to the pursuer, the said defender Alexander McDonald, acting on the instructions of the other defender, Miss Smart, wrongfully and illegally, nimiously and oppressively, carried out a pretended sale of the whole furniture and other effects within the said dwelling-house. . . . The explanations in answer are denied.”

No. 128.
Mar. 18, 1892.
Gray v. Smart.

The defenders in answer stated that the proceedings complained of were in all respects legal and regular, and in particular the defender McDonald explained (Ans. 4) that he was “unable to find the pursuer, or to discover any trace of his having removed elsewhere. In these circumstances, the said summons, and the inventory and appraisement of the furniture, were served on the pursuer, both by leaving copies of them at the said house in Musselburgh, and by posting them in a registered letter to the pursuer at the said house, which was the only and last residence of the pursuer known to the defender McDonald,” and he further explained (Ans. 7) “that before the said sale took place the usual notice of sale was duly given to the pursuer, by affixing it to the door of the pursuer’s said dwelling-house, and sending a copy thereof through the post in a registered letter, addressed to the pursuer at his said dwelling-house, because access to the said house could not be obtained. *Quoad ultra* denied.”

The pursuer pleaded;—1. The pursuer having sustained loss, injury, and damage through the wrongful and illegal actings of the defenders, nimiously and oppressively carried out, adopted, and taken advantage of by them as condescended on, is entitled to decree in terms of the petitory conclusions of the summons. 2. The alleged inventory and appraisement being inept in respect (1) the summons of sequestration was not served on the pursuer, (2) the alleged inventory and appraisement was not served on him, and (3) there was no proper inventory and specification of the articles said to have been sequestered, ought to be reduced, with all that has followed thereon. 4. The pretended sale following on the said alleged inventory and appraisement, not having been notified to the pursuer, nor preceded by a charge, in terms of the Small-Debt Acts, and not having been carried out as required by the Small-Debt Acts, and having comprehended articles improperly inventoried and specified, as well as articles not inventoried and specified, and some not liable to the landlord’s hypothec, the said pretended sale ought to be reduced.

The defenders pleaded that the pursuer’s averments were irrelevant.

On 4th February 1892 the Lord Ordinary (Low) found that the pursuer’s averments were irrelevant, and dismissed the action.*

* “OPINION.— . . . The pursuer does not dispute that he gave no notice of his intention to leave the house in Musselburgh, and he does not say that he explained to Mr Newlands why he was taking away his furniture, or where he was going. The interference of the police suggests that the removal was taking place at an early hour in the morning, because I do not know what right they had to interfere, unless it was under the 255th section of the Police Act of 1862, which authorises the police to stop removal of furniture within burgh, until inquiry can be made, between the hours of eight in the evening and six in the morning, except at the usual terms of removing. . . .

“The pursuer claims damages on the grounds (1) that he was not properly cited in the action; (2) that there was no proper appraisement of the articles sequestered; and (3) that he had not received notice of the sale. The first two of these grounds of action are in a different position from the third, because the former refer to matters which preceded the decree in the action, while the latter refers to the procedure in carrying out the decree.

“Now it is admitted that a small-debt decree cannot be challenged in any way whatever in the Court of Session. The decree must be dealt with as a valid and legal decree, and therefore it seems to me to be impossible to enter-

No. 128. The pursuer reclaimed, and argued ;—(1) *Crombie v. M'Ewan*¹ appeared to settle that no action would lie on account of irregularities in the service
 Mar. 18, 1892.
 Gray v. Smart.

tain an action of damages founded upon alleged irregularities in the proceedings leading up to the decree, because that would truly be to allow objections to the decree itself. The case of *Crombie v. M'Ewan*, 24 D. 333, is directly in point.

"The pursuer's counsel, however, tried to make out that the appraisement was in some way separable from the decree, and ought to be made the ground of an action in the Court of Session, although the decree was unchallengeable. I am unable to adopt this view. The procedure in a summons of sequestration and sale at the instance of a landlord is regulated by the 5th section of the Small-Debt Act, and schedule B of the Act, and it is plain that the appraisement is just a step which must be taken in the process before decree can be pronounced:

"In so far, therefore, as the pursuer's action is founded upon alleged irregularities in the procedure anterior to the decree, I am of opinion that it is incompetent. The remaining ground of action is the 3d, viz., that the pursuer did not receive notice of the sale for which warrant was granted by the Sheriff. I do not think that the action, in so far as it is laid upon this ground, is incompetent, and the question is, whether the pursuer has stated a relevant case.

"The decree of 21st January granted warrant for the sale of the sequestrated effects upon forty-eight hours' notice. The defender M'Donald gave the notice by affixing the decree and warrant to the door of the house in Musselburgh, and by sending a copy in a registered letter, addressed to the pursuer at that house. The pursuer avers that M'Donald either knew that he was residing at Cockenzie, or could easily have found out that he was residing there, and that, therefore, to send the notice to the house in Musselburgh was insufficient. The Citation Amendment Act of 1882 (45 and 46 Vict. cap. 77), provides that citation may be by registered letter sent to the 'last known address' of the party 'if it continues to be his legal domicile, or proper place of citation.' The question is whether the sending of the registered letter to the house in Musselburgh was in conformity with the provisions of the Act, and in order to answer that question it is necessary to see precisely how the facts stand. The pursuer, upon his own shewing, tried to take his furniture away from the house without notice to his landlord, and under suspicious circumstances; he does not say that he told the factor, or anyone else, where he was going, and he did not go back to the house again for nearly seven weeks. He, however, left his furniture in the house, and kept possession of the key. In such circumstances the house in Musselburgh was, I think, *prima facie* the place at which to cite the pursuer. He was still tenant of the house, he had civil possession of it, and he had left no other address. It was therefore *prima facie* his last known address, and the proper place of citation. The pursuer, however, avers that it was well known to M'Donald that he had gone to Cockenzie, and that his address there was known to, or could have been readily ascertained by, M'Donald. I am of opinion that so general and vague an averment is not sufficient. I must assume that the sheriff-officer acted regularly and in conformity with his duty unless specific facts, necessitating a different conclusion, are averred. Now the undisputed facts in this case lead to the inference that the Sheriff-officer did not know, and had no means of knowing, where the pursuer actually was residing; and I cannot hold that a mere general averment that he had knowledge, or means of knowledge, makes the case relevant without some specification, or at least indication, of the sources from which he had obtained, or might have obtained his information.

"I understand, however, that the pursuer contends that the citation must be held to be one under the Citation Amendment Act of 1871 (34 and 35 Vict. cap. 41), and not under the Act of 1882, because there was a lockhole charge as well as a registered letter. Now if the sending of a registered letter is sufficient under the Act of 1882, the additional precaution of a lockhole charge would not, I think, make the citation bad. But, assuming the citation to have

¹ *Crombie v. M'Ewan*, Jan. 17, 1871, 23 D. 333, 33 Scot. Jur. 167.

of a small-debt summons, but irregularities in the appraisement were in a different position, because the appraisement was not a proper step leading up to the decree, but was separable from it. (2) At all events, *Crombie v. M'Ewan* had no application to the diligence following on a small-debt or any other decree, and the service of the decree and charge was bad. The proceedings here must be taken to have been an attempted compliance with the Citation Amendment Act of 1871, and not with that of 1882, because there had been a lockhole charge. Under the Act of 1871 it was essential that there should be diligent inquiry to discover the address of the person on whom the charge was to be made, but here the defender M'Donald made no attempt to find the pursuer, and there was not the slightest doubt that he could have found out his address without any trouble. Even under the Act of 1882 the charge was bad, for the Act, in permitting service by registered letter sent to "the last known address," required that that address should continue to be the person's proper place of citation, and the house in Musselburgh did not continue to be that with reference to the pursuer. Further, "last known address" meant last address known to the person making the service, and the pursuer averred that the defenders knew that he had changed his address.

Argued for the defenders;—(1) In so far as the first and second grounds of action were concerned *Crombie v. M'Ewan* was conclusive, because the appraisement as well as the service of the summons were both steps leading up to the decree, which, being a small-debt decree, was unchallengeable in the Court of Session. (2) Diligence following on a small-debt decree was probably in a different position, but the pursuer's statements were irrelevant on this point. He left his furniture in the house, kept the key, and went away leaving no address, and all he said was that the defenders knew, or might have ascertained, in the first place, that he had left permanently, and secondly, what his new address was. A case of this sort might be relevant if the pursuer had made specific averments of knowledge, or of the means of knowledge, but bare averments of this kind could not be held sufficient. The service was under the Act of 1882, but even under the Act of 1871 the question was, had the registered letter been sent to the pursuer's "last known address," and it had been sent to the last address known to the defenders.

LORD PRESIDENT.—The pursuer in this action complains of a wrong done to him by the sale of his household effects, and he alleges three illegalities in the

been under the Act of 1871, I do not think that the averments are sufficient. The Act provides (section 3) that when an officer is satisfied that the defender is concealing himself to avoid citation, or has, within a period of forty days, removed from the house or premises occupied by him, his place of dwelling for the time not being known, it shall be lawful for the officer, after he has affixed to the gate or door of such house or premises, the summons, or warrant, or order, as the case may be, 'to send to the address which, after diligent inquiry, he may deem most likely to find the defender, or to his last known address, a registered letter by post,' containing a copy of the summons, warrant, or order, provided that the execution returned by the officer shall state that he endeavoured to effect service at the defender's last known dwelling-place, and the circumstances which prevented it. Now it seems to me that the citation here was in conformity with these provisions, unless the officer knew the pursuer's place of dwelling for the time, or failed to make diligent inquiry as to the address most likely to find the pursuer. The only averments as to the officer's knowledge of the pursuer's dwelling-place, or his failure to make inquiries, are the general averments to which I have referred; and, for the reasons I have already given, I am of opinion that they are insufficient, and that the pursuer has not stated a relevant case. I shall therefore dismiss the action, with expenses."

No. 128.

Mar. 18, 1892.
Gray v. Smart.

No. 128. proceedings. Two of these relate to steps anterior to the warrant of sale, and the case of *Crombie v. M'Ewan*, 23 D. 333, is a binding authority to this effect, Mar. 18, 1892. that the clause of the Small-Debt Act excluding review of small-debt decrees implies that no action of damages will lie on account of irregularities in proceedings leading up to such a decree any more than for defects in the decree itself. *Gray v. Smart.* Now, unless it can be made out that what purports to be part of the small-debt decree is not so in fact, that case applies, but I think it is impossible to split up the decree in the manner for which the pursuer contended, and therefore I think that *Crombie v. M'Ewan* is in point, and that the two first grounds of action are irrelevant.

There remains the third objection, which depends on what is said to have taken place after the granting of the decree, that is to say, it assumes the validity of the decree, but challenges the proceedings subsequent thereto. The decree was the only warrant of sale, and one condition in it was that the sale was only to take place after forty-eight hours' notice had been given to the pursuer. The pursuer avers that he received no notice whatever. I cannot escape from the conclusion that that is a relevant averment of a defect in procedure. The defenders' only answer is that notice was sent to what they were entitled to regard as his proper residence. That is an answer upon the facts, not upon relevancy, and does not meet the pursuer's universal negative that he received no notice. Upon the clear and simple ground that there is here a plain allegation of no notice, I am of opinion that this part of the case must be allowed to go to trial.

LORD ADAM.—I am of the same opinion, and on the same grounds. I think that the Lord Ordinary rightly rejected the first and second grounds of action, because of the finality clauses of the Small-Debt Act. There is only an appeal from small-debt decrees upon limited grounds, and to the Court of Justiciary. Here there is a decree for payment of £1, 3s. 6d., and it is quite settled that the objection of want of citation is an insufficient ground for setting aside that decree, because citation is a necessary preliminary to decerniture. The same reasoning applies to want of notice of appraisement, for of course decerniture could never have been given unless upon the footing that appraisement had been made. But, as your Lordship has pointed out, while this applies to decrees in the Small-Debt Court, it does not protect diligence done in virtue of such decrees. Here the sale may have been properly proceeded with, or it may not, but we must at this stage take the pursuer's statement as true when he says that his effects were sold without any intimation to him. If that turns out to be the case, no doubt a wrongful act has been done. I do not see why what he has said is not to be regarded as a sufficient averment of the wrong he complains of. The defenders may be able to shew that notice was given at a certain house, and that that house was the pursuer's dwelling-house, where he should have been prepared to receive such notices, but that is a question of fact which is just what the jury will have to determine. Accordingly, I think the Lord Ordinary has gone too fast, and that the case must go to trial.

LORD M'LAREN.—It seems to be settled by the case of *Crombie* that no action will lie because of informality attending proceedings incidental to a small-debt decree so long as the case is pending in the Small-Debt Court, that is to say, while the case is under the control of the Judge in that Court he can correct any error before pronouncing decree, and the holder of a decree has protection by statute against its being reduced. But when the case has passed out of the

Sheriff's hands, I cannot see why a small-debt decree should confer a higher immunity upon a creditor in carrying it into execution than that enjoyed by holders of decrees in any other Court. A decree in this Court, affirmed it may be by the House of Lords, must be regularly enforced, and any informality in its execution is open to challenge. It is no answer to say that the decree being the decree of the Supreme Court is a final decree, and not appealable to any other Court. Its finality only warrants lawful execution. In that respect there is no difference between decrees of this Court and those of the Small-Debt Court. Therefore, upon the question of the objection to the execution of this charge, I think there is issuable matter. No. 128.
Mar. 18, 1892.
Gray v. Smart.

It is argued that under the Citation Amendment Act of 1882 it was sufficient if a registered letter were sent to the pursuer's last known address. But, according to the pursuer's statement, the house in Musselburgh, to which the defenders say the registered letter was addressed, was neither his present address nor his last address known to the defenders, because he says the factor knew perfectly well that the pursuer had moved to Cockenzie. I have no doubt that if a person goes away temporarily, on a holiday for example, he may be well cited by a registered letter sent to his permanent address, because he ought to make arrangements for getting his letters, but here the pursuer says that he had finally given up the Musselburgh house. However that may be, we are at present on relevancy, and must accept the pursuer's statements, and therefore I cannot hold, with the Lord Ordinary, that the pursuer's case is altogether irrelevant. On the contrary, I am of opinion that if the facts he avers are true, a wrong has been done, for which he may obtain compensation.

LORD KINNEAR.—I am of opinion that the Lord Ordinary is perfectly right as to the effect of the decree in the Small-Debt Court, and as to any irregularities in the proceedings leading up to that decree, but then I agree with your Lordships that there remains a different and perfectly relevant ground of action when the pursuer says that he found in February that his whole furniture had been sold in the previous January, and that without any notice to him. It is said that that is not relevant because vague. I cannot see how the pursuer could have said more than that he knew nothing about the sale, if it is true that he did not know. Of course that puts it upon the other party to shew what means he took to inform the debtor. I can imagine the sheriff-officer returning an answer which would, on the face of it, be conclusive, but here the answer which he does make involves a question of fact which we cannot possibly determine now. What he says is, that a registered letter was sent to the pursuer's last known address, and this the pursuer denies. Now, but what is that except just an additional question of fact, to be ascertained by evidence? I therefore agree with your Lordships that this branch of the case should go to a jury.

THE COURT pronounced the following interlocutor:—"Adhere to the Lord Ordinary's interlocutor in so far as it sustains the pleas therein mentioned as applicable to the objections to the decree of the Small-Debt Court, and procedure antecedent thereto: *Quoad ultra* recall the said interlocutor, and remit to the Lord Ordinary to adjust an issue or issues for the trial of the cause," &c.

ROBERT BROATCH, L.A.—MACFARLANE & RICHARDSON, S.S.C.—
PETER MORISON, S.S.C.—Agents.

No. 129.

JAMES ORR Pursuer (Reclaimer).—*Sol.-Gen. Murray—Dickson—Morison.*Mar. 18, 1892.
Orr v. Moir's
Trustees.ALEXANDER MITCHELL AND OTHERS (Moir's Trustees), Defenders
(Respondents).—*D.-F. Balfour—MacWatt.*

Property—Disposition—Superior and Vassal—Construction of disposition.—In 1796 the Duke of Argyll, who held the *plenum dominium* of the lands of Castle Campbell of the Crown, disposed in feu the lands of Hillfoot, part of Castle Campbell, to Drysdale, but reserved the coals and coalheughs. Tait acquired the Castle Campbell estate remaining in the Duke. Tait became bankrupt in 1828, and in 1837 Tait's trustee, on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, who had in 1796 acquired Drysdale's feu, had offered a certain sum for these subjects, and had been preferred to the purchase, conveyed to Moir "all and whole the town and lands of Hillfoot . . . all as at present possessed" by Moir and his tenants. No coal had at this time been worked in Hillfoot. The feu-rights and infeftments granted by the disponent's predecessors to feuars were excepted from the warrandice clause. The disposition contained an assignment to an unexecuted precept of sasine in a Crown charter of resignation and confirmation, which Tait had obtained, "in so far as applicable to the lands of Hillfoot thereby disposed, to the end that" Moir "may be more readily infeft and seased in the premises, and also in and to the whole feu-duties and other services and casualties payable from the said lands and others above disposed." "Surrogating hereby" Moir "in my full right and place of the premises for ever." On the precept assigned Moir was infeft. In 1890 Orr, who had acquired from Tait's trustee in 1860 the lands of Castle Campbell, with a description which included the lands of Hillfoot, and the "coals and coalheughs," raised an action against Moir's testamentary trustees to have it declared that the pursuer was proprietor of the coals in Hillfoot (which still remained unworked), in virtue of the conveyance of 1860. The defenders pleaded the conveyance of 1837. *Held* by a majority of the whole Court that the defenders should be assolizied, in respect that the conveyance of 1837 on a just construction carried the coals along with the superiority to Moir, *diss.* Lord Justice-Clerk, Lord Young, Lord Rutherford Clark, Lord Wellwood, Lord Kyllachy, and Lord Low, who *held* that that conveyance carried nothing but the superiority.

WHOLE COURT
Ld. Stormonth
Darling.

In 1702 the Duke of Argyll was proprietor of the lordship, barony and estate of Campbell, otherwise Dollar or Gloum, in the county of Clackmannan.

Some time prior to 1796 the Duke disposed in feu to John Drysdale all and whole certain lands, forming part of the lands of Castle Campbell, and which may be referred to by the general name of Hillfoot. The Duke reserved to himself and his heirs and successors, all the coals and coalheughs of the said lands, with full power to him and them to work the same. In 1796 John Moir became proprietor of Hillfoot (Drysdale's feu) and obtained a charter of confirmation from the Duke, there being here again a reservation of the coals. Hillfoot passed to Moir's son and grandson, and in 1890 was in possession of his grandson's testamentary trustees.

The coals were never worked in the lands of Hillfoot, but coal had been worked before 1836 in other parts of the Castle Campbell estate.

In 1808 Crawford Tait of Harviestoun acquired from the Duke of Argyll All and Whole the lordship, barony, lands, and estate of Campbell, including, *inter alia*, the lands of Hillfoot and others, with, *inter alia*, the coals and coalheughs. Power was given to Mr Tait, and his heirs and successors, to work coal and put down sinks.

Mr Tait's estates were sequestrated in 1828, and a trustee appointed.

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

By disposition dated 28th July 1837, Mr R. E. Scott, Tait's trustee, granted a disposition in favour of Moir. The disposition in its narrative clause set forth the trustee's appointment, and the vesting in him of "the whole lands and other heritable and moveable estates which belonged to the said Craufurd Tait or to my predecessors in office, to pertain and belong to me as trustee foresaid, and particularly without prejudice to said generality, the lands and estate of Campbell, otherwise Dollar, therein described, comprehending, *inter alia*, the superiority and feu-duty of the lands of Hillfoot and others lying in the parish of Dollar and county of Clackmannan, belonging in property to John M'Arthur Moir of Hillfoot." The same clause further set forth that the disponent "having upon the 11th day of January last, 1837, exposed, *inter alia*, said superiority and feu-duty of the lands of Hillfoot to public roup and sale, in terms of certain articles and conditions of roup executed by me upon the said 11th day of January last, the said John M'Arthur Moir, after various offers, offered for the same the sum of £450, and being the last and highest offerer, he was by the judge of the roup preferred to the purchase, and by minute subjoined to the said articles, became bound for the said price, and to implement the whole conditions of the sale so far as applied to the said purchase, as the said articles of roup, offers, and minute of enactment, more fully bear." It also set forth the payment of £450, and then proceeded in the dispositive clause to convey "All and Whole the town and lands of Hillfoot, . . . all as at present possessed by the said John M'Arthur Moir and his tenants," . . . "to be holden from me and my foresaids, of and under our immediate lawful superiors of the same, in the same manner, and as freely in all respects as I, as trustee foresaid, my predecessors and authors, held, hold, or might have holden the same." The warrantice clause bore this exception, viz.,—"Excepting always from this warrantice the feu-rights or infeftments of property of the said lands granted by my predecessors and authors to the feuars and vassals thereof." This disposition further constituted John M'Arthur Moir the disponent's assignee in and to a charter of resignation and confirmation in favour of Mr Tait under the Union Seal, dated 4th February, and sealed 6th May 1811, and the precept of sasine therein contained still unexecuted, "in so far as applicable to the town and lands of Hillfoot and others thereby disposed; to the end that, in virtue thereof, and of the precept of sasine contained in said charter yet unexecuted, and of these presents, the said John M'Arthur Moir, or his foresaids, may be the more readily infeft and seised in the premises, and also in and to the whole feu-duties and other services and casualties payable from the said lands and others above disposed." There then followed this clause: "Surrogating hereby, and substituting, with consent foresaid, the said John M'Arthur Moir and his foresaids in my full right and place of the premises for ever, which assignation above written I, as trustee, with consent foresaid, bind and oblige myself to warrant from my own facts and deeds only; and I bind the creditors on the sequestrated estates of the said Craufurd Tait to warrant the same as follows, viz., in so far as concerns the writs and evidents, at all hands and against all mortals, and in so far as concerns the feu-duties and casualties of superiority, from facts and deeds only." Mr Moir was infeft in 1838 upon the Crown precept assigned, and by procuratory of resignation and instrument of resignation following thereon in 1838, he consolidated the property of Hillfoot, &c., with the superiority.

By disposition dated March 1860, Tait's trustees sold to Sir Andrew Orr All and Whole the lands of Castle Campbell acquired by Tait, including the lands of Hillfoot and others, with the "castles, towers, fortalices

No. 129. woods, fishings, coals, coalheughs, and whole parts, pendicles, and pertinents," for a sum of £80,000. Existing feu-rights were excepted from the warrandice of this disposition. This disposition was confirmed by the Crown.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

In 1890 James Orr, who had succeeded Sir Andrew Orr, made a claim to the coals in the lands of Hillfoot, and to make good that claim raised an action of declarator against Mr Moir's testamentary trustees for declarator that he had the sole and exclusive right to the coal in the lands of Hillfoot, and had power to work and win it.

The pursuer and defenders pleaded their respective titles.

On 19th December 1890 Lord Stormonth Darling (Ordinary) assized the defenders.*

* "OPINION.—Both parties concurred in representing this case as one to be decided on a construction of the titles, and I do not think it would be competent to look beyond them.

"The sole question, therefore, is—Whether the coal under the lands of Hillfoot, and under some other small parcels of land, belonging to the defenders, was conveyed to the defenders' author, John M'Arthur Moir, by disposition, dated 28th July 1837. For if it was, undoubtedly the defenders' right is prior and preferable to any right which can be claimed by the pursuer, whose title is twenty-three years later in date. The coal, if it exists, has never been worked, so that no aid can be derived from possession.

"It is common ground between the parties that, when the lands of Hillfoot, &c., were feued out to the defenders' predecessor before 1796, the coal was reserved to the then superior, the Duke of Argyll; that the coal so reserved was, with the rest of the Castle Campbell estate, conveyed to the late Mr Crawford Tait in 1808; that the estates of Mr Tait were sequestrated in 1828, and that his trustee remained feudally vested in the whole Castle Campbell estate (including the coal of Hillfoot), down to 1837.

"The deed of 1837 proceeds on the narrative that the trustee had exposed to public roup 'the superiority and feu-duty of the lands of Hillfoot,' and that Mr John M'Arthur Moir, having offered £450, had been preferred to the purchase; also that the said John M'Arthur Moir, had subsequently purchased from the trustee by private bargain 'the superiority and feu-duty of the said lands of Lochyfaulds and others,' at the price of £30; and the trustee disposed to Mr Moir 'All and Whole the town and lands of Hillfoot, of old called the Easter-town of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said John M'Arthur Moir and his tenants, as also All and Whole the lands of Lochyfaulds,' as therein fully described. There was an exception from the warrandice of the 'feu-rights or infestments of property of the said lands granted by my predecessors and authors to the feuars and vassals thereof,' but there was no exception of the coal under the lands.

"By procuratory of resignation and instrument of resignation following thereon, dated and recorded in 1838, Mr M'Arthur Moir consolidated the property of Hillfoot and Lochyfaulds with the superiority. What was the effect of the disposition of 1837? The pursuer says that it only conveyed the *dominium directum* of the lands, and left the coal still in the person of Crawford Tait's trustee. He goes on to say that when the trustee, in 1860, conveyed to his author, Sir Andrew Orr, the Castle Campbell estate, with a description which included the lands of Hillfoot, and the 'castles, towers, fortalices, woods, fishings, coals, coalheughs, and whole parts, pendicles, and pertinents, which belonged to the late John Duke of Argyll, in property or superiority, at his death,' he truly conveyed the coal under Hillfoot and Lochyfaulds to Sir Andrew Orr.

"I cannot adopt this view. To me it seems that the dispositive clause of the deed of 1837 was habile to convey, and did convey to John M'Arthur Moir, the whole rights of Crawford Tait's trustee in the lands of Hillfoot and Lochyfaulds, *a calo ad centrum*.

"That undoubtedly is the primary and natural construction of such a dis-

The pursuer reclaimed, and after argument had been heard in the No. 129.
Second Division, before the Lord Justice-Clerk, Lord Rutherford Clark,
and Lord Trayner, parties were appointed by interlocutor of 19th March
1891 to box cases to the whole Court.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

The following is a summary of the pursuer's argument;—Prior to the disposition of 1837 Tait's trustee was vested in two separate estates, viz., the superiority of the land, and the *plenum dominium* of the coal. Coal, when reserved from a grant of the *dominium utile* of land, formed a separate tenement—separate both from the *dominium utile* and from the superiority of the land.¹ The superior was infeft in the coals in *pleno dominio* and not as superior.² This was the principle on which the case of *Fleming v. Howden*³ was determined. It was again affirmed in the *Duke of Hamilton's* case both in the Court of Session and in the House of Lords.⁴ That being so, the next question was, whether the disposition of 1837 conveyed this separate estate of coal—an estate as separate as if it

position (Bell's Lectures on Conveyancing, p. 604). But the pursuer says that the comprehensive words of the dispositive clause are controlled by the narrative, which recites a purchase of the 'superiority and feu-duty,' and that the dispositive clause itself is limited by the words, 'all as at present possessed by the said John M'Arthur Moir and his tenants.'

"With regard to the first of these contentions, I think it is enough to say that the 'superiority' means simply the estate remaining in the superior. The coal had never been erected into a separate tenement. It had been reserved as part of the superior's estate, and when he sold that estate without reservation, it seems to me that he sold the coal. With regard to the second contention, I think it is impossible to read the words, 'all as at present possessed,' &c., as meaning more than a definition of the boundaries of the lands, for otherwise these words would exclude the bare superiority itself, which had never been possessed by John Arthur Moir or his tenants.

"I am not sure that I correctly represent the pursuer's argument if I say that he also founds on the price as shewing that the coal was not included, for that argument would require information outside the deed. But if it be used, I think the answer is that the price of Hillfoot superiority was more than thirty-eight years' purchase of the feu-duty, which shews that no real aid can be derived from the amount of the price.

"The pursuer's main reliance is in the case of *Fleeming v. Howden*, May 21, 1868, 6 Macph. 782, 40 Scot. Jur. 401. But that case is of so very special a nature that I think it affords no guide to this. Undoubtedly, the two main considerations which led the Court in that case to hold that the minerals were not conveyed were,—(1) That the granters of the deed, who were commissioners of an heir of entail, had no power under the Act 20 Geo. II. c. 50, to sell anything but the bare superiority; and (2) that the grantee himself (so far from consolidating the property with the superiority as Mr M'Arthur Moir did) actually granted deeds of *clare constat* and resignation, in which he inserted a reservation of the minerals, thus shewing plainly his own understanding that the minerals had not been conveyed to him.

"If I am right in my construction of the deed of 1837, it is unnecessary to consider the pursuer's title of 1860, but that deed, if it were necessary to examine it, seems to me to contain some indications, particularly in the warrantee clause, that it was not considered by the parties as carrying the coal under the lands of Hillfoot."

¹ Erskine, ii. 6, 5; Forbes v. Livingston, Nov. 29, 1827, 6 S. 167; Ross' Leading Cases, Land Rights, iii. p. 409.

² Hutton v. Macfarlane, Nov. 11, 1863, 2 Macph. 79, 36 Scot. Jur. 33, see specially the opinion of the Lord Justice-Clerk.

³ May 21, 1868, 6 Macph. 782, 40 Scot. Jur. 401.

⁴ Duke of Hamilton v. Graham, July 5, 1869, 7 Macph. 976, 41 Scot. Jur. 547, (H. L.) June 28, 1871, 9 Macph. 98, 43 Scot. Jur. 491.

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

were a distinct portion of land. The narrative clause set out distinctly that it did not. That clause narrated a bargain made and a price paid which affected nothing but the superiority. That clause would be controlled no doubt by the dispositive clause, but there was no inconsistency between them. The dispositive clause conveyed the lands of Hillfoot: that was the ordinary form of a conveyance of superiority, for the superior had a title to the lands themselves. If it was limited to a conveyance of superiority, the two clauses would stand together, and the deed would do what it professed to do. If it were extended to the coal then the clauses were irreconcilable, and the disposer was conveying under cover of the superiority what belonged to him, not on his title of superiority, but in *pleno dominio*. The Lord Ordinary was wrong in saying that the coal had never been erected into a separate tenement. The authorities quoted established the contrary, and an examination of the case of *Fleming* would shew that it depended on no specialties. The case of *Erskine v. Schaw* in 1785¹ was no sufficient authority as against those cited. The opinions were obscure, but it would appear that the actings of parties had much weight with the Court. The case, however, never having been reported, was of no great authority. It had plainly not been accepted at its date, and could not have ruled the practice since.

The defenders' argument may be thus summarised;—The superior by his grant of the lands of Hillfoot prior to 1837 was not truly divested of these lands.² His infestment subsisted as an *ex facie* absolute title to the whole lands. The typical case of a disposition of superiority, where the lands are themselves disposed, feu-rights being reserved from the warrantice, was proof of this doctrine. The superiority, *dominium directum*, of the land could not exist apart from the proprietorship of the coals, which he had never parted with. The authorities to which the pursuer referred³ only shewed that minerals could be made a separate estate to be held apart from the lands and apart from the *dominium directum*. They did not establish that the granting of the feu-right with a reservation of the minerals necessarily had this effect. Now, the dispositive clause in the deed of 1837 was in general terms; if it was intended to reserve the coals the disposer should have so expressed himself. If not reserved they were conveyed.⁴ To refer to the narrative clause with a view of derogating from the terms of the dispositive clause was to defy plain rules of interpretation laid down by the highest authority.⁵ If such a reference was competent, the defenders' reading of "superiority" in the narrative clause was that it meant the superior's whole estate, *i.e.*, *dominium directum* in coal. The case of *Fleming v. Howden*⁶ was throughout treated by the Court as a case dependent on specialties. The case of *Erskine v. Schaw*

¹ See *infra*.

² *Erskine*, ii. 5, 1.

³ *Hutton v. Macfarlane and Fleming v. Howden*, *supra*.

⁴ Bell's Lectures on Conveyancing, i. p. 611.

⁵ *Viz.*, the House of Lords in *Lee v. Alexander*, Aug. 3, 1883, 10 R. (H. L.) 91.

⁶ 6 Macph. 782, 40 Scot. Jur. 401.

Feb. 2, 1785.
Erskine v.
Schaw.

* JOHN FRANCIS ERSKINE OF MAR, *Pursuer*.
RIGHT HON. WILLIAM SCHAW, LORD CATHCART, *Defender*.

The following narrative of this case was given in the defenders' pleading:—"The defender's lands of Gogar and Gartenclair were held in feu from the pursuer, the coal being reserved. In an agreement, dated in 1736, between the parties' authors, settling questions as to use of water, arranging as to purch-

was not before the Court in *Fleeming v. Howden*, nor would it have touched the specialties on which that case was decided. But it was binding on

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

of portions of the respective estates by the parties, &c., it was agreed that the vassal should buy his superiority at thirty years' purchase of the feu-duty. Accordingly, thereafter, a disposition, dated in 1744, was granted by the superior to the vassal, narrating the agreement, stating that the superiority was sold at so many years' purchase of the feu-duty, and disposing to the vassal the lands as in his charters. There was no mention of coal. Subsequently, an action was brought by the superior, to have it found that the coal under the feus belonged to him. It was held by the majority of four to two of the Judges that the coal belonged to the vassal, and upon a reclaiming petition, it was again decided in the vassal's favour by a similar majority."

The following notes of the Judges' opinions were taken by Sir Ilay Campbell, who was of counsel for the pursuer—(Sess. Papers, Campbell Coll. vol. 47, No. 126):—

"**LORD JUSTICE-CLERK** (Sir Thomas Miller).—Would be sorry if this claim good, but clear grounds in law and justice for preserving it to Lord Cathcart—good feudal title to whole—dangerous after such an acquiescence to allow such investigation to limit and explain. If contract had been before their eyes this would have been no bar—no appearance of coal—possibility of it a matter of no importance, but clearly not under view. Whose fault? Not Sir John Schaw's business, but theirs to advert to coal, and to except it if so meant. *Res ipsa loquitur* what Lord Cathcart understood when built his house there. They *in pessima fide* to allow that to go on. *Bar personali exceptione*.

"**LORD PRESIDENT** (Robert Dundas).—Cannot look to consequences—as to house, &c., but of opinion that words being broad enough, wrong explain from collateral circumstances.

"**HENDERLAND**.—Same. Farm of Gartmorn conveyed in same terms—full assignment of writs and evidents—as to intention first probably not attended to—out of head—future operations in view—rise of water, pleasure ground.

"**SWINTON**.—Doubt—how stood right before 1736—clear that coal reserved then various —adjusted superiority, &c., warrandice.

"**MONBODDO**.—Same.

"**ESKGROVE**.—At first of that opinion, but afterwards came to see it in different light—intention of parties to be disengaged from one another.

"Sustain the defence and assoilzie."

On a reclaiming petition the following opinions were delivered:—

"**LORD PRESIDENT** (Robert Dundas).—Difficult cause but cannot bring myself to alter. Purchaser would be safe on faith of record, therefore words must be ample enough. If this be the case difficulty is to narrow from collateral circumstances—feudal contract—shall we rumage into letters, &c. No going coal here, no act or deed shewing retention of coal,—perhaps not in view,—or, one side slyer than another, but in general Sir John Schaw meant to obtain full right. Lord Cathcart began to build his house as early as 1756. Lord Erskine said nothing—neither party had then an idea. Adhere.

"**LORD JUSTICE-CLERK** (Sir Thomas Miller).—Reservation of coal was part of the full *dominium* belonging originally to the disposer *pleno jure* as king's vassal—afterwards, however, meant to convey over every right to Sir John Schaw in same manner, &c. Words of disposition full and ample. Disposition does not go further than agreement. But if it did, not called upon to go back to original communings. Everything settled and clearly expressed in disposition. In mutual contract must presume that both parties equally in knowledge—ought to have seen from their own chartulary. If meant to reserve, incumbent on them to limit and explain. Parties acted upon faith of full right being conveyed.

"**ESKGROVE**.—Upon reconsidering the cause have great difficulty to concur in interlocutor. Had it been possessed forty years upon titles—prescription—but no prescription—simple question what is action and limitation—we are not calling in witnesses—but disposition proceeds on minute of sale—therefore must

No. 129. the Court here and was directly in point. The Lord President and Lord Justice-Clerk in *Erskine v. Shaw* gave no weight to the actings of parties. The consulted Judges returned the following opinions,—

Mar. 18, 1892.
OTT v. Moir's
Trustees.

LORD PRESIDENT.—I concur in the opinion of Lord Kinnear.

LORD ADAM.—The lands of Hillfoot and Lochyfaulds seem originally to have formed parts of the lordship and barony of Campbell.

The original grant or disposition of these lands has not been produced, but there is produced a charter of confirmation, of date 6th November 1798, by the Commissioners of the Duke of Argyll, who was then proprietor of the lordship and barony, in favour of John Moir.

This charter confirms to and in favour of John Moir, his heirs and assignees, the lands of Hillfoot and Lochyfaulds, as also two small pieces of land called the Bog, but “reserving to the said John Duke of Argyll and his heirs and successors all coals and coalheughs of all and sundry the said lands respectively above written.”

The charter then confirms the various writs by which Mr Moir was vested in the lands, which it was declared were to be holden of and under the Duke of Argyll for the feu-duties and other prestations therein specified.

This charter, accordingly shews that, at its date, Mr Moir held the *dominium utile* of the lands of Hillfoot and Lochyfaulds, with the exception of the coals in these lands, while the Duke of Argyll held the *dominium utile* of these coals, and also the *dominium directum* of the lands, excepting the coals. It is true that the coals formed a separate tenement from the rest of the lands, but they were not held under any separate title. They simply remained part of the lordship and barony of Campbell, and, along with the *dominium directum* of the rest of the lands, were held by him under his infeftment in that lordship and barony.

The next writ, to which it is necessary to refer, is the disposition by the Duke of Argyll and others to Mr Tait, dated September and November 1808. By this disposition there is conveyed to Mr Tait certain portions of the lordship

see how the right stood—must take in whole together. See clause in contract limited in express terms to superiority and feu-duty—matters of less importance expressly attended to—consideration given for superiority—value common price same as if no regard of coal. Lords Grange and Dunn—ignorant even of this age—Disposition does not mean to go beyond contract—see narrative what held feu before—in implement, &c.—Lord Cathcart, the heir of the party, as a third party acquiring on faith of record. In disposing superiority land always disposed. Suppose an adjudication in implement. Clause of warranty dice. This the usual clause for shewing precisely extent of right, usual to them in exception of feu-rights—impossible to resist the conviction thence arising. Thirlage, cannot lay much weight on acquiescence of heir ignorant of the facts. House, &c., built by Lord Cathcart, &c. M. have been ignorant.

“MONBODDO.—Inclined to be of first opinion—by obligation to dispose property—coal included—meaning of superiority is lands as then held with burden of subaltern infeftment—do not know if coal of any value—but only comes this that too little paid.

“GARDENSTONE.—Full conviction that coal not conveyed—simple question upon *res gesta*—and clear that not in view to dispose of the coal.

“ROCKVILLE.—For interlocutor. Sense (?) of parties from conduct—if intended to be reserved it was conveyed—of consequence that formal disposition should not be defeated by collateral circumstances.”

barony, lands, and estate of Campbell, and *inter alia* the lands of Hillfoot, with No. 129.
the coal, coalheughs, and whole parts and pendicles, which belonged to John
Duke of Argyll.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

The lands of Lochyfaulds are not mentioned in this disposition, but it sufficiently appears from the charter of confirmation, previously referred to, that these lands had formed part of the lands of Hillfoot, and no doubt passed to Mr Tait under that description.

The feu-rights of the vassals are excepted in the clause of warrandice. It will be observed, accordingly, that Mr Tait, the common author of the pursuer and defender, acquired right to the *dominium directum* of the lands, excepting the coals, and to the *dominium utile* of the coals, not by any conveyance of them as *separata tenementa*, but simply by a conveyance of the lands of Hillfoot with the coals.

The next deed to be referred to is the disposition by Mr Scott, the trustee on Mr Tait's sequestrated estate, in favour of Mr Moir, of date 28th July 1837.

By this deed the granter, after narrating his own title and the cause of granting the deed—to the consideration of which I shall afterwards return—dispones to Mr Moir all and whole the town and lands of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as then possessed by Mr Moir and his tenants, and also the lands of Lochyfaulds and the two pieces of land called the Bog, being parts and portions of the church lands of Campbell, lying within the lordship of Campbell.

Then follows an obligation to infest the disponent and his heirs *a me*, and a warrandice clause from which are excepted the feu-rights or infestments of property of the said lands granted by his predecessors or authors to the feuars and vassals thereof.

Then the disponent and his foresaid are assigned, not only in and to the whole writs, titles, and securities of the lands and others, but specially in and to a charter of resignation and confirmation in favour of Mr Tait, under the Union seal, with the unexecuted precept of sasine therein contained, in so far as applicable to the lands of Hillfoot and others thereby disposed, “to the end that in virtue thereof, and of the precept of sasine contained in said charter yet unexecuted, and of these presents, the said John M'Arthur Moir or his foresaids may be the more readily infest and seized in the premises, and also in and to the said feu-duties, and other services and casualties payable from the said lands and others above disposed,” “surrogating hereby and substituting, with consent foresaid, the said John M'Arthur Moir and his foresaids, in my full right and place of the premises for ever.”

What followed on this disposition was that Mr Moir took infestment in the lands of Hillfoot and Lochyfaulds, in virtue of the precept of sasine contained in the crown charter of resignation and confirmation thus assigned to him, conform to instrument of sasine in his favour, dated 27th June, and recorded 6th July 1838. He thereafter consolidated the property with the superiority conform to precept of resignation *ad remanentiam*, dated 30th November 1838, and instrument of resignation following thereon in his favour, dated 30th November, and recorded 3d December 1838.

It appears to me that the legal effect of this disposition, and of the infestment following thereon, clearly was to divest the trustee of all right, title, and interest he had in the lands of Hillfoot and Lochyfaulds, and to invest Mr Moir in his full right and place therein.

No. 129.

Mar. 18, 1892.
OTT v. Moir's
Trustees.

But I think that that was not only the legal effect of the disposition and infestment, but that it also gave effect to the intention of the parties.

The trustee must have known that his only title to the coals was his infestment in the lands, and we should certainly expect that, if he had meant to retain them, they would have been expressly reserved from the conveyance. In that case also the trustee would have had an interest in the titles to the lands, and we might have expected that there would have been an obligation on the disponent to make them forthcoming to him on all necessary occasions.

I think that the intention was, what the deed itself says, to substitute "the said John M'Arthur Moir and his foresaids in my full right and place in the premises for ever." That "the premises" means the lands of Hillfoot and Lochyfaulds, and the rights thereto pertaining, and is not limited to the *dominium directum* thereof, appears to be clear, because it is said that the writs, and particularly the crown charter of resignation containing the unexecuted precept, are assigned, to the end that the disponent and his foresaids may be the more readily infest "in the premises, *and also* in and to the whole feu-duties and other services and casualties payable from the said lands."

To return to the narrative clause of the disposition—it sets forth that the trustee had exposed the superiority and feu-duty of the lands of Hillfoot for sale by public roup, that Mr Moir was the highest offerer at a certain price, that Mr Moir had also purchased from him by private bargain the superiority and feu-duty of the lands of Lochyfaulds, that Mr Moir had made payment of the agreed-on price, and that therefore he disposed to him the lands of Hillfoot, &c.

It certainly appears to me that it is to be gathered from this narrative, that the subject-matter of the conveyance was to be the superiority and feu-duty of the lands, and not anything more.

It is suggested that the word "superiority" may be construed so as to include all the rights in the lands held by him, contained in the title under which he held the superiority, and therefore may be held to include the *dominium utile* of the coal, but I do not think that that is an admissible construction.

Neither do I think that the right to the coal in question can be considered as merely the incorporeal right of working and winning the coal, and as such among the rights the aggregate of which is denoted by the word superiority. It appears to me that the right reserved was nothing less than the full right of property in the coals—that being the right which was in the granter antecedent to the grant. The case of *Duke of Hamilton v. Dunlop*, 12 R. (H. of L.) 65, would seem to be conclusive on that point.

I also think that in all cases, whether the right to be disposed be the *plenum dominium*, or the *dominium directum*, or the *dominium utile*, the proper and recognised form is to dispose "the lands of A." But I do not think that such words in a dispositive clause are at all ambiguous or open to construction. I think that a disposition of the lands of A *prima facie* implies a grant of these lands, with everything pertaining to them, *a centro ad cælum*. If it is intended that something less is to be given, then I think it is the duty of the conveyancer to see that such rights as are intended to be excepted or reserved are expressly, or it may be impliedly, excepted or reserved on the face of the deed; and it appears to me that every right of the disponent in the lands, not so excepted or reserved, will be carried to the disponent by force of the terms of the dispositive clause.

Where, therefore, a superior has nothing but the superiority of lands and de-

sires to convey it, the usual and appropriate form is to convey the lands excepting the feu-rights in the dispositive clause ; or it may be done, though perhaps not so correctly, as in this case, by excepting the feu-rights from the clause of warrandice, because the vassals are secured in their rights of property by their own infeftments, and the disponent can have no action on the warrandice. But I do not think that it is an appropriate form where the superior has, besides his rights of superiority, other rights in the lands which he desires to retain. In that case it appears to me they must be excepted or reserved, expressly or impliedly, in the deed.

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

In this case the trustee had, besides his right of superiority, a right of property in the coals in the lands. According to my construction of the disposition granted by him to Mr Moir, this right of property was neither excepted nor reserved, and therefore was carried to Mr Moir by force of the dispositive clause.

The case, therefore, appears to me to come to this—the narrative clause expresses an intention of conveying the superiority of the lands and nothing more ; but the dispositive clause, and the ancillary clauses to which I have referred, do in fact, and I think in intention, convey not only the superiority, but every other right which the trustee had in the lands, including the coals.

In these circumstances, and giving the fullest weight to the principles applied in the case of *Fleeming v. Howden*, I am of opinion that the coal was carried by the disposition granted by the trustee, and now belongs to the defender. I think, therefore, that the Lord Ordinary's interlocutor should be adhered to.

There has been no argument as to the pursuer's title to the coal in question, though that would rather appear to me to be the first question which should be disposed of. I desire, however, to say that, as at present advised, I am not satisfied that the pursuer has a title to the coal. Mr Moir's infeftment on the precept of sasine, contained in the crown charter of resignation, and assigned to him, would appear to have exhausted that precept in so far as applicable to the lands and coal in question, and I do not see how the trustee could thereafter get himself infeft in the lands ; and if that be so, I do not see how he, not being himself infeft, could grant a valid title to the pursuer of the lands and coal. I should require to be satisfied on this point before decerning in the pursuer's favour.

LORD M'LAREN.—The case being fully before the Court, I proceed, without recapitulating the facts, to state some considerations which, as I think, ought to determine the question in favour of the defender.

1. I should not be disposed to rest my judgment on any special rule of construction applicable to the dispositive clauses of deeds of sale. I should be disposed to construe the clauses of a deed just as the clauses of an Act of Parliament are construed, according to ordinary critical laws and methods. If a deed is arranged in clauses, the subject of each clause is either announced or is apparent from the structure of the clause ; and there is, I think, a certain presumption to the effect that each clause is intended to be complete in itself, and to contain all that the granter has to say with reference to its principal subject. But this is not always practicable ; and it may be necessary that the granter, either in the inductive clause, or, it may be, in some other part of the deed, should announce some limitation of the subject or purpose of the deed. If he does so in plain language, it does not seem to be very material, unless in a question of literary criticism, whether the limitation is or is not introduced at the

No. 129. most appropriate place, which I suppose would be as near as possible to the words of grant the scope of which is to be defined or limited.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

For example, I should consider that the proper way of conveying a right of bare superiority would be to begin by disposing the estate, either by its general name or by a bounding description, and then to add words excepting in general terms all such feu-rights as the grantor or his authors had given off. But in practice such excepting words are often omitted; and instead of excepting the feu-rights from his grant, the maker of the deed very often only excepts them from the warrandice, giving in form a right, but only an elusory right, to the lands which have been feued.

Again, the proper way of qualifying the right of a dispositive under a deed of entail is by the insertion of the prohibitions and irritancies in the dispositive clause; but in our older practice this was not usually done. The so-called "fetters" were usually inserted only in the procuratory, and this was held to be sufficient, in respect of the expressed intention to make an entail. In such a case, while the words of disposition might be absolute and unqualified, the grantee could have no action (even if the deed were onerous) to compel the grantor to give him a new procuratory discharged of the fettering clauses.

2. While I contend that a dispositive clause, unqualified in its terms, may have its effect qualified or restricted by other clauses importing such qualification or restriction, I am not of opinion that a dispositive clause is liable to have its effect controlled by expressions in other parts of the deed, which are represented as amounting to *evidence* of an intention to qualify or restrict the grant. That the maker of the deed should qualify his grant by antecedent or subsequent clauses is one thing; that we should do it for him, by conjectural interpretation, quite another. Inferences drawn from the narrative clause of a deed are always in some degree conjectural, because the narrative is not a clause which professes to give, or even to define, a right, but only to indicate the nature of the transaction and the cause of granting. It does not necessarily or usually supply all the information that would be requisite if its office were to interpret or to control the other clauses of the deed. It has besides a tendency to fall into conventional forms, as, for instance, where railway stocks or securities are transferred in consideration of "the sum of five shillings to me paid," in which case everyone would admit that the extent of the subject of conveyance ought not to be measured by its apparent value as set out in the narrative. Even where the statements in the narrative represent the true transaction, we never can be sure that they contain a complete statement of the necessary facts; and therefore the principle of reforming a deed of sale by supplying words from the narrative is, in my opinion, not only open to serious objections from a theoretical point of view, but is practically a very untrustworthy mode of finding out the true contract, as understood by the parties at the time.

3. In the present case the subject of conveyance is announced in the narrative clause as being the superiority and feu-duty of a certain estate; and it is suggested that this expression is evidence (I suppose conclusive evidence) of an antecedent contract which did not include the coal. I am not able to follow either the suggested construction or the conclusion founded upon it. "Superiority and feu-duty," especially when used in a non-technical clause, is a short expression for the assemblage of rights which a superior retains after having conveyed away the substantial estate to a tenant or tenants *in capite*, and may very well include such a right of working minerals as the superior has in fact reserved

to himself. That this may be, will be apparent if we consider the case of the superiority, say, of a Highland estate, in which neither coal nor metals have been found or are supposed to exist. Nevertheless, as a usual precaution, the superior has reserved the minerals, in case any may be discovered. In such a case, if the superior came afterwards to sell the superiority by a contract or missives of sale purporting to sell the "superiority and feu-duties," I think that the superior would be bound to convey to the grantee every right which he himself possessed; that the superior would not be entitled to put into the disposition a clause excepting or reserving minerals which might be discovered; and I also think that if the superior's estate were conveyed to the grantee in general terms, and minerals were thereafter discovered, these would belong to the grantee in virtue of the transfer to him of the estate of superiority, that is the estate in general, subject to the burden of existing feu-rights. Whether the words "superiority and feu-duty" in a dispositive clause would include reserved rights is a different question, on which it is not necessary to give an opinion, though my inclination would be in favour of the extended meaning.

But even if I were able to read the words "superiority and feu-duty" as descriptive of the superior's rights other than the right to work coal, I should not therefore conclude that coal was not conveyed. Because it might be that the coal was not included in the contract of sale to which the narrative refers, and yet that when the disposition came to be granted, the coal was thrown in, either because it was believed to be of no value, and not worth retaining as a separate subject, or because the vendor was willing for some other reason to make a concession. This may be unlikely in the actual case; but we ought not to enter on an irrelevant inquiry for the purpose of getting at the history of the contract. It is just because all inquiry is excluded that I prefer the terms of what I conceive to be an unambiguous dispositive clause to the clause as it is proposed to be reformed by the introduction of limiting words said to be derived from a comparison of other parts of the deed.

On the main question, the construction of the dispositive clause in the conveyance by Tait's trustee to Mr M'Arthur Moir, I think that this clause (keeping in view the limitation of its effect resulting from the clause of warrandice) imports a disposition of the *dominium directum* or superiority, in the large sense which is inclusive of the superior's reserved rights in relation to mines and minerals.

4. I have said that I read this disposition as giving the grantee an unqualified right to the superiority, as including every privilege which the granter had in virtue of his superiority title, and I may add that I think the disposition is not limited topographically. The reference to existing possession may be useful for defining the marches of the different farms which are conveyed by name; but for different reasons I am unable to read these words as importing a vertical limitation. In the first place, if it is supposed that the feuar's possession is referred to as being the measure of the limits within which the disponee of the superiority may exercise his rights, then the reference is altogether inadequate to effect such a limitation as is suggested. The feuar's sasine is not an instrument of possession of the "surface" of the lands. His right and his possession (I mean in contemplation of law) extends to the centre of the earth, subject only to the burden of suffering such necessary use of the land as may be claimed by the superior for the purpose of extracting coal or minerals having a mercantile value. If the feuar's possession has any bearing on the question, then I suppose the disponee of the minerals may mine to any necessary depth, just as the feuar

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

may dig in search of water, or for any purpose not inconsistent with the superior's reserved rights. There is another and to my mind a better, reason for not giving the suggested meaning to the words of reference to possession, and it is this—that right to the minerals, although recognised as a right of property, is an incorporeal right, and is not the proper subject of such a limitation. I think that the meaning of the reference to possession is no more than this, that if any particular lands can be proved to have been possessed by the feuar under the sasine, the disponent of the superiority shall have a right which extends to these lands. It is implied, in the case of the superior as in that of the feuar, that his estate is in three dimensions, and is not limited to the visible surface, which would indeed be of very little use to anyone.

5. I add a single sentence on the case of *Fleeming v. Howden*. I understand that the present case has been referred to the whole Court, in order that we may decide the important question that has been argued to us on its merits, giving such weight to previous judicial opinions as is due to the reasoning on which they depend. It appears to me that in the case of *Fleeming v. Howden* it was an important, and, in the opinion of the Lord President, a determining element in the case that the disponent of the superiority had no power to convey mineral estate, being precluded from doing so by the terms of the entail under which he possessed. In that case the decision was to the effect that the conveyance carried what the disponent *had the power to convey*. I think that in the present case the conveyance to Mr M'Arthur Moir ought to receive effect by giving the disponent all that the granter had the power to convey; and while I do not say that my views coincide with all that is said in the opinions delivered in *Fleeming*, I do think that the decision in *Fleeming* is capable of standing along with the Lord Ordinary's judgment in this case, by giving weight to the element to which I have referred.

6. It is suggested in one of the opinions in this case, which I have had the opportunity of considering, that if, as matter of construction, a disposition in general terms transfers to the grantee every right which was in the granter, it would have the effect of transferring a feu or other subaltern right which the superior might have reacquired, or might thereafter reacquire, and this notwithstanding that feu-rights were excepted from the operation of the clause of warranty. If I rightly understand the argument, it is that in the case supposed there is no eviction, and therefore no case which brings into operation either the warranty or the exception to it. Hence, it is suggested, the grantee would take by disposition not only the superiority but such feu-rights as the granter possessed or might acquire by separate titles, contrary to the true contract which the deed was intended to carry out.

This, as I think, is a perfectly relevant and legitimate consideration to be taken into view in determining the proper principle of construction to be applied to a case like the present competition. Indeed, I think it provides a complete answer to the view (if such a view be entertained) that a dispositive clause being unambiguous, is incapable of being controlled by other clauses of the deed containing it. I wish, however, to point out that my opinion does not involve assent to such an unqualified proposition. My view has always been, as stated in the first paragraph of this opinion, that the granter may make such qualifications as he pleases, and in such parts of the deed as he pleases, provided he makes his meaning clear. I do not understand the Lord Ordinary's judgment as involving a different view, because his reasoning is founded on the unequal-

fed character of the grant in so far as relates to coal. An exception of subjects already feued out may be put into the warranty, or even into the testing-clause (provided in the latter case that the clause is filled in before subscription); because the maker of a deed is not bound to be consecutive, and a Court of construction ought to give effect to every term of the contract or condition of the grant. Now, although I hold that it is according to good conveyancing that the exception of feu-rights in a conveyance of a superiority should be noticed in the dispositive clause as well as in the clause of warrandice, yet if the granter, anywhere within the confines of the deed, declares that he does not profess to give a title to the *dominium utile* of feus already given off, I should consider this to be a valid restriction of the effect of the dispositive clause. Having regard to the practice of conveyancers, of which we may take cognisance, I should hold that an exception inserted in the clause of warrandice is sufficient as a restriction of the dispositive clause, although not the best way of making such a restriction.

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

But I am not prepared to assent to the view that a dispositive clause may have its effect cut down by drawing inferences from statements of fact inserted in the deed by way of narrative. That appears to me to be a large, and, I fear, a dangerous extension of the principle that a clause is to be construed with reference to the subject and context. I am of opinion that the line which separates merely technical or strict construction from lax construction—a line which, I must admit, is not easily defined—has in this case been properly drawn by the Lord Ordinary, and that the reclaiming note ought accordingly to be refused.

LORD KINNEAR.—I am of opinion that the defenders have been rightly assolized, and that the Court should adhere to the interlocutor of the Lord Ordinary.

It is common ground that since 1838 the defender and his predecessors have been infeft in the lands in question by virtue of titles which contain no exception or reservation of minerals. In order to succeed in his action, therefore, the pursuer must produce a prior infeftment in the minerals as a separate tenement, by which he himself either is, or may be vested in that estate, to the exclusion of the proprietor of the lands. But the pursuer's case is rested exclusively on his construction of an instrument which forms a link in the defender's title—the disposition and assignation of 1837; and he seems to me to have failed, if indeed he has attempted, to deduce his own title, so as to shew that he is either infeft or in a position to obtain infeftment in the minerals, assuming that it was intended to exclude them from the conveyance contained in that deed. His case, as it is presented in argument, and on record, proceeds on the assumption—which, as the Lord Ordinary has observed, has been accepted by the defenders—that the Castle Campbell estate, including the coal of Hillfoot, was feudally vested in Ralph Erskine Scott; and on that assumption he would probably be well founded in his contention that, if Mr Scott were not divested of the mineral estate by his disposition to John M'Arthur Moir in 1837, he must be held to have conveyed it to Sir Andrew Orr by the disposition of 1860. But the fact is that neither Mr Tait nor Mr Scott was ever feudally vested either in the superiority or in the minerals of Hillfoot. Mr Scott, therefore, not being infeft, could not effectually dispoise. The only method by which he could transfer the property was by assigning his personal right to claim sasine from the Sheriff, as crown bailie, by virtue of the open charter and precept of 1811; and

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

accordingly the operative and effectual part of the deed of 1837 was not the disposition of lands but the assignation of the crown charter and precept, the words of disposition being unnecessary, and perhaps, as the Judges suggested in *Renton v. Anstruther* (15 S. 137, 2 Bell's App. 214), incorrect and improper, although undoubtedly customary. This is a consideration which may not be immaterial to the question of construction. But, in the meantime, I observe that no infeftment upon Scott's conveyance can be of any avail to the pursuer; and therefore, in order to establish the right which he alleges, he must connect his title not only with the disposition to his ancestor, of 1860, but with the warrant for infeftment in the minerals of Hillfoot, which is contained in the crown charter of 1811. This crown charter is the basis of the pursuer's title, if he has any title to the minerals; and yet he has neither produced it nor explained why it is not produced. We do not know what were its terms, but we know that it was assigned to John M'Arthur Moir "in so far as relates to the lands" of Hillfoot and Lochyfaulds, and that he took infeftment on the precept. The pursuer, therefore, must either shew that the precept was not exhausted, in so far as regards the minerals, or else he must reduce the infeftment of M'Arthur Moir as going beyond its warrants, so as to enable him to take up an estate which at present stands in the defender's title. I understand that the argument has been taken on the assumption that there is no objection to the form of action. But that will not relieve the pursuer of the obligation to set forth a feudal title to the minerals he claims. I do not see how he can obtain decree until he makes it clear whether he has already a good title to the minerals, or whether he is only in a position to obtain a title after he has reduced the defender's infeftment. The presumption appears to me to be that the defender is feudally vested in the minerals in question, whether it was intended to include them in his predecessor's purchase or not; and I think it was essential for the pursuer, whose right, if it exists, must be founded on the charter of 1811, to produce that deed, and to shew how he is connected with it in title.

But the question as to the construction and effect of Mr Erskine Scott's conveyance of 1837 has been argued on the assumption that the deed is an effectual disposition of the lands. This may not be an inconvenient mode of stating the argument, because the deed disposes the lands in form; and the true question is whether, in so disposing, the granter intended to reserve the minerals to himself or to convey them to his purchaser.

There can be no question that a conveyance of lands carries the minerals as well as the surface. But it is said that the dispositive clause must be restricted in its effect, because the feudal right in the minerals had not been split, so as to create separate estates of superiority and property; and it appears from other parts of the deed that a superiority alone was intended to be conveyed.

I can find no indication of any intention to confine the conveyance to the superiority, except that which may be collected from the narrative. The other clauses which have been relied on—the obligation to infeft *a me*, the assignation of feu-duties and casualties, and the warrandice clauses—are equally applicable whether the minerals are conveyed or not. The intention of the deed was to put the disponent in the place of the granter, or of the granter's author, as the immediate vassal of the Crown; and an obligation to infeft otherwise than as such would have been repugnant to that intention. The exception of subaltern rights from the warrandice was appropriate and necessary, because a subaltern

right had been constituted by the seller's author in favour of the donee. But that exception affords no indication whatever of the extent of the new conveyance. It must have been expressed in the same terms, if the feu-right already granted had affected only a small portion of the estate conveyed, and the greater part of it had belonged in property to Mr Tait and his trustee. The assignation of feu-duties and casualties is equally without significance, and for the same reason. It is appropriate, because a part of the estate conveyed was subject to a feu-right; but it does not follow that no other part is held by the grantor and carried to the donee in full property. The omission of an assignation of rents would have been unusual, if that part of the estate which was not affected by subaltern rights had been a rent-bearing subject. But the sole purpose and effect of the assignation is to give the donee a good title to levy the rents from tenants and occupiers, although his right to the lands may not have been made real by infeftment. Such a clause would have been futile and unmeaning with reference to minerals which were neither let nor worked at the date of the grant.

No. 129.

Mar. 18, 1892.

Orr v. Moir's
Trustees.

I cannot, therefore, assent to the proposition that the disposition, read as a whole, is conceived in terms appropriate to the conveyance of an estate of superiority only. It is in terms appropriate to the conveyance of an estate which may have been feued out in whole or in part. But the operative clauses would be equally appropriate, whether the feus already granted had affected the whole or a part of the estate described in the dispositive clause; and there is nothing except the narrative to suggest that the subject of the conveyance, although it certainly includes a superiority, is a mere estate of superiority, and nothing more.

I agree that the narrative, taken alone, sets forth a contract with reference to a superiority only. The reserved minerals were held under the superior's title; but it is not, in my opinion, an accurate use of language to describe them as forming part of the superiority. I do not think they would have been carried by a conveyance "of the superiority with the feu-duties and casualties." But the subject of the conveyance, as described in the dispositive clause, is not the superiority but the lands; and it is the function of the dispositive clause, and not of the narrative, to describe and convey the subject in which it is intended to give sasine. It cannot be disputed that lands include minerals, unless minerals are expressly reserved; and it is well-settled law that if the terms of the dispositive clause are unambiguous, they cannot be contradicted or controlled by any other part of the deed—(Ross, ii. 127, 128; *Lee v. Alexander*, 10 R., H. L., 91). It does not follow that the disposition may not be restricted by an express declaration in some other part of the deed, that the grantor excludes, from the conveyance, some part of the subject which might otherwise have fallen within the description. But the dispositive clause cannot be controlled by any other, which does not, in terms, purport to qualify or explain it. The canon of construction, as Lord Blackburn states it in *Lee v. Alexander*, is that "where the description of the premises assigned is clear and unambiguous, effect must be given to it by the Court, even though convinced from other parts of the deed, that it was not what the parties meant to say." Lord Watson, in the same case, says,—“If the terms of the dispositive clause are *per se* sufficient to give the right, they cannot be displaced or controlled by a reference to the other clauses of the disposition.” But it appears to me to be certain that the dispositive clause *per se* would be sufficient to carry the minerals. It conveys the lands in terms which admittedly include minerals, unless their meaning

No. 129. can be confined by the reference to the possession of Hillfoot. I agree with Lord Kincairney and the Lord Ordinary, for the reasons stated by them, that the reference to possession is merely demonstrative, and cannot exclude the minerals, even of Hillfoot. The conveyance is, therefore, as clear and explicit as if the minerals had been specified in express terms; and the question is whether a clear and unambiguous conveyance of lands is to be denied effect because it carries something more than is expressed in the narrative clause.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

But it is said that a dispositive clause is always ambiguous, because it does not define the estate of property or superiority which it is intended to convey. It is true that in correct feudal form the lands should be disposed in the same terms, whether a *dominium utile* or a *dominium directum* is conveyed. But that is because the subject of the dispositive clause is not the feudal right, but the lands themselves. A dispositive clause cannot be said to be ambiguous, because it does not define the holding. That is no part of its function. It specifies the disponent, the subject conveyed, and the real burdens and reservations with which it is intended that it shall be affected. It will be expressed in the same terms, therefore, whether the lands are to be held of the granter, or of the granter's superior; and it is, in general, expressed in the same terms, whether they are affected by subaltern rights or not, provided such subaltern rights are not vested in the granter himself. But this identity of expression involves no ambiguity in the dispositive clause itself, although the feudal character of the disponent's right may differ, in different cases. In all the cases supposed it will carry the whole land and estate, within the description and covered by the granter's infestment, except in so far as the conveyance may be limited by an express reservation.

It has been suggested that if a conveyance by a superior of lands which had been feued out had this effect, it would carry the *dominium utile* which was not vested in the granter, notwithstanding an exception of subaltern rights in the clause of warrandice. But it is just because such a conveyance does in fact carry the whole estate, that the exception from the clause of warrandice is necessary. It is not because the property of the vassal is not included in the superior's conveyance, but because it is so included, that the superior must be protected by the exception, from an action upon the warrandice. The effect of the superior's conveyance is limited by the recorded infestment of the vassal, but not by anything in the conveyance itself, except in so far as the disponent may be precluded by a personal obligation expressed or implied in the warrandice clause, from challenging a subaltern right which might otherwise have been reducible. An obligation to this effect is not unusual, to preclude the grantee from reducing the excepted rights, on grounds which might infer warrandice against the granter. But the necessity for such a stipulation only serves to illustrate the effect of the disposition; and, accordingly, Mr Duff recommends that an exception of subaltern rights should be inserted not only in the clause of warrandice but also in the dispositive clause, "in order that it may qualify the conveyance; for although such exception, even in the warrandice, may operate against the disponent, it would plainly be ineffectual in a question with an adjudger, whose diligence, when perfected by infestment, would thus exclude subaltern grants made by the seller or his predecessor which had not been duly feudalised, the vassals on these having no remedy but under their author's personal obligation of warrandice. The same result might take place where a second purchaser or bondholder had acquired a right in which the

exception was not repeated.”—(Duff’s Feudal Conveyancing, sec. 140 ; Dewar, No. 129. Mor. Dict. 16,637 ; Erskine, ii. 3, 31.)

But whatever be the effect of an exception from the warrandice as regards the rights of vassals, I take it to be clear in law that an unqualified conveyance of lands will carry all the rights vested in the granter himself, whether of property or superiority. If he means to reserve any subject which is within the description, and is covered by his infeftment, he must in terms exclude it from the conveyance.

Mar. 18, 1892.
Orr v. Moir’s
Trustees.

It is said to be doubtful whether a conveyance by a proprietor infeft in two separate fees will comprehend both fees, if it does not contain the words “with all right, title, and interest,” in addition to the description of the lands. I venture to think that this doubt is without foundation ; and Professor Bell, who is referred to as having given it some countenance, says distinctly that the words cited are not essential, at least in onerous deeds. But the point has no bearing on the present discussion, because the only plausible ground, on which the effect of such a conveyance has been questioned, appears to have been that when two distinct fees in the same lands are held upon separate titles, a disposition of the lands must be ascribed to the nobler title, and not to the inferior, and will therefore carry the superiority only. But when an estate is held upon one title only, it is of no consequence that a part of it is a superiority. It is not open to question that a conveyance of lands, of which a portion has been feued, will carry the *dominium directum* of that portion, and the full *dominium* of the rest. In other words, it will carry the lands as they stood in the granter, subject to the subaltern rights.

This follows of necessity from the nature of the right that still remains vested in the granter of a feu. A superior is not divested of the lands contained in the grant to his vassal. “His right continues unimpaired except so far as the grant conveys the *dominium utile* to the grantee”—(Erskine, ii. 5, 1). His infeftment subsists in every other respect ; and it follows that his conveyance of lands, described as in his own title, will carry everything covered by his infeftment, subject only to the right already constituted in his vassal.

It can make no difference whether that part of the estate which is unaffected by the subaltern right consists of minerals, or whether it extends *a celo ad centrum*. The effect of a reservation of minerals in a grant of lands, as the Lord Ordinary explains in *Fleeming v. Howden*, is to separate the minerals from the estate which is vested in the grantee. But it does not separate them from the estate which still remains vested in the granter. They remain, as they were before, an integral part of the lands in which he is infeft, just as any other portion remains which has not been included in the grant to the vassal ; and an unqualified conveyance of the lands will divest the superior of his minerals, just as it will divest him of every other part and portion of the land described in the conveyance.

It appears to me, therefore, that there is no ambiguity in the dispositive clause. It is true that it does not distinguish between superiority and *dominium utile*. But it describes the subject-matter of the conveyance, and, in so far as regards the subject-matter, a conveyance of land means the same thing, whether it occurs in an original grant, in a disposition by the vassal, or in a disposition by the superior. There is nothing, therefore, in the nature of the superior’s right to justify a reference to the other clauses of the deed for the purpose of ascertaining the subject of the conveyance. But if these other clauses are

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

referred to, they are all, except the narrative, in perfect conformity with the dispositive clause. There is not one of the operative clauses which would have been expressed otherwise, if the minerals had been conveyed in terms. It is the narrative clause alone which creates any ambiguity. The argument therefore is that the dispositive clause is ambiguous, because it is not in conformity with the narrative, and that the narrative clause may be called in to control the dispositive, because the dispositive clause is ambiguous.

The pursuer's argument is, in substance, that the two clauses being in conflict, the narrative must prevail. I am not satisfied that there is any conflict; because, although the minerals are not accurately described as a part of the superiority, they are undoubtedly part of the superior's estate, and the subject of the two clauses may be substantially the same, in the framer's intention, although it is described imperfectly or inaccurately in the one, and more correctly in the other. But if the intention of the narrative were clearly repugnant to that of the dispositive clause, it is the latter that, according to the established canon of construction, must necessarily receive effect.

The question is not whether the deed confers *dominium utile* in the minerals, or *dominium directum*, but whether the minerals are conveyed at all; and the narrative is not invoked for the purpose of clearing up the point on which the dispositive clause is said to be inexplicit, and defining the feudal character of the right which the deed confers in the subject conveyed. Even for this purpose I should not think it legitimate to control the operative clauses by the narrative, if the operative clauses themselves are not ambiguous. But it is used, in fact, for the purpose of excluding altogether from the operation of the dispositive clause a subject which falls within its terms. The dispositive clause, according to the ordinary rules of construction, includes minerals, and the narrative is relied upon to exclude minerals from the conveyance.

It is said to have this effect because the conveyance is of a superiority, and a superiority cannot include minerals which have not been made the subject of a feu-right. The answer is that the deed does not convey a superiority, or a *dominium utile*. It conveys lands to be held of the granter's superior, subject to existing subaltern rights. If the subaltern rights are not coextensive with the lands included in the granter's infeftment, the property of that part of the estate which has not been feued is conveyed with effect, as the whole estate is conveyed in form, by the dispositive clause.

But the deed, as I have observed, is not to be construed as a disposition by a proprietor infeft. It is a disposition and assignation of a personal right, and the operative part of it is the assignation of the crown charter. The argument upon this point appears to have been misunderstood. The assignation of writs, when it occurs in a disposition, is merely subsidiary. Its purpose is to fortify the right conveyed by the dispositive clause; and accordingly it is said that the assignation of the charter can have no other effect than to warrant infeftment in the subjects already disposed. But when, as in the present case, the granter has no power to dispoise, the assignation of a charter and open precept is the only part of the deed which has any operative force and effect. If there were any conflict between the clause which formally dispoises the lands and the clause which effectually assigns the right, it might be a question which should prevail. But they are in perfect conformity with one another, and both of them include the whole lands, without exception of the minerals, as conveyed by the crown charter. The material point is that the seller, who is supposed

have intended a reservation of minerals, has not only conveyed the estate without reservation by his own deed, but has also made over to his purchaser, absolutely and without qualification, the crown charter and precept which alone made it possible to complete a title in any part of the estate. The argument is that the superiority only was conveyed, and that the minerals remained in the grantor's title. But the grantor had no title either to the minerals or to the superiority; and if he had intended to complete a title to the minerals, he must have reserved right to make use of the crown precept for that purpose.

I do not think that the case of *Fleeming v. Howden* rules the present case. A decision on the construction of one instrument cannot be a precedent for the construction of another and different instrument; and the difference between the deed in *Fleeming v. Howden* and the deed now in question appears to me to be very material, for Charles Fleeming and his commissioners had no power to sell the minerals, and their want of power was clear on the face of the deed. The decision, therefore, was that a conveyance of lands will not carry minerals which it appears from the deed the grantor has no power to convey. It may be that an explicit statement of a limitation of the grantor's powers may be equivalent to an express declaration of intention to confine the scope of the conveyance. But that is not a reason for qualifying a conveyance, when the grantor's powers are not limited in any other way than by express reservation. There is no such reservation, even in the narrative of the deed now in question. The utmost that can be said is that the narrative imports an intention to convey a superiority, and no other intention; and therefore that the narrative would be satisfied if nothing more than a superiority were conveyed. But the dispositive clause does, in fact, convey a superiority, and something more. The question would be precisely the same if it had conveyed the minerals in terms. The argument, in that case, would probably have been stated in a different form; and the pursuer's contention would have been in terms—as I think it is now in substance—not that the dispositive clause, when properly construed, is insufficient to convey minerals, but that in so far as it bears to convey minerals it is invalid and ineffectual, since the narrative shews that it was not intended that minerals should be conveyed. It appears to me to be a sufficient ground of judgment that an unambiguous conveyance cannot be overruled by an inference, to be collected from the narrative, that something less was intended than has been actually conveyed.

LORD WELLWOOD.—In judging whether the coal in the lands of Hillfoot and others was carried by the disposition by Mr R. E. Scott to J. M'Arthur Moir of 28th July 1837, it is legitimate and necessary to consider the state of the disponent's title at that date. He, as trustee on the sequestrated estates of Crawford Tait, was vested (1) in the *plenum dominium* of the coal, and (2) in the superiority of the surface which had been feued out to the defender's predecessor. Thus while he had the full and undivided estate of the coal, he had also the superiority of the surface, including right to the feu-duty payable by the proprietor of the surface, who happened to be at that date the disponent, Mr John M'Arthur Moir.

Keeping in view this state of the titles, I next proceed to consider the terms of the disposition, reading it in its natural order. It proceeds on the narrative of the disponent's right as trustee to, *inter alia*, "the superiority and feu-duty of the lauds of Hillfoot and others lying in the parish of Dollar and county of

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

No. 129. Clackmannan, *belonging in property to Mr John M'Arthur Moir of Hillfoot*"
 Mar. 18, 1892. I observe in passing that Mr Moir was proprietor of the surface only, and not
 Orr v. Moir's of the minerals; it is therefore reasonable to infer that the word "superiority"
 Trustees. is used with special reference to the rights of the superior in relation to J.
 M'Arthur Moir's right of property which was limited to the surface. The deed
 then proceeds to narrate that the disposer having exposed, *inter alia*, "the said
 superiority and feu-duty of the lands of Hillfoot to public roup and sale, Mr
 Moir had been preferred to the purchase, being the highest offerer, and that he
 had paid the purchase price; and had also, by private bargain, purchased "the
 superiority and feu-duty of the lands of Lochyfaulds and others." The deed
 then proceeds: "Therefore I as trustee foresaid have sold, alienated, and dis-
 poned, as I with consent foresaid do hereby sell, alienate, and dispose from me
 and my successors in office or in the said lands and others to and in favour of
 the said John M'Arthur Moir, his heirs and assignees whomsoever, heritably
 and irredeemably, All and Whole the town and lands of Hillfoot," &c., "all as
 at present possessed by the said John M'Arthur Moir and his tenants; as also
 All and Whole the lands of Lochyfaulds, . . . formerly possessed by
 James Sharp, smith, and Thomas Hall, weaver, with the whole parts, pendicles,
 and pertinents thereof, all as more particularly described in the ancient rights
 and infeftments thereof." In the warrandice clause there is the following excep-
 tion: "Excepting always from this warrandice the feu-rights or infeftments of
 property of the said lands granted by my predecessors and authors to the feuars
 and vassals thereof."

It is maintained by the defender that, the coal not having been expressly reserved, the dispositive clause carried everything which the disposer had to convey, including the coal.

1. I shall assume, in the meantime, that the dispositive clause, if taken by itself, is unqualified and *ex facie* wide enough to carry all the disposer's rights in the lands of Hillfoot and others. It is impossible, however, to read the narrative and the dispositive clause together without seeing that the narrative is not consistent with this construction of the dispositive clause. The deed proceeds on the narrative of the sale of "superiority and feu-duty" of lands belonging in property to Moir, the donee; while the dispositive clause *ex hypothesi* is wide enough to convey the whole estate, which still remained in the disposer, including the coal, which did not belong in property to Moir, but to the disposer. How are the two clauses to be reconciled?

It is settled law that the dispositive clause in a conveyance cannot be contradicted by subsidiary clauses; and if they conflict with it, it must rule. But it is equally well settled that the dispositive clause admits of construction; and that if it can be reconciled with other clauses in the deed which are unambiguous, it may be construed and qualified so as to be read in accordance with them.

The solution in the present case, I think, is that a conveyance of the land is the appropriate way of conveying various and distinct rights. It is equally suitable for conveying the *dominium plenum* and the *dominium utile*. Again, it is a known and *habile* way of conveying a bare superiority. It is not only a *habile* way of doing so, but the more correct and appropriate form of conveyance; although it has been held to be also competent to convey the superiority or *dominium directum* in express terms. In each case you must examine the other clauses in the deed in order to ascertain the character and extent of the right conveyed.

The form of the dispositive clause, therefore, being equally applicable to a No. 129.
conveyance of the superiority and a conveyance of all that remained in the dis-
poner, I think it is legitimate to ascertain from the narrative and other clauses Mar. 18, 1892.
of the deed and the titles which of the two the disponent intended to convey. Orr v. Moir's
Trustees.

The narrative is not, in my opinion, ambiguous. The word "superiority" is not properly used as meaning all that remains in the superior after he has feued out part only of the *dominium utile*. It is a relative term, and is and should in legal language be exclusively used (as here) in relation to and as contrasted with the *dominium utile* of the lands or those portions of them which have been feued out. "Superiority" implies a previous severance of the *dominium utile* or part of it, and the consequent existence of a vassal holding of the superior. In this case the only vassal whom the disponent had in Hillfoot was the proprietor of the *dominium utile* of the surface; and when the deed speaks of the superiority and feu-duty of lands belonging in property to the vassal, I think that the word superiority must be referred to the only portion of the lands of Hillfoot which had been feued out and belonged to the vassal, and that it cannot be held as intended to include that portion of the *dominium utile* which had been expressly reserved and never been feued out.

This use of the word is justified by reference to the origin of the terms *dominium directum* and *dominium utile*, which were invented, I think, to express the two estates resulting from the creation of a feu; *dominium directum* meaning the bare right or interest left with the grantor—(2 Ross's Lect., 147, 148).

Apart from the narrative, other subsidiary clauses of the deed are appropriate to and indicate a conveyance of an estate of superiority. In particular, the obligation to infeft, the exception of the feu-rights, and the assignation to the duties.

Therefore, interpreting the dispositive clause by the narrative, I think it is clear that only the bare superiority was conveyed, and not the coal, unless, indeed, there is an insuperable conveyancing objection to adopting such a construction. In my opinion no such objection exists, because the disponent's estate in the coal was distinct and separate from the superiority conveyed.

The case of *Fleeming v. Howden* (6 Macph. 782) is directly in point if regard be had to the conclusions of the action and the form of the judgment of the Inner-House, and also to the grounds of judgment not only of the Judges of the Inner-House, but of the Lord Ordinary, whose judgment they recalled.

The summons concluded not merely for declarator of the pursuer's right of property in the mines, metals, and minerals, but also for reduction of the disposition of 1811, and deeds following thereon, in so far as that deed, or the deeds following thereon, could be held to have disposed the said mines, metals, and minerals to the vassals in the lands. The Lord Ordinary found that under the deed of 1811, and deeds following thereon, the defender acquired an *ex facie* legal title to the minerals, and that the pursuer was barred by the negative description from challenging that disposition. He therefore assoilized the defender. In recalling this judgment the Inner-House did not find it necessary to reduce the deeds in question, but merely found and declared in terms of the declaratory conclusions of the summons, in substance affirming the second plea in law for the pursuer,—“(2) Neither the disposition of the superiority of the defender's lands, granted in 1811, nor any of the other titles held as founded on by the defender, did, according to their sound meaning and true legal construc-

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

tion, convey the mines, metals, and minerals of the said lands, nor in any way exclude or impair the right thereto reserved by the titles to the property thereof, in favour of the heirs of entail of John Earl of Wigtown."

The Lord Ordinary's grounds of judgment are clearly expressed in his note (6 Macph. 785),—"Whatever may have been the intention of the parties, there seems no reason to doubt that the disposition of 1811 operated as a valid feudal conveyance, not only of the superiority, but of every reserved right in the lands belonging to the superior. According to the principles of our law, the *dominium directum* is a right to the lands themselves burdened only with the vassal's right, and whatever is reserved in the vassal's charter remains the property of the superior. The right to the minerals was never separated from the superiority, so as to constitute a separate tenement. Therefore, when the superiority was conveyed to Lord Elphinstone in 1811, in the usual form of a disposition to the lands, with all right, title, and interest which the superior had in the lands, subject only to the burden of the feu-right, the right to the mines and minerals necessarily passed to the disponee along with the *dominium directum*, and no right of any kind remained in the grantor, for where lands are conveyed without reservation a right to the minerals, as well as to the soil, is understood to be given, and if this is not intended, the minerals must be expressly excepted from the grant. If this view be correct, the disposition carried every right in the lands which the superior had, including the property of the minerals, which had been reserved in the original feu-right." Those grounds of judgment, which form the backbone of the defender's argument in this case, were rejected by the Inner-House.

Before considering the reasons given by the Judges of the First Division, I should mention that the disposition of 1811 was couched in practically the same terms as the deed now under consideration. The deed, after narrating the circumstances under which the superiorities were being sold, ran as follows:—"We, James Lord Elphinstone, proprietor of the lands and others after mentioned, desirous of purchasing the superiorities, casualties, and feu-duties which are part of the said entailed estates, we have resolved to sell the same to the highest bidder of the powers given to us by the foresaid commissary, and then, after payment of £480—as the price of the superiorities, casualties, and duties to be paid and others after mentioned belonging in property to the said estates, to the said and whole the lands in question, and all right title and interest they had therein. It will be observed that although the narrative of the deed is more redundant, it closely resembles that in the deed of 1811, and especially in this, that the superiority to be conveyed was the superiority of the lands of which the disponee already possessed, and that he was to have the same as he had the property were, as in the deed of 1811. The question to be decided was whether that deed carried the minerals which had been reserved by the earlier titles as in the deed of 1811.

The Inner-House affirmed two propositions:—First, that where a proprietor of lands feu'd to a vassal reserves the minerals the latter are erected into a separate tenement, and the conveyance admits of construction, and that the phrase "the lands" being a *habile* way of referring to the lands, the holder is to be held to carry such reserved right if he does not expressly declare a negative intention to do so.

In regard to the first point, it is, I think, immaterial whether the original owner's interest reserved in the minerals is regarded as *plenum dominium*, or as consisting of (1) *dominium directum*, and (2) *dominium utile*, although I think the former view is the more correct; in either view it is distinct from the superiority of the surface. Compare the opinion of Lord Justice-Clerk (Inglis) in *Hutton v. Macfarlane*, 2 Macph. 85; and that of Lord Curriehill in *Fleeming v. Howden*, 6 Macph. 790. No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

The more important passages in the opinions of the Judges are so fully quoted in the cases that I do not think it necessary to quote them again here; but as bearing out what I have given as the import of the judgment, I may refer particularly to the opinion of Lord Curriehill, pp. 790, 791, and the concise opinion of Lord Deas on pp. 794, 795.

They held that, *ex facie* of the deed, the minerals were not carried. Lord Curriehill, for instance, states the first question thus, p. 791,—“Whether or not, according to the true meaning and construction of the disposition of 1811, the mines were included in the subjects thereby disposed?” The answer of that question in the negative was the result at which the Court arrived.

Lord Deas, again, says that, looking at the deed of 1811, it was so perfectly clear on the face of it that it was not intended to convey the minerals, that it would be only waste of time to go over its terms,—“It professes to be granted on terms of the Act of Parliament, 20 Geo. II. c. 51, which gives power to heirs of entail to convey the superiority of lands to purchasers, but nothing else.” He then proceeds (p. 795),—“The question remains, whether—because the dispositive clause conveys the lands in general terms—this in point of law creates a conveyance of the minerals, whatever the intention of the parties may have been. I know nothing to warrant such a construction. Take the case already put, where one person has a feudal title to the minerals, and another to the lands; it does not follow that the minerals are conveyed with the lands, though they are not expressly excepted. The ordinary form of a disposition of superiority shews that the dispositive clause is subject to construction not only by the rest of the deed, but sometimes by other deeds. A disposition limited to the superiority has been sustained. But the usual and correct form is to dispose the lands themselves, and the feu-rights would stand good, even although they were not excepted (as they usually are) in the clause of warrandice.”

It must be conceded in favour of the defenders in the present case that in *Fleeming v. Howden* the Court founded strongly upon the fact that the commissioners had no power to convey anything but the superiority of the vassal's lands, and that this was patent on the face of the deed and the statute referred to; and in the present case the disponent had power, if he chose, to disponent the minerals. But that was only one conspicuous indication of intention which strengthened a construction of the deed, which was sufficiently clear without it. *Fleeming v. Howden* at least enables us to construe the word “superiority.” It is an authority for this, that it is not to be inferred from a narrative of power well to a vassal the “superiority” of lands owned by him, followed by a narrative that the vassal has agreed to purchase the superiority, that anything more is to be conveyed than the bare superiority of that portion of the estate which the vassal already possesses.

As to the older case of *Erskine v. Shaw*, we are under the disadvantage of having a very imperfect report of the opinions of the Judges. The case un-

No. 129.

Mar. 18, 1892.
 Orr v. Moir's
 Trustees.

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I think that the judgment of the Inner-House affirmed two propositions:—which ample authority was quoted. First, that where a proprietor of lands feu out the surface, reserving the minerals, the latter are erected into a separate estate; secondly, that the dispositive clause admits of construction, and that a conveyance in the dispositive clause of "the lands" being a *habile way* of conveying a bare superiority, will not be held to carry such reserved right if the context and the history of the titles negative an intention to do so.

In regard to the first point, it is, I think, immaterial whether the original owner's interest reserved in the minerals is regarded as *plenum dominium*, or as consisting of (1) *dominium directum*, and (2) *dominium utile*, although I think the former view is the more correct; in either view it is distinct from the superiority of the surface. Compare the opinion of Lord Justice-Clerk (Inglis) in *Hutton v. Macfarlane*, 2 Macph. 85; and that of Lord Curriehill in *Fleeming v. Howden*, 6 Macph. 790.

No. 129.

Mar. 18, 1892.

Orr v. Moir's Trustees.

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No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

doubtedly seems to be in point in so far as regards the terms of the deed. But the opinions of several of the majority of the Judges seem to proceed to a considerable extent upon the subsequent actings of the parties and their presumed intention in entering into the transaction. By far the most detailed opinion reported in Sir Hay Campbell's notes is that of Lord Eskgrove, which expresses distinctly and clearly the material heads of the argument for the pursuer in this case.

Having to choose between the two decisions, I prefer the reasoned judgment in the case of *Fleeming v. Houden* to that in the older case of *Erskine v. Schaw*.

2. In the view which I have expressed it is unnecessary to consider the effect of the words in the dispositive clause which occur in the conveyance of the lands of Hillfoot and others, but not in that of the lands of Lochyfaulds and others, "all as at present possessed by the said John M'Arthur Moir and his tenants." There is authority for holding that such a description is taxative as regards the superficial boundaries of the lands conveyed (1 Bell's Lect. 586, and *Murray v. Oliphant's Wife*, M. 2262); and it may be that they are also taxative as regards the different strata. On this question I prefer to reserve my opinion. The words, however, are at least quite consistent with, and indeed confirm, the interpretation which the pursuer places on the narrative.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor should be recalled, and decree given in favour of the pursuer.

LORD KYLLACHY.—I am of opinion that the pursuer is entitled to decree. The disposition of 1837 is, in my opinion, a disposition of a mere superiority, and I am unable to hold that the property of the minerals formed, or could form, part of that superiority. The view I take of the case is shortly this:—

I first inquire, What is the legal construction of the disposition—construing it according to its terms, and without reference to anything not appearing on its face?

The deed begins with a narrative which recites, carefully and at length, two contracts of sale which it is the object of the disposition to carry out. Those contracts of sale are set forth as the sole inducing causes of the disposition. And the subject sold is in each case declared to be the "superiority and feudal duty" of certain described lands. There is nothing about minerals or about any estate of property. The narrative recites simply the purchase of a superiority—a superiority assumed, if not expressed, to be coextensive with the described lands.

With such a narrative, one certainly expects to find that the other and operative clauses of the deed are appropriate to the conveyance of a mere superiority—that is to say, are expressed in the manner in which such a conveyance usually and properly expressed. Are then the other clauses in conformity with the narrative? Or do they go beyond the narrative and embrace a subject which had not been sold?

Neglecting in the meantime the dispositive clause, it can hardly, I think, be doubted that the other clauses of the deed are appropriate to the conveyance of a mere superiority, and have all the usual notes of such a conveyance. In particular, the warrandice contains an exception of subaltern rights. The obligation to infeft is *a me*, and not *a me vel de me*. There is no assignation of rents, but only an assignation of feu-duties and casualties. The assignation of warrandice (which includes an assignation to an unexecuted precept in a crown charter

resignation) is qualified, so as to assign the precept only so far as applicable "to the town and lands of Hillfoot and others above disposed," and it is only granted "to the end that the disponee may be more readily seized and infeft in the premises." But, with or without such qualification, the clause is appropriate, on the assumption expressed in the narrative, to operate an infeftment in a superiority and in nothing else.

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

Turning next to the dispositive clause, it also is in appropriate terms. It conveys the superiority of the lands in the usual and appropriate mode, viz., by conveying the lands. It makes no exception of minerals, because, in point of construction, and according to the scheme of the deed, the conveyance included the superiority of the minerals. On the other hand, it omits the words (usual in a conveyance of *plenum dominium*) by which the granter conveys his whole right, title, and interest, present and future, in the subjects.

In short, I do not think it can well be doubted that, simply reading the disposition, and not going outside it, any Scotch conveyancer would at once recognise it as a quite typical disposition of a superiority, every clause being expressed exactly as it ought to be, on the assumption that it was desired to convey, or attempt to convey, a superiority over the whole lands described, and nothing more than such a superiority.

Within the deed therefore there is, if I am so far right, no ambiguity. But then it is said—and this I think raises the real question in the case—that on going outside the deed, and investigating the granter's title, it appears that ~~word~~ one part of the lands described, viz., the minerals, there was in fact no superiority, but only a *dominium plenum*, which had never been "split," so as ~~validly~~ to create a superiority. In other words, it is said that the assumption of the deed, viz., that the superiority extended to the minerals as well as the surface, was erroneous, whence it is said to follow that the deed must be reconstructed in the light of this circumstance, and must be held to operate a conveyance of the *plenum dominium* of the minerals, because the language of the dispositive clause is apt to carry such *plenum dominium*, and if it does not do so, must be held, as regards the minerals, to carry nothing. It is further said that when once it is known that the minerals were held in *plenum dominium*, it becomes impossible to read the assignation to the precept in the crown charter except as contemplating an infeftment in such *plenum dominium*, because otherwise, just as with the dispositive clause, the assignation would, ~~quoad~~ the minerals, operate nothing.

Now, I am not prepared to admit that the disposition, taking it as a disposition confined to the superiority of the minerals, operated nothing. It certainly did not, as the title stood, warrant any infeftment in the minerals; and if the infeftment which followed upon it was so expressed as to apply to the minerals, it was infeftment beyond its warrant, and therefore so far inoperative. But the disposition at least imported an obligation by the disponent to vest the disponee in the superiority of the minerals, and I suppose it is not doubtful that the necessary "split" between the property and superiority of the minerals could have been quite easily effected if the disponent was willing or could be compelled to bear the expense of a not unfamiliar conveyancing operation. That operation might have been performed in various ways. The simplest way would have been for the disponent to grant a corroborative disposition of the minerals in exchange for a feu-charter by the disponee reconveying the *dominium utile* of the minerals. Or the disponent might have made up his title to the minerals

No. 129. (assumed to be not validly conveyed) and have then granted a feu-charter to his agent, and thereafter made a new and valid disposition of the superiority in favour of the disponee. In short, reading the disposition as I read it, it was not at all inoperative, but only as regards the minerals incomplete. It transferred the right, but something more was required to transfer the title, the disposer being however bound, and having it in his power, to do what was necessary for that purpose.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

But further, and even assuming that the disposition, read as a conveyance of a mere superiority, was as regards the minerals inoperative, I cannot assent to the argument that this in itself warrants an enlargement of the construction so as to make the deed read, *quoad* the minerals, as a conveyance of a *plenum dominium*. It may be that, if you discard the narrative, and also the assignment to feu-duties and casualties, the other clauses of the disposition are not inconsistent with a conveyance of *plenum dominium*. It may also be, that if you assume such a conveyance, the disposition becomes operative throughout. But the question after all is, What did the parties to the disposition mean? and if the narrative is clear, and the operative clauses are consistent with the narrative—though also it may be consistent with something else—that something else is not necessarily to be assumed, merely because it turns out that otherwise the deed will in some particular fail of effect. The construction of a deed is one thing, its effect is another. The results of a given construction may no doubt be an element for or against such construction, but they cannot override the language of the deed, or the scheme of the deed, if such scheme is clear upon its face. Supposing one has to choose between, on the one hand, ignoring the narrative of a deed, and, on the other hand, acknowledging that the deed professes to do more than it validly effects, I confess I see no reason why the former alternative should necessarily be preferred to the latter.

In this case, as I have already said, I think the scheme of this disposition is sufficiently clear on its face. The narrative, I think, plainly implies, if indeed it does not express, the assumption that the superiority disposed is coextensive with the lands. That is to say, it plainly assumes that there has been a "split" both in the surface and in the minerals. The superiority sold is said to be the superiority of the lands, *i.e.*, the whole lands, and that cannot, I think, mean less than that the disposition proceeded on the footing that such superiority existed. Now, suppose that that had been expressed in so many words, suppose that it had been set forth in terms that the superiority and property of the surface and minerals had been, or were believed to have been, validly split, and that then the deed had proceeded, in the terms in which it does proceed (perfectly apt terms), to convey that superiority, could the disponee in that case be heard to claim the *plenum dominium* of the minerals on the ground which is now suggested? I cannot think so, but yet, if I am right, that is in substance the case with which we have to deal.

In truth, the defenders' argument may really be illustrated thus. It was formerly, as we know, the practice for landowners in Scotland to split the superiority and property of their estates for voting purposes, and to divide the superiority among their friends and relatives. *The dispositions conveying the superiorities were expressed exactly as the disposition here.* But it was occasionally discovered, sometimes long afterwards, that the original split had been badly performed, so that there was really no superiority which could be effectually conveyed. What was the position of the landowners who had in their

circumstances granted those dispositions? According to the defenders they had No. 129.
divested themselves of their whole estate. The dispositions were ineffectual as Mar. 18, 1892.
dispositions of a superiority. They were effectual if read as dispositions of *plenum* Ott v. Moir's
dominium. Therefore, however clear may have been the narrative, however Trustees.

appropriate to that narrative may have been the operative clauses, each disposition, so soon as the state of the title was discovered, became a disposition of a *plenum dominium*, dividing the landowner's estate among his friends.

I come therefore to the conclusion that it is not always safe to go outside deeds of this description in order to construe them by the state of the title. It may be sometimes necessary to do so; but not, I venture to think, when, without doing so, and taking the narrative and operative clauses together, the intention and scheme of the instrument are sufficiently clear.

I may note one or two observations on certain points which have more or less come up in the argument.

It has been suggested that the expression "superiority and feu-duty," as used in the narrative, may be read as covering the whole estate possessed by the superior in the lands, including reserved (or acquired) minerals held in *plenum dominium*. I do not myself think it possible so to hold. A superiority cannot exist except as relative to a *dominium utile*, and cannot extend to a subject of which the superiority and property remain unsplit. Nor do I think it possible to regard the right to minerals as a mere accessory right—not amounting to a right of property. I think it must now be held as settled that minerals form, or may form, a separate estate, capable of separate infeftment, and in no respect less capable than the surface of being held as a separate estate.

It seems also to be suggested—at least the suggestion runs through the defenders' argument—that undue liberty is taken with the dispositive clause in holding it to be open to construction. In other words, it is said that a disposition of lands—if made without exception or reservation—conveys, as matter of construction, every estate existing in the lands, and conveys with effect every estate possessed, or that may come to be possessed, by the disponent. In short, the dispositive clause here is said to be clear and unambiguous, necessarily conveying, *inter alia*, the *plenum dominium* of the minerals, and not capable of being controlled by the narrative even if the narrative is clear.

The answer to this seems to be that there are, according to feudal law, three estates or *dominia* which may exist in or over lands,—(1) the *dominium plenum*; (2) the *dominium directum*; and (3) the *dominium utile*; and that according to settled practice the disposition is expressed in exactly the same terms whichever of these estates is intended to be conveyed. In each case, the clause simply disposes the lands, making no exception or reservation either of subaltern rights or over-superiorities. On this matter reference may be made, *inter alia*, to the Juridical Styles (vol. 1, pp. 113 and 125), and Duff's Feudal Conveyancing, p. 191. In both of those works—works of the highest authority in such matters—it is carefully explained that as between property and superiority there is no difference in the terms of the disposition; the differences to be noted by the conveyancer being only the difference in the warrandice, the assignation to rents, and other ancillary clauses. And if it be asked how this ambiguity (or indeterminateness) of the dispositive clause is to be solved, the answer is just this—that the context of the deed, and particularly the narrative and ancillary clauses, must be appealed to; and if, as may happen, the matter still remains doubtful, then recourse must be had to the state of the title—the inference *in dubio* being

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

referred to, they are all, except the narrative, in perfect conformity with the dispositive clause. There is not one of the operative clauses which would have been expressed otherwise, if the minerals had been conveyed in terms. It is the narrative clause alone which creates any ambiguity. The argument therefore is that the dispositive clause is ambiguous, because it is not in conformity with the narrative, and that the narrative clause may be called in to control the dispositive, because the dispositive clause is ambiguous.

The pursuer's argument is, in substance, that the two clauses being in conflict, the narrative must prevail. I am not satisfied that there is any conflict; because, although the minerals are not accurately described as a part of the superiority, they are undoubtedly part of the superior's estate, and the subject of the two clauses may be substantially the same, in the framer's intention, although it is described imperfectly or inaccurately in the one, and more correctly in the other. But if the intention of the narrative were clearly repugnant to that of the dispositive clause, it is the latter that, according to the established canon of construction, must necessarily receive effect.

The question is not whether the deed confers *dominium utile* in the minerals, or *dominium directum*, but whether the minerals are conveyed at all; and the narrative is not invoked for the purpose of clearing up the point on which the dispositive clause is said to be inexplicit, and defining the feudal character of the right which the deed confers in the subject conveyed. Even for this purpose I should not think it legitimate to control the operative clauses by the narrative, if the operative clauses themselves are not ambiguous. But it is used, in fact, for the purpose of excluding altogether from the operation of the dispositive clause a subject which falls within its terms. The dispositive clause, according to the ordinary rules of construction, includes minerals, and the narrative is relied upon to exclude minerals from the conveyance.

It is said to have this effect because the conveyance is of a superiority, and a superiority cannot include minerals which have not been made the subject of a feu-right. The answer is that the deed does not convey a superiority, or a *dominium utile*. It conveys lands to be held of the granter's superior, subject to existing subaltern rights. If the subaltern rights are not coextensive with the lands included in the granter's infeftment, the property of that part of the estate which has not been feued is conveyed with effect, as the whole estate is conveyed in form, by the dispositive clause.

But the deed, as I have observed, is not to be construed as a disposition by a proprietor infeft. It is a disposition and assignation of a personal right, and the operative part of it is the assignation of the crown charter. The argument upon this point appears to have been misunderstood. The assignation of writs, when it occurs in a disposition, is merely subsidiary. Its purpose is to fortify the right conveyed by the dispositive clause; and accordingly it is said that the assignation of the charter can have no other effect than to warrant infeftment in the subjects already disposed. But when, as in the present case, the granter has no power to dispoise, the assignation of a charter and open precept is the only part of the deed which has any operative force and effect. If there were any conflict between the clause which formally dispoises the lands and the clause which effectually assigns the right, it might be a question which should prevail. But they are in perfect conformity with one another, and both of them include the whole lands, without exception of the minerals, as conveyed by the crown charter. The material point is that the seller, who is supposed to

have intended a reservation of minerals, has not only conveyed the estate without reservation by his own deed, but has also made over to his purchaser, absolutely and without qualification, the crown charter and precept which alone made it possible to complete a title in any part of the estate. The argument is that the superiority only was conveyed, and that the minerals remained in the granter's title. But the granter had no title either to the minerals or to the superiority; and if he had intended to complete a title to the minerals, he must have reserved right to make use of the crown precept for that purpose.

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

I do not think that the case of *Fleeming v. Howden* rules the present case. A decision on the construction of one instrument cannot be a precedent for the construction of another and different instrument; and the difference between the deed in *Fleeming v. Howden* and the deed now in question appears to me to be very material, for Charles Fleeming and his commissioners had no power to sell the minerals, and their want of power was clear on the face of the deed. The decision, therefore, was that a conveyance of lands will not carry minerals which it appears from the deed the granter has no power to convey. It may be that an explicit statement of a limitation of the granter's powers may be equivalent to an express declaration of intention to confine the scope of the conveyance. But that is not a reason for qualifying a conveyance, when the granter's powers are not limited in any other way than by express reservation. There is no such reservation, even in the narrative of the deed now in question. The utmost that can be said is that the narrative imports an intention to convey a superiority, and no other intention; and therefore that the narrative would be satisfied if nothing more than a superiority were conveyed. But the dispositive clause does, in fact, convey a superiority, and something more. The question would be precisely the same if it had conveyed the minerals in terms. The argument, in that case, would probably have been stated in a different form; and the pursuer's contention would have been in terms—as I think it is now in substance—not that the dispositive clause, when properly construed, is insufficient to convey minerals, but that in so far as it bears to convey minerals it is invalid and ineffectual, since the narrative shews that it was not intended that minerals should be conveyed. It appears to me to be a sufficient ground of judgment that an unambiguous conveyance cannot be overruled by an inference, to be collected from the narrative, that something less was intended than has been actually conveyed.

LORD WELLWOOD.—In judging whether the coal in the lands of Hillfoot and others was carried by the disposition by Mr R. E. Scott to J. McArthur Moir of 28th July 1837, it is legitimate and necessary to consider the state of the disponent's title at that date. He, as trustee on the sequestrated estates of Crawford Tait, was vested (1) in the *plenum dominium* of the coal, and (2) in the superiority of the surface which had been feued out to the defender's predecessor. Thus while he had the full and undivided estate of the coal, he had also the superiority of the surface, including right to the feu-duty payable by the proprietor of the surface, who happened to be at that date the disponent, Mr John McArthur Moir.

Keeping in view this state of the titles, I next proceed to consider the terms of the disposition, reading it in its natural order. It proceeds on the narrative of the disponent's right as trustee to, *inter alia*, “the superiority and feu-duty of the lands of Hillfoot and others lying in the parish of Dollar and county of

No. 129. *Clackmannan, belonging in property to Mr John M'Arthur Moir of Hillfoot.*
 Mar. 18, 1892. I observe in passing that Mr Moir was proprietor of the surface only, and not
 Orr v. Moir's of the minerals ; it is therefore reasonable to infer that the word "superiority"
 Trustees. is used with special reference to the rights of the superior in relation to J.
 M'Arthur Moir's right of property which was limited to the surface. The deed
 then proceeds to narrate that the disposer having exposed, *inter alia*, "the said
 superiority and feu-duty of the lands of Hillfoot to public roup and sale, Mr
 Moir had been preferred to the purchase, being the highest offerer, and that he
 had paid the purchase price ; and had also, by private bargain, purchased "the
 superiority and feu-duty of the lands of Lochyfaulds and others." The deed
 then proceeds : "Therefore I as trustee foresaid have sold, alienated, and dis-
 posed, as I with consent foresaid do hereby sell, alienate, and dispoⁿe from me
 and my successors in office or in the said lands and others to and in favour of
 the said John M'Arthur Moir, his heirs and assignees whomsoever, heritably
 and irredeemably, All and Whole the town and lands of Hillfoot," &c., "all as
 at present possessed by the said John M'Arthur Moir and his tenants ; as also,
 All and Whole the lands of Lochyfaulds, . . . formerly possessed by
 James Sharp, smith, and Thomas Hall, weaver, with the whole parts, pendicles,
 and pertinents thereof, all as more particularly described in the ancient rights
 and infeftments thereof." In the warrandice clause there is the following excep-
 tion : "Excepting always from this warrandice the feu-rights or infeftments of
 property of the said lands granted by my predecessors and authors to the feuars
 and vassals thereof."

It is maintained by the defender that, the coal not having been expressly reserved, the dispositive clause carried everything which the disposer had to convey, including the coal.

1. I shall assume, in the meantime, that the dispositive clause, if taken by itself, is unqualified and *ex facie* wide enough to carry all the disposer's rights in the lands of Hillfoot and others. It is impossible, however, to read the narrative and the dispositive clause together without seeing that the narrative is not consistent with this construction of the dispositive clause. The deed proceeds on the narrative of the sale of "superiority and feu-duty" of lands belonging in property to Moir, the dispoⁿee ; while the dispositive clause *ex hypothesi* is wide enough to convey the whole estate, which still remained in the disposer, including the coal, which did not belong in property to Moir, but to the disposer. How are the two clauses to be reconciled ?

It is settled law that the dispositive clause in a conveyance cannot be contradicted by subsidiary clauses ; and if they conflict with it, it must rule. But it is equally well settled that the dispositive clause admits of construction ; and that if it can be reconciled with other clauses in the deed which are unambiguous, it may be construed and qualified so as to be read in accordance with them.

The solution in the present case, I think, is that a conveyance of the lands is the appropriate way of conveying various and distinct rights. It is equally suitable for conveying the *dominium plenum* and the *dominium utile*. Again, it is a known and habile way of conveying a bare superiority. It is not only a habile way of doing so, but the more correct and appropriate form of conveyance ; although it has been held to be also competent to convey the superiority or *dominium directum* in express terms. In each case you must examine the other clauses in the deed in order to ascertain the character and extent of the right conveyed.

The form of the dispositive clause, therefore, being equally applicable to a No. 129.
conveyance of the superiority and a conveyance of all that remained in the dis-
poner, I think it is legitimate to ascertain from the narrative and other clauses Mar. 18, 1892.
of the deed and the titles which of the two the disposer intended to convey. Orr v. Moir's
Trustees.

The narrative is not, in my opinion, ambiguous. The word "superiority" is not properly used as meaning all that remains in the superior after he has feued out part only of the *dominium utile*. It is a relative term, and is and should in legal language be exclusively used (as here) in relation to and as contrasted with the *dominium utile* of the lands or those portions of them which have been feued out. "Superiority" implies a previous severance of the *dominium utile* or part of it, and the consequent existence of a vassal holding of the superior. In this case the only vassal whom the disposer had in Hillfoot was the proprietor of the *dominium utile* of the surface; and when the deed speaks of the superiority and feu-duty of lands belonging in property to the vassal, I think that the word superiority must be referred to the only portion of the lands of Hillfoot which had been feued out and belonged to the vassal, and that it cannot be held as intended to include that portion of the *dominium utile* which had been expressly reserved and never been feued out.

This use of the word is justified by reference to the origin of the terms *dominium directum* and *dominium utile*, which were invented, I think, to express the two estates resulting from the creation of a feu; *dominium directum* meaning the bare right or interest left with the grantor—(2 Ross's Lect., 147, 148).

Apart from the narrative, other subsidiary clauses of the deed are appropriate to and indicate a conveyance of an estate of superiority. In particular, the obligation to infeft, the exception of the feu-rights, and the assignation to the duties.

Therefore, interpreting the dispositive clause by the narrative, I think it is clear that only the bare superiority was conveyed, and not the coal, unless, indeed, there is an insuperable conveyancing objection to adopting such a construction. In my opinion no such objection exists, because the disposer's estate in the coal was distinct and separate from the superiority conveyed.

The case of *Fleeming v. Howden* (6 Macph. 782) is directly in point if regard be had to the conclusions of the action and the form of the judgment of the Inner-House, and also to the grounds of judgment not only of the Judges of the Inner-House, but of the Lord Ordinary, whose judgment they recalled.

The summons concluded not merely for declarator of the pursuer's right of property in the mines, metals, and minerals, but also for reduction of the disposition of 1811, and deeds following thereon, in so far as that deed, or the deeds following thereon, could be held to have disposed the said mines, metals, and minerals to the vassals in the lands. The Lord Ordinary found that under the deed of 1811, and deeds following thereon, the defender acquired an *ex facie* valid title to the minerals, and that the pursuer was barred by the negative prescription from challenging that disposition. He therefore assoilzied the defender. In recalling this judgment the Inner-House did not find it necessary to reduce the deeds in question, but merely found and declared in terms of the declaratory conclusions of the summons, in substance affirming the second plea as law for the pursuer,—“(2) Neither the disposition of the superiority of the defender's lands, granted in 1811, nor any of the other titles held as founded on by the defender, did, according to their sound meaning and true legal construc-

No. 129.
 Mar. 18, 1892.
 Orr v. Moir's
 Trustees.

tion, convey the mines, metals, and minerals of the said lands, nor in any way exclude or impair the right thereto reserved by the titles to the property thereof, in favour of the heirs of entail of John Earl of Wigtown."

The Lord Ordinary's grounds of judgment are clearly expressed in his note (6 Macph. 785),—"Whatever may have been the intention of the parties, there seems no reason to doubt that the disposition of 1811 operated as a valid feudal conveyance, not only of the superiority, but of every reserved right in the lands belonging to the superior. According to the principles of our law, the *dominium directum* is a right to the lands themselves burdened only with the vassal's right, and whatever is reserved in the vassal's charter remains the property of the superior. The right to the minerals was never separated from the superiority, so as to constitute a separate tenement. Therefore, when the superiority was conveyed to Lord Elphinstone in 1811, in the usual form of a disposition to the lands, with all right, title, and interest which the superior had in the lands, subject only to the burden of the feu-right, the right to the mines and minerals necessarily passed to the disponee along with the *dominium directum*, and no right of any kind remained in the grantor, for where lands are conveyed without reservation a right to the minerals, as well as to the soil, is understood to be given, and if this is not intended, the minerals must be expressly excepted from the grant. If this view be correct, the disposition carried every right to the lands which the superior had, including the property of the minerals, which had been reserved in the original feu-right." Those grounds of judgment, which form the backbone of the defender's argument in this case, were rejected by the Inner-House.

Before considering the reasons given by the Judges of the First Division, I should mention that the disposition of 1811 was couched in practically the same terms as the deed now under consideration. The deed, after narrating the commission under which the superiorities were being sold, ran as follows:—"Seeing that John Lord Elphinstone, proprietor of the lands and others after mentioned, is desirous of purchasing the superiorities, casualties, and feu-duties thereof, which are part of the said entailed estates, we have resolved to sell the same to him in virtue of the powers given to us by the foresaid commission"; and then, after narrating payment of £480 "as the price of the superiorities, feu-duties, and others of the lands and others after mentioned belonging in property to him," conveyed to him all and whole the lands in question, and all right, title, and interest they had therein. It will be observed that although this narrative is rather fuller and more redundant, it closely resembles that in the deed under consideration, especially in this, that the superiority to be conveyed was the superiority of lands the property of which the disponee already possessed, and that the only "lands" of which he had the property were, as here, the surface. The question to be decided was whether that deed carried the minerals which had been specially reserved by the earlier titles as in the present case.

I think that the judgment of the Inner-House affirmed two propositions for which ample authority was quoted. First, that where a proprietor of lands feus out the surface, reserving the minerals, the latter are erected into a separate estate; secondly, that the dispositive clause admits of construction, and that a conveyance in the dispositive clause of "the lands" being a *habile* way of conveying a bare superiority, will not be held to carry such reserved right if the context and the history of the titles negative an intention to do so.

In regard to the first point, it is, I think, immaterial whether the original owner's interest reserved in the minerals is regarded as *plenum dominium*, or as consisting of (1) *dominium directum*, and (2) *dominium utile*, although I think the former view is the more correct; in either view it is distinct from the superiority of the surface. Compare the opinion of Lord Justice-Clerk (Inglis) in *Hutton v. Macfarlane*, 2 Macph. 85; and that of Lord Curriehill in *Fleeming v. Howden*, 6 Macph. 790.

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

The more important passages in the opinions of the Judges are so fully quoted in the cases that I do not think it necessary to quote them again here; but as bearing out what I have given as the import of the judgment, I may refer particularly to the opinion of Lord Curriehill, pp. 790, 791, and the concise opinion of Lord Deas on pp. 794, 795.

They held that, *ex facie* of the deed, the minerals were not carried. Lord Curriehill, for instance, states the first question thus, p. 791,—“Whether or not, according to the true meaning and construction of the disposition of 1811, the mines were included in the subjects thereby disposed?” The answer of that question in the negative was the result at which the Court arrived.

Lord Deas, again, says that, looking at the deed of 1811, it was so perfectly clear on the face of it that it was not intended to convey the minerals, that it would be only waste of time to go over its terms,—“It professes to be granted in terms of the Act of Parliament, 20 Geo. II. c. 51, which gives power to heirs of entail to convey the superiority of lands to purchasers, but nothing else.” He then proceeds (p. 795),—“The question remains, whether—because the dispositive clause conveys the lands in general terms—this in point of law operates a conveyance of the minerals, whatever the intention of the parties may have been. I know nothing to warrant such a construction. Take the case already put, where one person has a feudal title to the minerals, and another to the lands; it does not follow that the minerals are conveyed with the lands, though they are not expressly excepted. The ordinary form of a disposition of superiority shews that the dispositive clause is subject to construction not only by the rest of the deed, but sometimes by other deeds. A disposition limited to the superiority has been sustained. But the usual and correct form is to dispose the lands themselves, and the feu-rights would stand good, even although they were not excepted (as they usually are) in the clause of warrantice.”

It must be conceded in favour of the defenders in the present case that in *Fleeming v. Howden* the Court founded strongly upon the fact that the commissioners had no power to convey anything but the superiority of the vassal's lands, and that this was patent on the face of the deed and the statute referred to; while in the present case the disponent had power, if he chose, to dispose the minerals. But that was only one conspicuous indication of intention which strengthened a construction of the deed, which was sufficiently clear without it. *Fleeming v. Howden* at least enables us to construe the word “superiority.” It is an authority for this, that it is not to be inferred from a narrative of power given to a vassal the “superiority” of lands owned by him, followed by a narrative that the vassal has agreed to purchase the superiority, that anything more is to be conveyed than the bare superiority of that portion of the estate which the vassal already possesses.

As to the older case of *Erskine v. Schaw*, we are under the disadvantage of having a very imperfect report of the opinions of the Judges. The case un-

No. 129. doubtedly seems to be in point in so far as regards the terms of the deed. But the opinions of several of the majority of the Judges seem to proceed to a considerable extent upon the subsequent actings of the parties and their presumed intention in entering into the transaction. By far the most detailed opinion reported in Sir Ilay Campbell's notes is that of Lord Eskgrove, which expresses distinctly and clearly the material heads of the argument for the pursuer in this case.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

Having to choose between the two decisions, I prefer the reasoned judgment in the case of *Fleeming v. Howden* to that in the older case of *Erskine v. Shaw*.

2. In the view which I have expressed it is unnecessary to consider the effect of the words in the dispositive clause which occur in the conveyance of the lands of Hillfoot and others, but not in that of the lands of Lochyfaulds and others, "all as at present possessed by the said John M'Arthur Moir and his tenants." There is authority for holding that such a description is *taxative* as regards the superficial boundaries of the lands conveyed (1 Bell's Lect. 586, and *Murray v. Oliphant's Wife*, M. 2262); and it may be that they are also *taxative* as regards the different strata. On this question I prefer to reserve my opinion. The words, however, are at least quite consistent with, and indeed confirm, the interpretation which the pursuer places on the narrative.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor should be recalled, and decree given in favour of the pursuer.

LORD KYLLACHY.—I am of opinion that the pursuer is entitled to decree. The disposition of 1837 is, in my opinion, a disposition of a mere superiority, and I am unable to hold that the property of the minerals formed, or could form, part of that superiority. The view I take of the case is shortly this:—

I first inquire, What is the legal construction of the disposition—construing it according to its terms, and without reference to anything not appearing on its face?

The deed begins with a narrative which recites, carefully and at length, two contracts of sale which it is the object of the disposition to carry out. These contracts of sale are set forth as the sole inducing causes of the disposition. And the subject sold is in each case declared to be the "*superiority and feudal duty*" of certain described lands. There is nothing about minerals or about any estate of property. The narrative recites simply the purchase of a superiority—a superiority assumed, if not expressed, to be *coextensive with the described lands*.

With such a narrative, one certainly expects to find that the other and operative clauses of the deed are appropriate to the conveyance of a mere superiority—that is to say, are expressed in the manner in which such a conveyance usually and properly expressed. Are then the other clauses in conformity with the narrative? Or do they go beyond the narrative and embrace a subject which had not been sold?

Neglecting in the meantime the dispositive clause, it can hardly, I think, be doubted that the other clauses of the deed are appropriate to the conveyance of a mere superiority, and have all the usual notes of such a conveyance. In particular, the warrandice contains an exception of subaltern rights. The obligation to infeft is *a me*, and not *a me vel de me*. There is no assignation of rents, only an assignation of feu-duties and casualties. The assignation of warrandice (which includes an assignation to an unexecuted precept in a crown charter

resignation) is qualified, so as to assign the precept only so far as applicable "to No. 129.
the town and lands of Hillfoot and others above disposed," and it is only granted "to the end that the disponee may be more readily seized and infeft in Mar. 18, 1892.
the premises." But, with or without such qualification, the clause is appropriate, on the assumption expressed in the narrative, to operate an infeftment in a superiority and in nothing else. Orr v. Moir's Trustees.

Turning next to the dispositive clause, it also is in appropriate terms. It conveys the superiority of the lands in the usual and appropriate mode, viz., by conveying the lands. It makes no exception of minerals, because, in point of construction, and according to the scheme of the deed, the conveyance included the superiority of the minerals. On the other hand, it omits the words (usual in a conveyance of *plenum dominium*) by which the granter conveys his whole right, title, and interest, present and future, in the subjects.

In short, I do not think it can well be doubted that, simply reading the disposition, and not going outside it, any Scotch conveyancer would at once recognise it as a quite typical disposition of a superiority, every clause being expressed exactly as it ought to be, on the assumption that it was desired to convey, or attempt to convey, a superiority over the whole lands described, and nothing more than such a superiority.

Within the deed therefore there is, if I am so far right, no ambiguity. But then it is said—and this I think raises the real question in the case—that on going outside the deed, and investigating the granter's title, it appears that good one part of the lands described, viz., the minerals, there was in fact no superiority, but only a *dominium plenum*, which had never been "split," so as validly to create a superiority. In other words, it is said that the assumption of the deed, viz., that the superiority extended to the minerals as well as the surface, was erroneous, whence it is said to follow that the deed must be reconstructed in the light of this circumstance, and must be held to operate a conveyance of the *plenum dominium* of the minerals, because the language of the dispositive clause is apt to carry such *plenum dominium*, and if it does not do so, must be held, as regards the minerals, to carry nothing. It is further said that when once it is known that the minerals were held in *plenum dominium*, it becomes impossible to read the assignation to the precept in the crown charter except as contemplating an infeftment in such *plenum dominium*, because otherwise, just as with the dispositive clause, the assignation would, *quoad* the minerals, operate nothing.

Now, I am not prepared to admit that the disposition, taking it as a disposition confined to the superiority of the minerals, operated nothing. It certainly did not, as the title stood, warrant any infeftment in the minerals; and if the infeftment which followed upon it was so expressed as to apply to the minerals, it was infeftment beyond its warrant, and therefore so far inoperative. But the disposition at least imported an obligation by the disponent to vest the disponee in the superiority of the minerals, and I suppose it is not doubtful that the necessary "split" between the property and superiority of the minerals could have been quite easily effected if the disponent was willing or could be compelled to bear the expense of a not unfamiliar conveyancing operation. That operation might have been performed in various ways. The simplest way would have been for the disponent to grant a corroborative disposition of the minerals in exchange for a feu-charter by the disponee reconveying the *dominium utile* of the minerals. Or the disponent might have made up his title to the minerals

No. 129. (assumed to be not validly conveyed) and have then granted a feu-charter to his agent, and thereafter made a new and valid disposition of the superiority in favour of the disponee. In short, reading the disposition as I read it, it was not at all inoperative, but only as regards the minerals incomplete. It transferred the right, but something more was required to transfer the title, the disponent being however bound, and having it in his power, to do what was necessary for that purpose.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

But further, and even assuming that the disposition, read as a conveyance of a mere superiority, was as regards the minerals inoperative, I cannot assent to the argument that this in itself warrants an enlargement of the construction so as to make the deed read, *quoad* the minerals, as a conveyance of a *plenum dominium*. It may be that, if you discard the narrative, and also the assignation to feu-duties and casualties, the other clauses of the disposition are not inconsistent with a conveyance of *plenum dominium*. It may also be, that if you assume such a conveyance, the disposition becomes operative throughout. But the question after all is, What did the parties to the disposition mean? and if the narrative is clear, and the operative clauses are consistent with the narrative—though also it may be consistent with something else—that something else is not necessarily to be assumed, merely because it turns out that otherwise the deed will in some particular fail of effect. The construction of a deed is one thing, its effect is another. The results of a given construction may no doubt be an element for or against such construction, but they cannot override the language of the deed, or the scheme of the deed, if such scheme is clear upon its face. Supposing one has to choose between, on the one hand, ignoring, *i.e.*, the narrative of a deed, and, on the other hand, acknowledging that the deed professes to do more than it validly effects, I confess I see no reason why the former alternative should necessarily be preferred to the latter.

In this case, as I have already said, I think the scheme of this disposition is sufficiently clear on its face. The narrative, I think, plainly implies, if indeed it does not express, the assumption that the superiority disposed is coextensive with the lands. That is to say, it plainly assumes that there has been a "split" both in the surface and in the minerals. The superiority sold is said to be the superiority of the lands, *i.e.*, the whole lands, and that cannot, I think, mean less than that the disposition proceeded on the footing that such superiority existed. Now, suppose that that had been expressed in so many words, suppose that it had been set forth in terms that the superiority and property of the surface and minerals had been, or were believed to have been, validly split, and that then the deed had proceeded, in the terms in which it does proceed (perfectly apt terms), to convey that superiority, could the disponee in that case be heard to claim the *plenum dominium* of the minerals on the ground which is now suggested? I cannot think so, but yet, if I am right, that is in substance the case with which we have to deal.

In truth, the defenders' argument may really be illustrated thus. It was formerly, as we know, the practice for landowners in Scotland to split the superiority and property of their estates for voting purposes, and to divide the superiority among their friends and relatives. *The dispositions conveying the superiorities were expressed exactly as the disposition here.* But it was occasionally discovered, sometimes long afterwards, that the original split had been badly performed, so that there was really no superiority which could be effectually conveyed. What was the position of the landowners who had in these

circumstances granted those dispositions? According to the defenders they had divested themselves of their whole estate. The dispositions were ineffectual as dispositions of a superiority. They were effectual if read as dispositions of *plenum dominium*. Therefore, however clear may have been the narrative, however appropriate to that narrative may have been the operative clauses, each disposition, so soon as the state of the title was discovered, became a disposition of a *plenum dominium*, dividing the landowner's estate among his friends.

No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

I come therefore to the conclusion that it is not always safe to go outside deeds of this description in order to construe them by the state of the title. It may be sometimes necessary to do so; but not, I venture to think, when, without doing so, and taking the narrative and operative clauses together, the intention and scheme of the instrument are sufficiently clear.

I may note one or two observations on certain points which have more or less come up in the argument.

It has been suggested that the expression "superiority and feu-duty," as used in the narrative, may be read as covering the whole estate possessed by the superior in the lands, including reserved (or acquired) minerals held in *plenum dominium*. I do not myself think it possible so to hold. A superiority cannot exist except as relative to a *dominium utile*, and cannot extend to a subject of which the superiority and property remain unsplit. Nor do I think it possible to regard the right to minerals as a mere accessory right—not amounting to a right of property. I think it must now be held as settled that minerals form, or may form, a separate estate, capable of separate infeftment, and in no respect less capable than the surface of being held as a separate estate.

It seems also to be suggested—at least the suggestion runs through the defenders' argument—that undue liberty is taken with the dispositive clause in holding it to be open to construction. In other words, it is said that a disposition of lands—if made without exception or reservation—conveys, as matter of construction, every estate existing in the lands, and conveys with effect every estate possessed, or that may come to be possessed, by the disponent. In short, the dispositive clause here is said to be clear and unambiguous, necessarily conveying, *inter alia*, the *plenum dominium* of the minerals, and not capable of being controlled by the narrative even if the narrative is clear.

The answer to this seems to be that there are, according to feudal law, three estates or *dominia* which may exist in or over lands,—(1) the *dominium plenum*; (2) the *dominium directum*; and (3) the *dominium utile*; and that according to settled practice the disposition is expressed in exactly the same terms whichever of these estates is intended to be conveyed. In each case, the clause simply disposes the lands, making no exception or reservation either of subaltern rights or over-superiorities. On this matter reference may be made, *inter alia*, to the *Juridical Styles* (vol. 1, pp. 113 and 125), and Duff's *Feudal Conveyancing*, p. 191. In both of those works—works of the highest authority in such matters—it is carefully explained that as between property and superiority there is no difference in the terms of the disposition; the differences to be noted by the conveyancer being only the difference in the warrandice, the assignation to rents, and other ancillary clauses. And if it be asked how this ambiguity (or indefiniteness) of the dispositive clause is to be solved, the answer is just this—that the context of the deed, and particularly the narrative and ancillary clauses, must be appealed to; and if, as may happen, the matter still remains doubtful, then recourse must be had to the state of the title—the inference *in dubio* being

No. 129. that the grantor gives what estate he has, and, on the other hand, does not give what he has not. In the present case it is not necessary to go beyond the context. If I am right, the narrative here is clear; and every other clause is in conformity with the narrative.

Mar. 18, 1892.
ORT v. Moir's
Trustees.

It may be pointed out that, if the defenders' construction of the dispositive clause were to prevail, some results would follow which would be startling. For example :—

(1) If a disposition of lands covers, as matter of construction, every estate in the lands, it would cover, for example, a mid-superiority not belonging to the grantor; and the grantor would not only be liable in warrandice, but would be bound to convey the mid-superiority if, at some subsequent period, he acquired it. Indeed accretion would operate the same result whether he conveyed it or not.

(2) Similarly, on the same hypothesis, a disposition of lands would cover the *dominium utile* of the lands, although in the clause of warrandice feu-rights exhausting the subject were expressly excepted. An exception from the warrandice is not at all the same thing as an exception from the conveyance. And so the grantor, on the supposed construction, would find himself divested not only of any feu-right which he happened to possess, but also of any feu-right which he happened afterwards to acquire. Other absurdities may be figured, and could only be obviated by the dispositive clause expressing—what in practice it never expresses—the particular estate or *dominium* which it is desired to convey. It will not do to suggest, as a solution, that a conveyance of “lands” conveys only such estate as the grantor possesses. The state of the grantor's title may no doubt aid the construction where the context fails; but it can never determine it. Otherwise, there would be no difference between the *construction* of a conveyance and its *effect*; and amongst other things the clause of warrandice would be meaningless.

As to the two previous decisions referred to in the argument, I am satisfied, on examining the reports, and particularly the interlocutor in the case of *Fleeming v. Howden*, that the point now in dispute was not only considered, but was the subject of express decision in that case—a case which I take leave to think is one of very high authority. The decision proceeded solely on the *construction* of the disposition and of the infestment which followed; and having procured and examined the disposition, I can find no substantial difference between it and the deed here. The narrative, no doubt, made it very clear that a superiority only was intended to be conveyed; but so, I think, does the narrative here. Similarly, the disponers being there infest, the donee's title was made up by procuratory and charter of resignation, instead of as here by assignation to an unexecuted precept in such a charter. But that can hardly be thought material. And, subject to these differences, every point of difficulty which has been suggested here—both with reference to the construction of the disposition and the construction and effect of the infestment which followed—occurred equally in the case of *Fleeming*. With respect to the old and unreported case of *Erskine*, I can only say that, if it were necessary to choose as between that case and the case of *Fleeming*, I prefer the latter; but I observe in the case of *Erskine* that stress was laid on the actings of parties subsequent to the disposition, and also that the dispositive clause there under construction not only conveyed the lands in general terms as here, but also conveyed *all right, title, and interest, present and future, belonging to the grantor*. I do not say it was so, but it may have

been that those words made it difficult—notwithstanding the terms of the narrative—to say that the mineral estate belonging to the grantor was excluded from the disposition.

No. 129.]

Mar. 18, 1892.
Orr v. Moir's
Trustees.

It remains to notice in a word the alternative argument for the pursuer, noticed by the Lord Ordinary—viz., that the disposition is on its just construction confined to the superiority of such subjects (surface or minerals) as were already held in property by the disponent; the narrative reciting a purchase of the superiority of lands “belonging in property” to the disponent, and the dispositive clause disposing “the lands of Hillfoot, &c.,” “all as at present possessed by the disponent and his tenants.” The pursuer urges, and I think with force, that this reading—which is the *literal* reading—reconciles the narrative and dispositive clauses; and is at least preferable to the defenders’ reading, which makes the dispositive clause go beyond the narrative. He points out that although the words quoted appear to apply only to the lands of “Hillfoot and others,” these lands in fact include (as shewn by the titles) the small pendicles (Lochyfauld, &c.) separately disposed; and are indeed the only lands mentioned in the crown charter of resignation, the precept in which is assigned.

Now, as already said, I myself prefer the construction which makes the narrative and the dispositive clauses deal each with the *whole* lands (surface and minerals), but deal each with the mere superiority of the whole lands. But if that construction be rejected, then I have no hesitation in preferring the alternative construction now suggested to that of the defenders. One thing I consider must be presumed—that the narrative and dispositive clauses *apply to the same subject*. Accordingly, if, contrary to my view, it is necessary, in order to make their language square, to read the references to “property” and “possession” as looking both to vertical and lateral boundaries, I see, I confess, no particular difficulty. It may, I think, quite fairly be held that the minerals are excepted from the narrative as not being held in property by the disponent; and are excepted from the dispositive clause as not being possessed by him or his tenants.

I have purposely abstained from saying anything as to the pursuer’s title to the land. That title has not been challenged either in argument or on the record. It has throughout the case been taken for granted—and I assume rightly so—that the pursuer has had transmitted to him all rights which remained vested in Crawford Tait’s trustee after the disposition of 1837 had been executed. The sole question before the Court is as to the defender’s title under that disposition. If, on the just construction of that disposition, the minerals were not conveyed to the defender, it appears to be common ground that they now belong to the pursuer.

LORD KINCAIRNEY.—The first question is, whether the coal under the lands of Hillfoot and Lochyfaulds was carried by a disposition of these lands, dated 28th July 1837, granted by the trustee on the sequestrated estate of Crawford Tait, in favour of John M’Arthur Moir.

The state of the titles was as follows,—Treating the lands of Hillfoot and Lochyfaulds as one subject, it was vested in the Duke of Argyll as one undivided tenement and estate, including the minerals, by virtue of his title to the lands. He granted feu-charters of the lands, reserving all coals and coalheughs. The effect of these feu-charters was to convert the subject into two separate subjects or tenements. The one of these tenements was the coal, and the other the sur-

No. 129. face and all below the surface which was not coal—in other words, the lands except the coal. There were two proprietors of the latter tenements; the vassal, **Mar. 18, 1892.** who was in right of the *dominium utile* of the tenement, and the Duke of Argyll, **Orr v. Moir's** the superior, who was in right of the *dominium directum* of the tenement. The **Trustees.** former tenement—the coal—belonged to the Duke of Argyll alone. The superior thus retained two separate subjects or tenements—the coal, which he had in *plenum dominium*, and the lands, minus the coal, of which he had only the *dominium directum*. These two tenements, however, formed only one estate, and the superior retained them under one title, his original title to the lands. The expression, the lands of Hillfoot and Lochyfaulds, when occurring in his titles, comprehended the coal.

The *dominium utile* brought into existence by these feu-charters became vested by a series of titles in John M'Arthur Moir, predecessor of the defender, and belonged to him in 1837.

The other estate came to vest in the trustee on Tait's sequestrated estate, as it had been vested in the Duke of Argyll. Neither Tait nor his trustee were infert. On 28th July 1837, the trustee granted the disposition on which this case depends.

There was nothing unusual in this state of the titles. It is very common for minerals to be separated from the land in this precise manner, and therefore a question as to the proper and appropriate deed to be granted by the superior when he desires to sell the *dominium directum* with or without the minerals is of general importance.

Both parties are agreed that this disposition carried the superiority of the subject feued. The pursuer's case is that it carried nothing else; the defenders', that it carried the coal also.

There is no doubt that the disposition in question is of the character of a disposition of a superiority. Probably it is not framed according to the best style of a disposition of a superiority by the superior to his vassal. According to the style given in Ross's Lectures (ii. 276, 277), and also in the Style Book (2d ed. i. 134), the dispositive clause of such a deed should bear, after the description of the lands, some such words as these, "in the fee and property of which" the donee "stands vested and seized," words which, although not essential, would make the scope of the conveyance apparent from the dispositive clause, independently of the clause of warrandice (Ross's Lect. ii. 208). But, subject to that criticism, the deed may be regarded as the appropriate deed for conveying the *dominium directum* to the vassal. The exception of the feu-rights in the clause of warrandice, the obligation to infert *a me*, the reference to feu-duties and casualties, are all appropriate to, and indicative of, such a deed. All that is clear. It is just such a deed as might be granted to a vassal by a superior who had no interest in the lands except his right of superiority, and desired to convey all the interest which he had. But is it the appropriate deed to be granted by a superior who held under his title to the lands, not the superiority only, but the minerals also, and who desired to retain the minerals? I do not think so. It would be strange if precisely the same deed should suit circumstances so diverse. I know of no statement as to the practice in such a case more authoritative than the passage in Professor Bell's Lectures, quoted in the pleadings, where he says that if, in a disposition of a superiority by a superior, he does not expressly retain the minerals, they will be comprehended in the disposition (Bell's Lectures, i. 572). I think the deed is not well adapted to carry out the

purpose which the pursuer maintains to have been intended, and from that circumstance the difficulty of the question arises. No. 129.

If the dispositive clause alone were considered, the conclusion that the disposition carried the coal could hardly be resisted. It bears that the granter disposes the town and lands of Hillfoot, "all as at present possessed by the said John M'Arthur Moir and his tenants, as also All and Whole the lands of Lochyfaulds within the dykes betwixt the Orchard on the west, Bogyetts on the east, and Lochydubs on the south parts." Certain other inconsiderable subjects are mentioned, and the general words follow, "with the whole parts, pendicles, and pertinents thereof, all as described in the ancient infeftments thereof." Mar. 18, 1892.
Orr v. Moir's
Trustees.

Nobody denies that a conveyance of lands *prima facie* includes the coal, if there be nothing inconsistent in the context. The addition of the words "including the coal" would have been surplusage. I think there is nothing in the dispositive clause which derogates from the *prima facie* meaning. I am satisfied that the words "as possessed by John M'Arthur Moir and his tenants" do not. It is true that the coal never was possessed by Mr Moir. But such a description is very common, and it is used generally, if not universally, to serve instead of a description by boundaries. The suggestion that these words were inserted of set purpose to indicate that the coal was not disposed of, seems inadmissible. For if there had been such a design present to the mind of the drawer of this deed, it cannot be doubted that he would have excepted the coal expressly. Further, if that had been intended, Lochyfaulds would have been described in the same manner. But it is not; it is described by boundaries; and there is no suggestion that the coal under Lochyfaulds was conveyed and the coal under Hillfoot not conveyed.

Further, the fact that the subject has been converted into two separate subjects or tenements does not seem of consequence in this question. "The lands" *prima facie* include the minerals, just as much whether the expression "the lands" comprehends two tenements or one; and if the description, "the lands of Hillfoot and Lochyfaulds," was used in this deed with the same meaning which it bore in the titles of the Duke of Argyll and of Mr Tait—that is to say, in the titles of the granter of the deed—as presumably it was, it most certainly comprehended the minerals.

Now the dispositive clause is in a real and practical sense the ruling and paramount clause of a disposition. It cannot be contradicted or readily explained; and, if unambiguous, it cannot be displaced or controlled by the other clauses. "The language in which these subsidiary clauses is expressed cannot be permitted to override plain words of disposition, although other clauses may legitimately be referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause."—Per Lord Watson in *Lee v. Alexander* (3d August 1883, 10 R., H. L., 91). Again, in *Chancellor v. Mossman* (19th July 1872, 10 Macph. 995), the Lord President says that if the expression of a dispositive clause "is clear and unambiguous, it is not allowable to go to any other parts of the deed in order to contradict or explain that clause."

But this case can hardly be put so high as that. I do not hold that the dispositive clause can be treated as unambiguous. Probably a dispositive clause is seldom unambiguous and self-explanatory in all its terms. There are various cases in which dispositive clauses, not obviously ambiguous, have been explained

No. 129. by the other clauses—as, for example, by the tenendas, in *Bain v. Hamilton* (10th Mar. 18, 1892. May 1865, 3 Macph. 821), and *Lord Advocate v. Sinclair* (7th Jan. 1867, 5 Orr v. Moir's Macph., H. L., 97). In the class of cases regarding the effect of a general conveyance on a previous special conveyance of particular lands, the Court in Scotland has looked even beyond the other clauses of the deed—see *Campbell v. Campbell* (8th July 1880, 7 R., H. L., 100); and, according to a practice which is quite common, in a conveyance of the superiority, the clause of warrandice, while it does not perhaps affect the construction of the dispositive clause, controls its effect. In *Fleeming v. Howden* the narrative clause was one of the elements which led the Court to the conclusion that the minerals were not carried by the dispositive clause.

In short, I think that this dispositive clause is open to construction, and further, that it may be legitimately construed as not including coal, if it appears by plain implication from the other clauses of the deed that it was intended not to convey the coal.

Keeping out of view at present the narrative clause, and attending to the other subordinate clauses, it appears that they are appropriate to a conveyance of a superiority, which, indeed, is a matter of course. They are, however, equally well adapted to carry the minerals also. It is true that there is no assignation to the rents, and no exception of leases in the warrandice clause. But this omission loses its significance when it is considered that there were no open coalfield, no leases, and no rents. There is nothing in the absence of a precept of *sasine de me*, because the granter was not infeft, and such a clause would have been plainly unsuitable in any view.

Further, the deed does not contain the words “with all rights, title, and interest.” Mr Bell mentions (Book iii., chap. 2, t. 1) a case where, in a gratuitous disposition by a granter who had in his person two separate feudal estates, the superiority and *dominium utile*, the use of these words had been held in consultation to be important. But in this case the disposer had only one feudal estate, although it embraced an interest in two separate tenements; and it has been decided that in onerous deeds these words are unnecessary and superfluous (*Love v. Stone*, 6th Nov. 1863, 2 Macph. 22).

On the other hand, there are some of the subordinate clauses which although fitting enough in a disposition by a superior who had nothing but the superiority, were, to say the least, unguarded and inappropriate in a disposition by a superior whose title included the minerals, if he did not mean to convey them. They indicate a devolution of the whole right of the disposer to the disponent. In particular, there is assigned a crown charter, “with the unexecuted precept of *sasine* therein contained, in so far as applicable to the town and lands of Hillfoot and others above mentioned.” This precept of *sasine* was undoubtedly a precept to infeft in the whole lands, including coal, and it is not readily to be assumed that, when infeftment was taken on the precept, on 6th July 1838, as appears from the notarial instrument in favour of John M'Arthur Moir, that precept remained unexhausted as regards the coal. Again, the disponent is surrogated and substituted in the full right of the premises of the disposer. It is true that the effect of these clauses must be limited by the dispositive clause; all that is suggested is that, if it had been in the view of the granter that the coal was not to be conveyed, they would have been expressed in more qualified terms.

On the whole, I think that, apart from the narrative clause, there is no suffi-

cient ground for limiting the comprehension of the dispositive clause, and there No. 129.
appears little difficulty in reaching that conclusion.

But no doubt the narrative clause is of great importance in this question. I ^{Mar. 18, 1892.} Orr v. Moir's
do not doubt that it is permissible to refer to it in order to obtain assistance in Trustees.
construing the dispositive clause, but I certainly think that that must be done
with great caution.

The narrative clause is very inferior in importance to the dispositive clause, and, probably, is not always framed with the same caution and exactness. For it is not only inoperative, but in truth it is almost if not altogether superfluous and mere redundancy; and when used to interpret the dispositive clause, it is put to a use for which it was not intended.

It is not to be denied that the narrative clause, construed according to its *prima facie* meaning, sets forth a purchase and sale of a bare superiority and nothing else. But still, although that be so, it is not beyond the reach of construction; and I think that the term superiority may be ambiguous. No doubt, it primarily denotes the estate corresponding and relative to the *dominium utile*, and nothing more; but it is capable of meaning the whole interest in the lands within the title and infeftment of the superior. Such an interpretation seems countenanced by Lord Curriehill in *Bain v. Duke of Hamilton* (19th May 1865, 3 Macph. 827), where he says that "The right to work the minerals on the lands, although by law it would naturally go to the vassal as part of the *dominium utile*, may be reserved to the superior as part of the *dominium directum*, and in such a case the right of a superior depends not so much on the reservation in his favour as on his own antecedent right."

It is countenanced also in the notes of the opinions of some of the Judges in the case of *Erskine v. Shaw*, referred to in the pleadings, especially in those of Lord Monboddo and the Lord Justice-Clerk.

What the deed really says is, that the parties bought and sold the superiority, and that therefore the disponee disposed his whole remaining interest in the lands, putting the disponee in his place in regard to them; and the question arises, whether the narrative clause shall explain the dispositive clause, or the dispositive clause the narrative, both being open to construction.

Further, even if it should be assumed as certain that the narrative clause mentions nothing but the bare superiority, that proves nothing more than this, that the coal was not thought of as a valuable saleable subject, perhaps not as an existing subject. The deed bears the view that because the superiority, being the only estate of apparent value, was sold, the whole interest of the disponer was conveyed, no interest in the estate being reserved.

The question may be said to be narrowed to this, Was the coal not conveyed because not mentioned, or was it conveyed because not excepted? That appears a question difficult to solve, and it is therefore important to find that the precise point has been decided in the case of *Erskine v. Shaw*. That case, so far as the judgment depends on the deed, is absolutely in point. There is no material distinction between the two deeds. The note preserved of the judgments is intelligible, and the case, having regard to the eminence of the Judges who formed the Court, must be admitted to be important. No doubt some of the Judges refer to the conduct of the parties after the sale. But the judgment does not seem to have proceeded to any material extent on that ground. The chief grounds of judgment appear to have been—(1) that, *prima facie*, the dispositive clause included the minerals; (2) that the scope of the dispositive clause

No. 129. ought not readily to be narrowed by the narrative clause; (3) that it was possible
 Mar. 18, 1892. to read the narrative clause in accordance with the *prima facie* meaning of the
 Orr v. Moir's dispositive clause; and (4) that if the disponent intended to retain the minerals,
 Trustees. it was incumbent on him to have excepted them expressly. These grounds of
 judgment may all be applied to the present case, which can hardly be decided
 in favour of the pursuer without overruling that decision.

The only case which is said to be opposed to it is *Fleeming v. Howden*. But I think, in truth, it is not. In that case the Judges went on a great variety of considerations. But the one prominent point was undoubtedly this, that it appeared from the deed that the disponents had no power to dispose the minerals. The mere want of power was not of itself conclusive, because the question was with singular successors, but I think it formed the chief ground on which the Court proceeded in construing the deed, and therefore the main ground of judgment; and it distinguishes that case from the present and from *Erskine v. Schaw*. If this case were decided for the defender, that judgment, *Erskine v. Schaw*, and *Fleeming v. Howden* would all be consistent. For these reasons, I have come to the conclusion that the interlocutor of the Lord Ordinary should be affirmed.

If, however, it shall be held that the disposition in question did not convey coal, the second question whether it was carried by the disposition in favour of the predecessor of the pursuer arises, and I am of opinion that it was.

LORD STORMONTH DARLING.—I remain of the opinion expressed in the interlocutor under review.

But I should like to explain one sentence in my former opinion, in which I say that "the superiority means simply the estate remaining in the superior." I agree with those of my brethren who hold that it is not an accurate use of language to describe reserved minerals as forming part of a superiority. But inasmuch as the minerals here formed part of the superior's estate, and were held on his original title, I think it may quite well have been intended to include them under the phrase "superiority," particularly in a clause like the narrative, which is non-operative, and does not demand such precision of language as the dispositive clause. I am, therefore, not satisfied that there is any real conflict between the two clauses, but if there is, I am clearly of opinion that the dispositive clause is unambiguous, and must prevail.

LORD LOW.—The disposition of 1837, even if the narrative clause be omitted, is framed in terms appropriate, according to established practice, to the conveyance of an estate of superiority. The obligation to infeft is *a me only*; in the warrandice clause feu-rights and infeftments of property are excepted; and there is an assignation, not to the rents, but to the feu-duties and casualties. These clauses are indicative of a disposition of an estate of superiority, and suggest that the disposition of the lands in the dispositive clause, although *ex facie* unlimited, is truly limited to an estate of superiority of the lands.

The narrative clause appears to me to be unambiguous. The cause of granting is there said to be the purchase by John M'Arthur Moir of "the superiority and feu-duty of the lands of Hillfoot and others . . . belonging in property" to him. I think that it can hardly be disputed that the usual and natural meaning of the word "superiority" is the *dominium directum* of lands, the *dominium utile* of which has been given out to a vassal. That the word is

used here in that sense seems to me to be clear, because it is defined as being No. 129. the superiority of the lands "belonging in property to John M'Arthur Moir." Mar. 18, 1892.
 I do not see how a superiority so defined can be held to include an estate of *plenum dominium*, with which John M'Arthur Moir had no connection what- Orr v. Moir's Trustees.
 ever.

Thus, if the disposition alone is considered, the inference must be that it deals with an estate of superiority only. If it deals with an estate of superiority only, it is consistent throughout; if it deals in the operative clauses with something more than an estate of superiority, then there is a repugnancy between these clauses and the narrative clause.

In order therefore to ascertain what is the precise effect of the disposition, it is necessary to consider the state of the titles at the time when the disposition was granted. The titles disclose that the disponent was possessed of the superiority of the surface, and the *plenum dominium* of the minerals, both of which estates he held under the same title. The disponent, Mr Moir, was proprietor of the *dominium utile* of the surface only.

But although the disponent held the superiority of the surface and the *plenum dominium* of the minerals by virtue of the same title, these constituted two separate estates. When the surface of the lands was feued out, reserving the minerals, the latter became as much a separate estate from the surface of the lands as if they had been different lands altogether. The case of *Fleeming v. Horden* seems to be a direct authority for that proposition. But if that was the result in law of feuing the surface, under reservation of the minerals, it seems to me to follow that the estate of superiority of the surface was a separate estate from the minerals, because it was just the part which remained to the superior of the separate estate in the surface created by the granting of the feu-right.

So standing the titles, the question is whether the disposition conveys to Mr Moir only the superiority of the surface which he held in property, or that superiority plus the *plenum dominium* of the minerals.

Now I admit that, setting aside the narrative clause, the disposition is not only capable of carrying both the superiority of the surface and the *plenum dominium* of the minerals, but is framed in terms appropriate for that purpose, looking to the state of the titles. If a conveyancer had intended to convey both the estates (of superiority and in the minerals) possessed by the disponent, I do not think that he would have framed the disposition (of course apart from the narrative clause) in different terms from those which are actually used. He might have added an assignation to rents; but as the minerals had never been worked, he might have considered such a clause to be unnecessary.

The result is that, in my opinion, the operative clauses are, in the circumstances, appropriate to the conveyance either of the superiority of the lands only or of that estate and the *plenum dominium* of the minerals. But if both of the estates are held to be included in the disposition, then I think that it must also be affirmed that there is repugnancy between the narrative and the other clauses of the deed. The presumption is against such an interpretation of the deed, although if the operative clauses are not open to construction but must receive the widest effect of which they are capable, they must control the narrative clause, however clearly it may be expressed. I think, however, that the operative clauses are open to construction. I admit that they are *habile*, if taken alone, to carry both superiority and minerals; but they are also, as I have

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

already said, the appropriate clauses, in my opinion, according to well-settled practice, for the conveyance of an estate of superiority only.

If, therefore, the disponent had been possessed of an estate of superiority co-extensive with the lands enumerated in the dispositive clause, I should, without much difficulty, have come to the conclusion that that estate alone was carried, because that view would have given effect to every clause in the disposition, and would have been inconsistent with none.

The disponent, however, had not an estate of superiority in the whole lands but only in the surface. How does that fact affect the construction of the disposition? It is said that it shews that the narrative and the operative clauses are in any view repugnant, because the former speaks only of the superiority of what Mr Moir held in property, while the latter clearly disposes an estate in the whole lands, whatever that estate may be. Assuming that that is the case, I cannot think that it necessitates a different construction of the disposition from that which I would otherwise put upon it. The disponent had an estate of superiority coextensive with the lands in one sense, and the disposition (read as a whole) bears to be, and is conceived in terms appropriate to, a disposition of an estate of superiority only. In these circumstances I think that it is more consistent with sound principle to hold, that although the dispositive clause was wider than the estate of superiority possessed by the disponent, it not the less dealt with an estate of superiority only, than to hold that the dispositive clause is to be stretched beyond the professed scope of the disposition altogether, and construed as including a separate estate of a character different from that in regard to which the parties contracted, and with which they allege that they are dealing.

I have arrived at this conclusion the more readily, because it seems to me to be the only one which is consistent with the judgment in *Fleeming v. Howden*—a judgment which I think must be regarded as an authority of the greatest weight. In that case the state of the titles, and the disposition under construction, were substantially identical with what they are here. It is true that there were elements in that case which there are not in the present, the most important being the want of power on the part of the disponent to convey the minerals. But the important point is that the Court held that the disposition was open to construction. If the disposition had not been open to construction, the fact that the disponent had no power to convey the minerals could never have enabled the Court to arrive at the conclusion which they did arrive at. Unless the dispositive clause had been capable of being construed as limited to the superiority, the want of power on the disponent's part would not have entitled the Court to give decree in terms of the declaratory conclusions of the summons, although it might have formed a sufficient ground for reduction of the disposition.

I therefore consider the case of *Fleeming v. Howden* as a direct authority for saying that the operative clauses of the disposition now under consideration are open to construction, and must be held to carry either the whole estate of the disponent or the superiority only, according as the one view or the other is most consistent with the context of the deed, the state of the prior titles, and such circumstances as the actings of parties. Here the state of the title is exactly what it was in *Fleeming's* case, and can therefore create no bar to the view which I take; there are no actings of parties one way or the other; and the context of the deed appears to me to be absolutely clear and unambiguous. I am therefore of opinion that this case is ruled by that of *Fleeming v. Howden*.

No. 129.

In some respects, indeed, it seems to me that the present case is more favourable to the view that the minerals were not included than the case of *Fleeming*. In the first place, in that case the lands were disposed with "all right, title, and interest, claim of right, property, and possession, as well petitory as possessory, which we, as commissioners foresaid, or the said Honourable Charles Fleeming, his predecessors and authors, heirs and successors, have, had, or can any way pretend thereto in all time coming." There are no such words in the disposition in this case, and I do not think that it can be said that such words are altogether unimportant. In the second place, in the dispositive clause in *Fleeming's* case the description of the lands was not qualified in any way. In the present case the description of the lands of Hillfoot is limited by the words "all as at present possessed by John M'Arthur Moir." These words look very like the correlative in the dispositive clause, of the words "belonging in property to John M'Arthur Moir," which are used in the narrative clause as descriptive of the superiority which Mr Moir had purchased, and I should have been disposed so to read them, if it had not been that no such words are applied to the lands of Lochyfaulds. These lands, however, were originally part of Hillfoot, and had been conveyed to and possessed by Mr Moir's predecessor under the general name of Hillfoot, and the reason for their insertion as a separate subject in the disposition appears to have been this: Lochyfaulds was mentioned separately in the superiority title, and after the purchase by Mr Moir at the public roup of the superiority of Hillfoot a question seems to have arisen whether the superiority of Lochyfaulds was included. Mr Moir accordingly, by a private transaction, paid £30 for the superiority of Lochyfaulds, and these lands were therefore inserted in the dispositive clause as a separate subject. They were also described by boundaries, and that fact is legitimately relied on in support of the view that the words referring to the possession of Hillfoot were intended to do no more than indicate superficial boundaries. I feel the force of this view, and therefore I do not lay much stress upon the limiting words in the dispositive clause, although I think that they constitute an element which should not be altogether left out of consideration.

It is said that the view which I have expressed is inconsistent with the assignment in the disposition to the charter of resignation and confirmation of 1811, with the unexecuted precept of sasine therein contained, and the infeftment following thereon. But the charter and precept are assigned only in so far as applicable to the lands disposed, and to the end that John M'Arthur Moir "may be the more readily infeft and seased in the premises." The assignation, therefore, is only to the extent necessary to operate infeftment in what was disposed—i.e., an estate of superiority—and was not, in my judgment, a warrant for infeftment in anything more. I may point out that in the disposition in *Fleeming's* case, although there was not an assignation to an open precept, there was a procuratory of resignation; and it seems to me that any argument which can be founded upon the assignation of the open precept in this case would have been equally available in that case upon the procuratory.

In regard to the unreported case of *Erskine* I agree with Lord Wellwood and Lord Kyllachy that, if it conflicts with the unanimous judgment in *Fleeming*, the latter is to be followed. I observe, however, that in the disposition in *Erskine's* case there was an unusually exhaustive conveyance of all right, title, and interest in the lands, or any part or portion thereof, and that the majority

Mar. 18, 1892.
Orr v. Moir's
Trustees.

No. 129. of the Judges relied to a considerable extent upon the actings of parties. Both of these elements are absent in the present case.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

At advising,—

LORD JUSTICE-CLERK.—I entirely concur in the opinion of Lord Rutherford Clark, which I have seen. I could add nothing to the weight of that opinion by any remarks of my own.

LORD YOUNG.—I was not present when this case was originally argued, and I was no party to sending it for consideration by the whole Court. I had, however, to read the papers and to form an opinion. I did so, and wrote this opinion, which may be taken as the opinion of a consulted Judge. It was, indeed, prepared before any of the opinions of these Judges were lodged.

The question in this case regards not the construction of the disposition of 1837 to the defenders' author, but the identity of the subject thereby conveyed. For the construction of a deed of conveyance extrinsic evidence is generally (not always) inadmissible. For the identification of the subject such evidence is always admissible. Prior to the deed of 1837 the defenders' author held the lands of Hillfoot as vassal first under the Duke of Argyll, and subsequently of Mr Tait and his trustee in bankruptcy, and it is not doubtful that, but for an express reservation, he would have held the coal therein. That being an express reservation he had (at least prior to the deed of 1837), no *dominium* in the coal. Whether that deed gave him *dominium* therein is the question in the case.

It seems to be settled law that a reservation of coal in a feu-charter or disposition has the effect of making a *separatum tenementum* of the estate in such coal. It might, perhaps, not unreasonably have been otherwise regarded. But the decisions and judicial *dicta* are irresistible to the effect I have stated. On such reservation the minerals, says the Lord President in the case of *Fleeming v. Howden*, are "as completely a separate subject as if they had been a distinct portion of land." To the same effect Lord Curriehill says: "One practical effect of that proceeding"—the reservation—"was to split the *solum* of these lands from the subjacent mines into *separata tenementa*, it being established law that land may be separated into different tenements not only superficially but likewise vertically." Also Lord Westbury, who asserts "as beyond the possibility of doubt," that coal separated in title by reservation is a distinct feudal estate, "to which all the privileges and all the incidents of the ownership of an estate belong."

Applying these *dicta* I must hold that, down to 1837, the coal in Hillfoot constituted a *separatum tenementum*, a distinct feudal estate, "to which all the privileges and all the incidents of the ownership of an estate belong," and, "as completely a separate subject as if they" (the coals) "had been a distinct portion of land," as, for example, a farm of 1000 acres, or a mansion-house and policies of similar extent, for, as Lord Curriehill observes, there is no legal distinction between superficial and vertical separation. The separation here happens to be vertical. Suppose it had been superficial, and that the reservation in the feu-charter to the defenders' author had been of the mansion-house and policies (of the estate of Hillfoot), extending to say 1000 acres, and quite capable of being identified, of course by extrinsic evidence. Without the reservation the charter conveying the lands of Hillfoot to the defenders' author would, I assume, have carried the mansion-house and policies. With it, and

by reason of it, the mansion and policies are a *separatum tenementum* to the *plenum dominium* of which, under the Crown, the granter of the charter has right. No. 129.

Suppose, then, that the vassal by the charter possesses the lands of Hillfoot (of course exclusive of the mansion and policies, to which he has no title), for, say, fifty years, and then, in 1837, purchases from his superior "the superiority and feu-duty of the lands of Hillfoot," and in implement and execution of the contract of sale obtains from his superior a disposition of "the lands of Hillfoot, all as at present possessed" by himself, and that he thereupon asserts right to the mansion-house and policies, as being, on a just construction of the disposition, included in the conveyance. Would it, or not, be a good answer that he did not purchase the mansion-house and policies, that he had no previous title thereto or seisin therein, and that these, therefore, were not included in the disposition of the lands of Hillfoot as at present possessed by him and his tenants? But the case thus put is, I think, indistinguishable from the present as regards the law applicable to it. It is legitimate and familiar to define and limit a general disposition of lands by reference to existing possession on an existing title, and there can, I should think, be no more natural and legitimate occasion for such limitation than in a disposition by a superior to his vassal in implement of a sale of the superiority, the plain purpose of which is not to enlarge the subject of the original grant to the vassal but only to give him the *dominium directum* of the very subject of which he was already in possession on a title to the *dominium utile*. Mar. 18, 1892. Orr v. Moir's Trustees.

But the validity of such limitation is not doubtful, and it certainly occurs in the disposition of 1837 to the defenders' predecessor. It disposes the lands of Hillfoot quite generally to John M'Arthur Moir "all as at present possessed by the said John M'Arthur Moir and his tenants." Now, was he, by himself or his tenants, then in possession of that part of those lands of Hillfoot which consisted of coal? That this question must be answered in the negative is clear and indisputable, for as the coal had never been worked (and has not yet been), there could be no possession of it other than seisin on a title that comprehended coal, and John M'Arthur Moir had no such title or seisin. The estate in the coal of the lands had fifty years before been erected into a *separatum tenementum* or distinct and separate estate or property to which John M'Arthur Moir had no title, and of which he had and could have no possession.

This is, in my opinion, conclusive of the case in the most strict technical view of the title to which the defenders appeal.

The cases which might be put in illustration of the extravagant results to which the defenders' argument would, or might, lead, are perhaps too obvious to warrant a consumption of time in stating them. But let me put one. Suppose the superior was himself working or had let to tenants the coal in the lands, and was drawing therefrom say £1000 a-year. He sells the superiority of the surface estate to his vassal therein for £400, being the fair market price of his superiority rights, viz., the feu-duty of £11 and possible casualties. The disposition in implement is, I assume, expressed exactly as that before us. According to the defenders' *a cælo ad centrum* argument, the vassal would take the estate in the coal, with of course the position of landlord in the coal lease. Nor would the result be different if the surface superiority and coal estate had been exposed to sale by auction in separate lots on the same day, the superiority lot being bought by the vassal for £400, and the coal lot by the coal company (a company) for £10,000. The vassal would take the coal as well as

No. 129. the superiority, at least if his disposition (in the same terms as here) was a day earlier in date or the soonest recorded. No reference to the sale contracts, although truly narrated in the disposition, or to the limitation of the conveyances by reference in the dispositive clauses to existing possession would be legitimate, if the defenders' argument is sound. *Sensus moresque repugnant.*

Mar. 18, 1892.
Orr v. Moir's
Trustees.

The reservation expressed in the original feu-right might have been repeated in the disposition of 1837, and such repetition might have been prudently cautious. But it would have been, strictly speaking, inaccurate, and I think superfluous, having regard to the reference to the disponees' possession, which was necessarily under the title containing the reservation. Whether, having regard to the original relation of superior and vassal between the disponent and disponee, and the contract narrated in the disposition, such references to the vassals' existing right and possession would have been implied without expression, I have no occasion to consider. Such a question seems to have occurred, and occasioned a difference of opinion, in the case of *Erskine v. Schaw*, referred to in the case for the defenders. I am not disposed to take any account of that case, which is unreported, and so was never before the profession. But I may notice that the dispositive clause there was not limited by a reference to the existing possession of the disponee. A minority of the Judges appear to have thought (and I am disposed to agree with them) that it might reasonably be implied. Had it been expressed, as here, the case would have been different, unless it could be held that such reference is immaterial.

LORD RUTHERFURD CLARK.—The question in this case is whether, under the disposition of 1837, Mr M'Arthur Moir, whose trustees are the defenders, acquired right to the coal under the lands thereby conveyed. It was conceded by both parties that this question must be determined by reference to the titles alone.

At the date of the disposition Mr Moir held these lands in feu. The coal did not form a part of the feu. It was expressly reserved by the superior. Mr Moir purchased the superiority, and the disposition was granted in implement of the purchase.

A good deal has been said about the manner in which Mr Moir feudalised this disposition, and in reference to the fact that he used for this purpose a crown charter into which he had been assigned. I confess that I cannot see the importance of it. The mode in which his title was completed cannot, in my opinion, enlarge the conveyance, or aid in its interpretation. It is true that the disponent was not himself infeft in the superiority. But his disposition is not the less the only measure of the right conveyed.

The disposition recites the two contracts of sale under which Mr Moir purchased the superiority. There cannot, I think, be a doubt of the subject of the sale. It was the "superiority and feu-duty" of the lands, which were then held by Mr Moir in feu. In other words, the sale comprised a *dominium directum*, and nothing else. It did not comprise, and could not comprise, the coal which had not been feued. For the *dominium directum* can never comprehend a subject which is not contained in the *dominium utile*.

The disposition was granted in order to convey the subjects which were sold. It recites the contracts and the payment of the price. It then proceeds,— "Therefore I, as trustee foresaid, have sold, alienated, and disposed," &c. To my mind nothing could be clearer. The disponent disposes because he has sold.

the superiority, and received the price. He has to perform his part of the contract, and he can only do so by conveying what he has sold. If we read the disposition as including the coal, we are holding that it conveys more than the disposer was bound to convey, and as I think more than by his disposition he undertakes to convey. No. 129.
Mar. 18, 1892.
Orr v. Moir's
Trustees.

This is precisely what the defenders maintain. They claim the coal by virtue of the disposition, though they admit that the superiority did not contain it. It may be noticed that the disposition was granted by a trustee in bankruptcy, and it would be strange if he conveyed more than he was bound to convey. The case of the defenders depends on the one consideration, that the lands are conveyed without any reservation of the coal. They contend that the disposition had the double effect of conveying, first, the estate of superiority, and second, the *plenum dominium* of the coal.

It must be kept in view that the disposition is in the ordinary and appropriate form for conveying a superiority. It contains all the usual clauses applicable to such a conveyance, and it does not contain all the clauses usual in the conveyance of a *dominium utile* or *dominium plenum*.

In legal theory lands which have been feued remain within the title of the superior. The nature of his right in them is changed, inasmuch as from the date of the vassal's infeftment it is a *dominium directum* or superiority only. The vassal is infeft in the same lands, his estate being the *dominium utile*. When the superior desires to convey the superiority he conveys the lands which are comprised in the feu. In order to serve an important purpose in the feudal law, on which I need not dwell, there is no limitation in the conveyance. Feu-rights are excepted from the clause of warrandice. But this exception does not limit the conveyance. It merely excludes any action which might be brought on the warrandice on the theory that the disposition was absolute.

I see from the disposition in question that the disposer was bound to convey the superiority, and that he granted the disposition for the sole purpose of implementing his obligation. The disposition is, in my judgment, nothing more than a disposition of the superiority, though it takes the form of a conveyance of lands by reason of the legal theory to which I have adverted. It seems to me to follow that the description of the subjects conveyed was meant, and must be construed to be a description of the subjects comprised in the feu-right. For I think that the disposition contains a "declaration plain" to that effect. We are bound to read the deed so that it shall be, if possible, consistent in all its clauses, and to my mind it would be a violation of all just construction to read it as conveying what I think it clear the disposer did not undertake to convey.

Further, the lands are with one exception disposed as possessed by the vassal or those in his right. Inasmuch as they had been feued there could be no possession except by the vassal, and inasmuch as the coal was not within the feu there could be no possession of the coal, for there was no title to possess it. But when the possession of the vassal is appealed to as defining the subject conveyed, I think that I am justified in holding that a subject so defined should not be construed as including what the vassal had no title to possess.

It is said that if the disposer did not intend to convey the coal he should have reserved it. It might have been more prudent to do so, but in my opinion it was not necessary. I think that it was more incumbent on the disposer if he claimed right to the coal, to see that it was inserted in the disposi-

No. 129.

Mar. 18, 1892.
Orr v. Moir's
Trustees.

tive clause in order that it might be made clear that it was conveyed. In my opinion it could not be shewn in any other way that the coal was conveyed by the disposition before us.

The argument of the defenders is that, as the coal is not reserved, it is comprised in the disposition of the lands. Let me shew what would be the necessary consequence of sustaining it. In this case the coal was at the date of the disposition vested in the disponent. But the meaning of the disposition cannot be determined by reference to the rights of the disponent. It must have the same meaning whether he was vested in the coal or not. If, therefore, the defenders are right in construing it as a conveyance of the coal, observe the necessary consequence. They would have an action of damages under the warrandice clause were it the fact that the disponent had not and never had a right to the coal. Or should he acquire the coal by a separate title after the date of his disposition, his right would at once perish, and the coal would be vested in the defenders by accretion.

Nay more, if a person held a superiority and a feu without consolidation, and on a sale of the superiority executed such a disposition as we have here, he would find himself divested of the feu as well as of the superiority. For the word "lands" is sufficient to carry every right, and as I have shewn, feus are not excepted from the disposition but from the warrandice clause. The disponent would have no action on the latter clause, but he would be entitled to the entire subject by virtue of the disposition, inasmuch as there is no limitation in the conveyance. Of course such a thing could not happen when the superiority and feu were held by different persons, for the disposition of the superior could carry nothing which was vested in the vassal. But on the theory of the defenders it must happen when the two estates are held by the same person.

I think that I am bound to put such a construction on the disposition as would avoid results so inequitable, and it seems to me that I can easily reach it by looking at the whole deed and not confining my attention to a single clause.

I have observed that the defenders are the representatives of the disponent. No question arises, therefore, with regard to a singular successor, though I do not think that would make any difference on the result. But it is not easy to see how the defenders, founding on a sale of a superiority in a disposition professing to convey what their author had bought, should be entitled to claim more than the subject of the sale.

It is said that, in holding that the word "lands" does not include the coal I am violating the canons of construction laid down by the House of Lords in the case of *Lee* (10 R. 91). I do not think that I am. I fully recognise that the words of the dispositive clause must receive their necessary meaning, and that that meaning cannot be controlled or limited by any inference to be drawn from the rest of the deed. I also recognise that they must receive the full meaning of which they are capable, unless it appears from the disposition itself that they were not used in that sense. I do not think the House laid down any other rules for our guidance. The principle on which they depend is very obvious. It is that construction is admissible to explain words of conveyance but never to contradict them.

If minerals are expressly conveyed by the dispositive clause it would be vain to argue that the disponent did not intend to convey them. The clause must receive its necessary meaning. If lands are conveyed the word "lands" will be construed in its most comprehensive sense, unless it be shewn that

was used with a more restricted meaning. In limiting it to a conveyance of the surface or of the *dominium directum*, there is no violence done to its necessary meaning. It does not necessarily include minerals. For lands may be disposed with or without minerals as the case may be. It is ambiguous, for it is the appropriate word for the conveyance of a *dominium directum*, or of a *dominium utile*, or a *dominium plenum*. If a disponent on the narrative that he had sold certain lands, but under reservation of the minerals, executed a disposition in implement of that contract by which the lands were conveyed without the reservation being repeated in the dispositive clause, I cannot doubt that the minerals would not be included. I am stating what I take to be a clear case. In such a disposition there is a "declaration plain" that the word "lands," as it occurs in the dispositive clause, is not used in its largest sense, and does not convey the minerals. But if in any case the word "lands" as it occurs in the dispositive clause is susceptible of construction it is susceptible of construction in all, so that if it appears with sufficient certainty from the rest of the deed that it is used as not including minerals, it will be read in the limited sense in which it is shewn to be used.

Holding that I may construe the language of the dispositive clause before me, I am of opinion that it does not include the coal under the lands.

It has been suggested by some of the consulted Judges that, even if the coal was not conveyed to Mr Moir, it is not within the title of the pursuer. No question of this kind was raised or argued by the parties. On the contrary, it was assumed that the pursuer had right to the coal, unless it had been previously conveyed to Mr Moir. So far as I can judge from the disposition of Mr Scott to Sir A. Orr in 1860, the assumption is right. But it is not necessary for me to enter on that question, which must be argued if anything is to turn on it.

LORD TRAYNER.—I concur with Lord Kinnear.

THE COURT adhered.

ALEX. MORISON, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

ABRAHAM THORSEN, Pursuer (Respondent).—*W. Campbell—Salvesen.*
M'DOWALL & NEILSON, Defenders (Appellants).—*Dickson—Aitken.*

No. 130.

Mar. 18, 1892.

Thorsen v.
M'Dowall &
Neilson.

Ship—Charter-party—Delivery of cargo.—A ship was chartered to carry a cargo of timber and "deals for beam fillings and broken stowage" to a safe port as ordered, "the cargo to be unloaded as customary at port of discharge at such wharf or dock as the charterers or their agents may direct." "The custom of the wood trade of each port to be observed in all cases when not specially expressed."

The ship was ordered by the consignees to discharge at Queen's Dock, Glasgow, but the harbourmaster refused to give a berth there, and assigned another berth for the discharge of the cargo into the water. The consignees acquiesced in this arrangement, and the deals as well as the timber were discharged into the water.

In an action for payment of freight against the consignees the defenders pleaded compensation in respect of damage alleged to have been sustained by the deals being put into the water, and in being allowed to remain in the water for several days.

The Sheriff-substitute held that by the custom of Glasgow Harbour the ship-owners were bound to deliver the logs upon the quay, and that they were liable for the damage caused by their being allowed to remain in the water.

The "Theodor
Korner."

No. 130.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

The "Theodor
Korner."

In an appeal *held* (1) that the defenders' acquiescence in the mode of discharge had freed the ship from responsibility therefor; and (2) that the ship had performed her contract by delivering the deals into the water, and had no further responsibility in regard to them.

Ship—Freight—Charter-party—Demurrage.—A charter-party provided that part of the freight should be payable on arrival, "and the remainder after unloading and on right delivery of the cargo." It also provided that the owners should have a lien "for all freight, dead freight, and demurrage." The ship in the course of delivering a cargo of timber into the Clyde at Glasgow suspended delivery for two days till the consignee should find security for the freight.

In an action for two days' demurrage, *held* that the shipowners were not entitled to demurrage, as they might have completed unshipment of the cargo and yet retained their lien.

2D DIVISION.
Sheriff of
Inverclyde.

By a charter-party dated at Pensacola, Florida, on 30th December 1890, between the shipowners of the Norwegian ship "Theodor Korner," then lying there, and Messrs Wittich & Company, merchants there, it was agreed that the ship should load there a cargo of square pitch pine sawn timber, the merchants "to supply timber and/or deals and/or boards at their option for beam fillings and broken stowage." It was further agreed that she should proceed to a safe port in "the United Kingdom . . . as ordered on signing bill of lading, and deliver the same always afloat on being paid freight," at certain rates per measurement, . . . "freight to be paid as follows:—One-third in cash on arrival, and the remainder after unloading and on right delivery of the cargo," by approved bill at four months' date or in cash, "the cargo to be unloaded as customary at port of discharge, at such wharf or dock as the charterers or their agents may direct, and ten days of demurrage over and above the said lying days, at £18 per day . . . custom of the wood trade of each port to be observed in all cases when not specially expressed . . . the master or owners to have a lien on cargo for all freight, dead freight, and demurrage."

The bill of lading was endorsed to M'Dowall & Neilson, timber-merchants, Glasgow, and the ship was ordered to the port of Glasgow.

The ship arrived at Glasgow on 15th May 1891. M'Dowall & Neilson directed her to go to Queen's Dock, where there were cranes and other arrangements suited for landing on the wharf the deals with which the interstices of the timber cargo were packed. The harbourmaster, however, declined to give the ship a berth at Queen's Dock, on account of the danger to other traffic in discharging logs of timber through the bow port, and directed her to be taken to Yorkhill, where the timber would have to be discharged into the water and rafted down to Port Glasgow. That berth was chiefly used for foreign cattle, and it was not possible to discharge the deals on the quay. The deals were in point of fact discharged into the water. The consignees, though they were unwilling that the ship be discharged at Yorkhill, were obliged to consent. The deals were allowed to lie in the water for several days. After about eight or ten days the shipmaster, at the request of M'Dowall & Neilson's measurers, took them up by water to Queen's Dock (a distance of 200 yards), where they were landed on the quay by means of a crane. When landed many of them were much discoloured and depreciated in value.

On 26th May, after the cargo was partly discharged, the shipmaster repeated a demand for security for the balance of freight due, and on M'Dowall & Neilson declining this and saying that nothing was due, his agents, on 29th May, wrote,—"We beg to intimate that the discharging herein will be stopped to-morrow morning until the quantity of cargo discharged is ascertained, and until we get the measurements your clients will be held liable for any loss arising thro' this detention. Further, the captain states he has

discharged cargo more than sufficient to meet the amount of freight No. 130. already advanced. Our clients are still, however, willing, to avoid any unpleasantness, to continue the discharging, provided the freight due on the cargo already discharged be paid, and security for the balance given, or, if you still wish it, to deliver on *pari passu* payments." In terms of this letter delivery was stopped on 30th May and 1st June. On the latter day M'Dowall & Neilson without prejudice paid £190, and obtained a guarantee for the balance of freight, and discharging was resumed on 2d June.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

The "Theodor
Korner."

Subsequently Abraham Thorsen, the master, as representing the ship-owners, raised against M'Dowall & Neilson two actions before the Sheriff of Lanarkshire, the first for £56, 4s. 7d. as an unpaid balance of freight, and the second for £36, being two days' demurrage at £18 per day.

In their defences to the action for freight the defenders claimed to set off £56, 4s. 7d. for loss sustained by the deals being put into the river, and in being allowed to remain in the river for several days. The defenders averred;—(Stat. 4) "It is the custom of the wood trade in Glasgow, under charter-parties in similar terms to the present, for deals to be discharged on to the wharf." (Stat. 6) "In discharging the deals into the river the pursuer acted in breach of the custom of the port of Glasgow, and in defiance of the remonstrances of the defenders. In permitting the deals to remain in the river some days before being delivered on the quay in the Queen's Dock the pursuer acted in breach of his obligations under the charter-party."

In the other action the pursuer claimed demurrage for the two days—Saturday, 30th May, and Monday, 1st June—during which delivery was stopped till the consignees should find security for the freight.

The defenders denied that any demurrage was due.

A joint proof was led in the two actions, in which the facts above narrated were proved.

As regarded the custom of the port of Glasgow, the evidence shewed that very few ships having a cargo of timber and deals came to the port of Glasgow, as such cargoes were generally discharged at Greenock or Port-Glasgow, but that such ships as did come discharged their deals upon the quay. There was evidence that the Greenock merchant who received the logs would not allow them to be used as a raft for the deals.

The Sheriff-substitute (Guthrie), on 23d December 1891, in the action for freight, found "that the pursuers failed to deliver the deals loaded under the charter-party and bill of lading in like good order and condition, at the port of Glasgow, as contracted for: Finds that the deals were damaged to the amount of £40 sterling, and to that extent sustains the defences; decerns against the defenders in favour of the pursuers for the admitted balance of freight due, viz., £16, 4s. 7d., &c.*

In the action for demurrage the Sheriff-substitute on the same date found "that the detention of the ship 'Theodor Korner,' for which the pursuers ask demurrage or damages, was caused by their own act and not by the defenders," and assoilzied the defenders.†

* "OPINION.— . . . I hold it proved that the ship was in fault, if not in putting out the deals into the water, at all events in leaving them in the dirty water of the Clyde for from ten to fourteen days. The ship's duty was to discharge according to the custom of the port, and that undoubtedly is by putting the deals upon the quay."

† "OPINION.— . . . The other question is whether Messrs M'Dowall & Neilson are liable in demurrage for the two days on which delivery of the cargo was stopped by the ship, in order to compel the merchants to pay freight and give security for the balance. The first observation that occurs at this point is

No. 130.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

The "Theodor
Korner."

The pursuer appealed, and argued ;—*Action for freight*.—The pursuer's duty was to discharge the cargo over the side at a berth secured for him by the defenders. It was quite true they wished him at first to go to Queen's Dock, but the harbourmaster would not give them that berth, and they had acquiesced in the harbourmaster putting the ship in berth at Yorkhill. But at Yorkhill the right way to discharge over the side was to discharge into the water, because it was the only possible way. That being so, it was unreasonable to suppose that the pursuer could make a raft of the main part of the cargo, the timber, for the benefit of the deals which filled up the interstices and so keep the latter out of water, and equally so to suppose that he was to take the deals, a few at a time, up to Queen's Dock. The defenders should have made their own raft, or arranged otherwise for it. The case of *Hillstrom*¹ was overruled by the case of the "*Alhambra*."² That the pursuer took the deals up to Queen's Dock at all was more than his contract, which was to deliver over the side. The alleged custom was not proved. It was proved that once in the dirty water the deals were damaged.

Action for demurrage.—The pursuer was right in the dispute at the end of May, and entitled to stop delivery till he was satisfied. Three clauses in the charter-party bore upon the matter, first, it provided that the ship should "deliver . . . on being paid freight." Also that the payment was to be "one-third in cash on arrival, and the remainder after unloading and on right delivery of the cargo" by bill; and, lastly, that the owners were "to have a lien on cargo for all freight, dead freight, and demurrage." These clauses were scarcely consistent, for if it were meant that the freight was only to be paid on delivery to the consignee, the lien was lost. But the lien was distinctly given in the last clause, and the first agreed with it, and these two clauses should prevail. That being so, the ship was entitled to demand security and stop unloading till it should be given.³

Argued for the defenders ;—*Action for freight*.—The custom of port which they averred was proved. The ship if it could not deliver in the proper way at the place she went to should have gone to the nearest place where she could. Freight could not be due for a cargo put into filthy water and damaged. That was not right delivery. Whether the Clyde damaged them or not the deals were delivered in a bad state, and the ship must excuse herself. If the deals had to be put into water the pur-

that if the shipowner was entitled to a payment to account of freight, or to security, he did not take the proper course to protect himself when he stopped delivery. His own agents seem to have taken a more accurate view of the remedy when they wrote on May 27 (No. 18 of process)—'We have advised them to store the cargo and apply to the Court for a warrant to sell.' At all events that was more nearly the line indicated by the authorities and practice in like cases, as well as by the provisions of the Merchants Shipping Amendment Act of 1862. Prof. Bell, Com. i. 558 (605, M'Laren's edn.), says,—'The master is bound to land and lodge the goods with a wharfinger when there is any difficulty about freight, instead of keeping them on board,' and a like principle has been applied both in England and Scotland in regard to the detention of a vessel for unpaid charges for a dry dock,—in *Somes v. British Empire Shipping Company* [11th Aug. 1860, 24 Jurist, 761] in the House of Lords, followed in *Stephen v. Swayne*, 1861, 24 D. 158. I do not see, therefore, how to give effect to a claim for demurrage, or for damages in the nature of demurrage, arising from a detention by the master's own act."

¹ *Hillstrom v. Gibson*, Feb. 2, 1870, 8 Macph. 463, 42 Scot. Jur. 217.

² L. R., 6 P. D. 68.

³ *Lamb v. Kaselack, Alsen, & Co.*, Jan. 31, 1882, 9 R. 482.

suer should have made a raft to receive them either out of the discharged timber or in some other way. No. 130.

Action for demurrage.—The charter-party did not contemplate payment standard by standard as unloading proceeded. It was not so inconsistent as pursuer supposed. The master could discharge but retain the cargo for his lien, by putting a wharfinger in charge. If he had a lien he should have taken that course instead of turning the ship into a warehouse to preserve it. The cause of the stoppage was the refusal to unload, not any refusal or failure to take delivery.¹

Mar. 18, 1892.

Thorsen v.

M'Dowall &

Neilson.

The "Theodor

Korner."

At advising,—

LORD TRAYNER.—There are here two actions to be disposed of, first, an action for freight, and second, an action for demurrage.

In the first action the pursuer claims decree for £56, 4s. 7d., as the balance of freight due to him in respect of a cargo of timber and deals carried in his ship the "Theodor Korner" from Pensacola to Glasgow. The defenders admit the balance of freight claimed to be correct, but plead in compensation that the cargo was damaged to that extent through the fault of the pursuer. The fault alleged against the pursuer, out of which the damage to cargo arose, is this, that whereas the pursuer was bound under his charter-party to deliver his cargo at such wharf or dock as the defenders might direct, and there according to the custom of the wood trade of the port, he, in disregard of the custom of trade in Glasgow and the defenders' directions to him to discharge in the Queen's Dock, discharged his cargo into the Clyde at Yorkhill.

The Sheriff-substitute has affirmed that there was fault as alleged on the part of the pursuer, he has assessed the damage thence arising at £40, and has given the pursuer decree for £16, 4s. 7d. I am of opinion that the Sheriff-substitute's conclusion is erroneous. Assuming that damage was done to the cargo by discharging it into the river to the extent allowed, I think the defenders have failed to shew that the damage arose in any way through the fault of the pursuer. The pursuer was undoubtedly bound by the terms of the charter-party to deliver his cargo at the wharf or dock selected by the defenders, if the defenders had secured a discharging berth for the vessel (as was their duty) at that wharf or dock. They directed the pursuer to discharge in the Queen's Dock, but the harbourmaster refused to allow the vessel to discharge there. Accordingly, the pursuer was not in fault for not discharging in the Queen's Dock. No order or direction by the defenders to discharge there was of any avail, seeing that the harbourmaster forbade it. The harbourmaster assigned a discharging berth to the pursuer at Yorkhill, at which, there being no facilities for landing the cargo on the wharf, the cargo was discharged into the river. The harbourmaster says,—"The 'Theodor Korner' was put there to discharge her cargo in the water." This was known to the defenders and acquiesced in by them. Any damage therefore which arose through discharging the cargo into the water was damage for which the pursuer is not responsible. It was the only mode of discharging possible at the berth assigned to the vessel, and it was a mode of discharging consented to by the defenders, although unwillingly.

But it is said that even if the discharge into the water was right, at all events not involving fault on the part of the pursuer, he should, without delay, have transferred the cargo, or part of it, from the water to the nearest wharf and

¹ Carver on Carriage by Sea, secs. 683 and 718, 5th edn.; Bell's Com. i. 558, 7th edn. 605.

No. 130. delivered it there. I think there was no such duty on the part of the pursuer. He was bound to deliver his cargo over the ship's side at Glasgow, at whatever discharging berth was assigned to him. But he was bound to deliver the cargo at one place only, and it was the defenders' duty at that place to take delivery. The pursuer had no concern with the future destination of the cargo after delivery over the ship's side, and was no more bound to tow it in rafts to the Queen's Dock than to put it on railway trucks for delivery in some other town. Whether, therefore, the damage arose from putting the cargo into the river, or from its being allowed to lie there for several days, it is equally damage for which the pursuer is not responsible.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

The "Theodor
Korner."

The alleged custom of the port, said to have been disregarded by the pursuer, does not really affect the question. I think the alleged custom is not proved, but if it had been proved that it was the custom to deliver cargoes such as that in question on a wharf or quay, and only there, the defenders acquiescing in a different mode of discharge, as they did, absolves the pursuer from any consequences arising from the discharge in a manner other than customary. I am accordingly of opinion that the pursuer is entitled to decree for the full balance of freight claimed, and that the counter claim for damage should be repelled.

In the second action the pursuer claims two days' demurrage under these circumstances. After a portion of the cargo had been discharged in excess of that for which freight had been received, the pursuer demanded payment of the freight still unpaid for delivered cargo, and security for payment of the freight due or to become due for the cargo still in the ship. Alternatively with the demand for security, he proposed to deliver the balance of his cargo in return for freight to be paid as cargo was delivered—as he termed it “to deliver on *pari passu* payments.”

These demands or proposals were at first declined, but after some negotiation the defenders paid the amount due in respect of cargo already delivered, and gave the security for the balance of the freight which had been asked. During these negotiations, however, the pursuer stopped the discharge of cargo for two days, and for these two days he claims demurrage at the rate stipulated in the charter-party, on the ground that the discharge of the ship was thus delayed beyond the time which was necessary or reasonable for her discharge through the fault of the defenders in refusing what the pursuer was entitled to demand, and the defenders bound to grant. Whether the pursuer was entitled to make this demand, and the defenders in fault in refusing to comply with it, depends on the terms of the charter-party. Its provisions bearing upon this question are these—freight was to be paid on the cargo at a certain rate per 165 cubic feet, and was to be paid as follows—“one-third in cash on arrival, and the remainder after unloading and on right delivery of the cargo” by approved bill, or cash subject to discount in the pursuer's option—“the master or owner to have a lien on cargo for all freight, dead freight, and demurrage.” These provisions do not follow each other consecutively in the charter-party as I have stated them, but they are the whole provisions bearing upon the payment of freight. Now, under these provisions, what were the pursuer's rights? The only difficulty in answering this question arises from a seeming conflict between the clauses of the charter-party which provide for the payment of the remainder of the freight (deducting the one-third payable on arrival, which was admittedly paid) after “unloading and on right delivery of the cargo,” and at same time provide that the pursuer should have a lien on the cargo “for all freight.”

In construing this charter effect must be given to all its stipulations, if that be possible; none of them can be disregarded unless a direct conflict between them makes it impossible to give effect to each. If the clauses of this charter were in direct conflict, so that one clause must yield if the other is to have effect, I think it would be a difficult question whether the express provision as to the payment of freight, or the equally express provision as to a lien "for all freight" should prevail. But I am of opinion that there is no such conflict necessarily here; the clauses may be read so as to give effect to each. If the freight clause "after unloading and on right delivery of the cargo" is read as meaning delivery to the consignee, the lien would be destroyed; there could be no lien over the cargo after delivery to the consignee. The words lien "for all freight" would thus simply be deleted from the charter-party. I therefore reject that reading of the freight clause, although I admit that in the ordinary case "delivery of the cargo" does mean delivery to the consignee. But if the freight clause is read as meaning "after unloading and on right delivery over the ship's side," then the lien is preserved, for the whole cargo may be put out of the ship and still remain in the custody of the shipowner. I therefore adopt this reading, which at once fulfils the condition in favour of the consignee under the freight clause, and the condition as to lien in favour of the ship. This reading of the charter-party is favoured by what may in this case be fairly conjectured to have been the intention of the parties. The freight here was to be ascertained by measurement of the cargo. That could not be done while the cargo was in the ship's hold. It had to be unloaded for the purpose of measurement, and as payment of freight was farther conditional "on right delivery of the cargo"—that is, on delivery of the cargo in the same good order and condition in which it was shipped,—this again required the cargo to be put in such a position as to admit of its examination. I read the charter-party therefore as providing that after payment of the one-third payable on arrival no further freight was payable or demandable until the cargo—that is, the whole cargo—had been unloaded, and found to be in good condition as when shipped, damage or deterioration caused by perils of the sea, &c., always excepted; while on the other hand the ship should have a lien on the cargo so unloaded and delivered over the ship's side "for all freight" until the consignee had satisfied the ship's demands in that respect.

Another view of the charter-party may be taken which leads to the same practical result. Assume, in favour of the pursuer, that the words in the freight clause "and on right delivery of the cargo" are in direct conflict with the lien clause, and that the latter must prevail, there still remains the provision that the remainder of the freight is only payable "after unloading" of the cargo, and that provision, as I have shewn, does not conflict with the clause. Both may be read together, and both must therefore receive effect. And the giving effect to both puts the pursuer in this position, that he could not demand the remainder of his freight until after the cargo had been unloaded, while the consignee could not demand delivery of the cargo to himself until the claims for freight had been settled.

It was suggested, by way of reconciling the clauses supposed to be conflicting, that the lien clause might be read as affording a lien only in so far as this was not taken away by other express stipulations of the charter-party. But the difficulty of accepting that view seems to me to be that it imports into the lien clause a restriction or qualification which is not there. The lien clause is

No. 130.

Mar. 18, 1892.

Thorsen v.

M'Dowall &

Neilson.

The "Theodor
Korner."

No. 130. absolute in its terms, and must be read as expressed; and the view I am now considering would not be a reconciliation of the clauses by which effect was given to each, but to make the one clause surrender to the other.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

The "Theodor
Korner."

The view which I take of the charter-party excludes the pursuer's claim for demurrage. The stoppage of the delivery of the cargo arose from the pursuer's demand for something to which under his contract he was not entitled. The delay thus occasioned was attributable to him, and for that the defenders are not liable. The Sheriff-substitute's judgment assoilzieing the defenders from this claim should in my opinion be affirmed.

I would propose to deal with the expenses of this litigation thus: The proof as regards both claims was led in the first action, but I find on examination that out of a proof of over fifty pages not more than six or seven pages have reference to the claim for demurrage. I would therefore find the pursuer entitled in the first case to expenses in the Sheriff Court and here, as the same shall be taxed, under deduction of a sum of £10; and find the defenders entitled to expenses in the second case in both Courts, but excluding therefrom the expenses incurred in connection with the proof.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

IN the action for the balance of freight the Court pronounced the following interlocutor:—"Sustain the appeal; recall the interlocutor of the Sheriff-substitute, dated 23d December 1891: Find in fact (1) that the 'Theodor Korner' arrived at Glasgow on or about 15th May 1891, with the cargo on board referred to on record, of which cargo the defenders M'Dowall & Neilson were the consignees; (2) that a berth at Yorkhill was assigned to said vessel by the harbourmaster at Glasgow for the discharge of said cargo there into the water, and that the said defenders or consignees foresaid acquiesced in the discharge of said cargo at said berth into the river Clyde; (3) that the said cargo was damaged by being discharged into the river and remaining there for several days before being removed to the Queen's Dock, and that the damage so sustained was to the extent and value of £40 sterling; (4) that said damage was not occasioned by any fault or breach of contract on the part of the pursuers; and (5) that the balance of freight due to the pursuers in respect of said cargo is £56, 4s. 7d.: Find in law that the pursuer is not liable to the defenders for the damage sustained by said cargo as aforesaid, and that the defenders are liable to the pursuers in the said sum of £56, 4s. 7d. with interest as concluded for: Therefore decern against the defenders in terms of the prayer of the petition: Find the defenders liable to the pursuers in the expenses of process, both in the Sheriff Court and in this Court, subject to a deduction of £10 sterling from the taxed amount."

IN the action for demurrage the Court pronounced the following interlocutor:—"Find in fact that there was no undue detention of the pursuers' vessel in the discharge of her cargo, and that any delay which took place in the course of the discharge of said cargo was occasioned by the pursuer and not by the defender: Find in law that the defenders are not liable in the demurrage sued for: Therefore dismiss the appeal: Recall the interlocutor of the Sheriff-substitute, dated 23d December 1891, in so far as it

finds the defenders entitled to expenses: *Quoad ultra* affirm the said interlocutor, and decern: Find the defenders entitled to expenses both in the Sheriff Court and this Court, except the expenses incurred in connection with the proof led by parties.”

No. 130.

Mar. 18, 1892.
Thorsen v.
M'Dowall &
Neilson.

J. B. DOUGLAS & MITCHELL, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

The “Theodor
Korner.”

PHILIP SULLEY (Surveyor of Taxes), Appellant.—*Mackay—Young.*
ROYAL COLLEGE OF SURGEONS OF EDINBURGH, Respondents.—
Comrie Thomson—Strachan.

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

Revenue—Income-tax—Exemption—Scientific institution—Income-tax Act, 1842 (5 and 6 Vict. cap. 35), sched. A, rule 6.—The Income-tax Act, 1842, schedule A, rule 6, exempts from income-tax “any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is demanded for any instruction there afforded by lectures or otherwise.” *Held* that the hall, library, and museum of the Royal College of Surgeons of Edinburgh were not exempt under the above provision, in respect that the college was not a literary or scientific institution but an institution whose main objects were professional.

ON 12th January 1891 the Royal College of Surgeons of Edinburgh 1st Division, appealed to the General Commissioners of Income-tax for the county of Edinburgh, against an assessment under schedule A of the Income-tax Acts, on £533, being the annual value of their hall and museum, the question being whether the College was exempted as a scientific institution in the sense of the Income-tax Act, 1842, schedule A, rule 6.*

The Commissioners sustained the appeal.

The Surveyor of Taxes obtained a case. The following were the facts stated in the case:—“The Royal College of Surgeons of Edinburgh is incorporated under various Acts of Parliament and Royal Charters dating from the year 1505, and its present constitution is regulated by the Act 13 Vict. cap. 23, entitled ‘an Act for enabling Her Majesty to grant a new charter to the Royal College of Surgeons of Edinburgh, and for conferring further powers on the said College,’ and a royal warrant for a new charter following thereon, dated 11th March 1851. By the said royal warrant, which proceeds on the narrative of Her Majesty ‘being willing to give all proper encouragement to the advancement of the science of surgery within her dominions, and to promote the good of the said College,’ the then Fellows of the Royal College of Surgeons of the City of Edinburgh, and such other persons as may from time to time be elected Fellows of the said College, are of new constituted and incorporated into one body-politic and corporate, by the name and style of ‘The Royal College of Surgeons of Edinburgh,’ and it is ordained and declared that the said Royal College shall have and enjoy all the rights and privileges heretofore belonging to the Royal College of Surgeons of the City of Edinburgh in respect of the arts and sciences of anatomy, surgery, and pharmacy. The said charter further provides for the admission of new Fellows by diploma, and empowers the College to grant diplomas or licenses to practise anatomy, surgery, and pharmacy, after such course of study, and

* The Income-tax Act, 1842 (5 and 6 Vict. cap. 35), schedule A, rule 6, provides for exemption, *inter alia*, in the following case, viz.:—“For the duties charged on . . . any building, the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise; provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same.”

No. 131. after passing such examination or examinations as the College might require, and such licentiates 'shall be entitled to exercise and enjoy all rights of practice in the arts or sciences of anatomy, surgery, and pharmacy.'

Mar. 19, 1892.

Inland

Revenue v.

Royal College

of Surgeons of

Edinburgh.

"In the first century and a-half of the existence of the Corporation of Surgeons their members were the sole teachers, and almost the sole practitioners in Edinburgh, of what was then known as the healing art. The original research in the sciences of medicine and surgery, with the kindred branches of chemistry, anatomy, physiology, midwifery, &c., which has proceeded from Edinburgh, has to a very large extent been done by the teachers and members of the Royal College of Surgeons of Edinburgh, which was in existence long before the foundation of the medical faculty of the University of Edinburgh. The diploma of the College was a professional qualification long before the University degree of M.D. was instituted. The College has always been closely allied to the University of Edinburgh. In accordance with the statutes of that University any four out of fifteen medical classes required for graduation may be attended under College teachers, as well as the practical classes of physiology, pathology, and materia medica. Similar privileges are extended by most of the other Universities in the United Kingdom. The whole education required for graduation at the Universities of London and Cambridge, and for M.D. of the University of St Andrews, may be taken in this school. Prior to 1858 none of the degrees of the Scottish Universities conferred any right to practise surgery. It was maintained at one time that the degree of M.D. conferred that privilege, but this was negatived by a judgment of the Court of Session.

"The Fellows are the governing body of the College. The Fellowship diploma is granted to candidates who are in possession of a recognised qualification in surgery, after due examination in surgery, and on the vote of the College as to their fitness. In certain cases the College admits to its Fellowship without examination registered practitioners whose distinction by original investigations and surgical qualifications seem of a sufficiently high order to warrant their admission. In both cases a fee of £30 is payable on entry, and these fees are assessed under schedule D of the Income-tax Acts. No annual subscription is payable by the Fellows, and no division of profits is made among them.

"The College also grants the qualifications of Licentiate, Diploma in Public Health, and Licentiate in Dental Surgery.

"The buildings belonging to the College consist of (1) hall, library, two committee rooms, and officer's house on the ground floor, with museum above; and (2) lecture rooms, chemical and other research laboratories, dissecting rooms, and other places of study. The former buildings which (with the exception of the officer's house) are the subject of the present appeal, form the main buildings of the College, and the latter are separated therefrom by a walk, and have separate communications. The lecture rooms, laboratories, &c., are assessed under schedule A separately from the main buildings, on a net annual rent or value of £227. The officer's house is also separately assessed on the net annual value of £12.

"Meetings of the College are held periodically in the hall, and the library and museum are open for the use of the Fellows of the College, to which privilege they are entitled by virtue of their position as Fellows, and the fees paid by them on entry. These buildings are never let for other purposes. The professional examinations are conducted in the hall, library, and committee rooms by the board of examiners, and include chemical testing, laboratory work, examination and description of preserved specimens of anatomy, surgical apparatus, and such like.

"The library contains a valuable collection of scientific works by British and foreign authors, is open to Fellows, and is meant to keep Fellows abreast of the advances, not only in their own spheres of the sciences of medicine and surgery but in other sciences, and is very important in encouraging and aiding study and research in the various sciences. The College does not publish any transactions in separate form, but many medical and surgical papers by its Fellows are published in the weekly medical journals, such as the *Lancet*, *Edinburgh Medical Journal*, &c.

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

"The museum contains a very valuable collection of anatomical specimens, and other specimens relating to the study of the sciences of medicine, surgery, &c., and is especially intended and used for study in special branches requiring illustration, the means of which can only be obtained by the possession of such a collection. The Conservator of the museum usually devotes one hour a week to the systematic demonstration of the preparations in the museum to registered medical students, whether they are studying in the University or any of the buildings used for extramural teaching. No fees are charged for such demonstrations, although desks are placed and arranged in the museum for the convenience of the students attending. The Conservator and his assistant are engaged chiefly in putting up new specimens illustrative of the sciences of anatomy, medicine, surgery, natural history, &c., and these are collected with the express object of further developing the study and investigation of special branches of these sciences. These new collections are periodically exhibited to, and examined by, the Fellows of the College at meetings held by them.

"The lecturers in the lecture-rooms adjoining the Royal College of Surgeons are associated together under a deed of agreement. They are not all Fellows of the College, but all those who lecture upon surgery, anatomy, &c., require to be, and are Fellows, and . . . some of the teachers, for example in chemistry, are not necessarily Fellows . . . The associated lecturers pay an annual rent to the College, and receive from the students fees for teaching. These fees are separate and distinct from the fees paid to the College for professional examinations, and do not entitle the students to enter the museum or library of the College; but they have access to the museum when it is open to the public for inspection. The lecturers transact their business within the lecture rooms, and as lecturers have no right of access to the hall, library, or museum. Beyond payment of the rent the College has no interest in the revenue derived by the lecturers from students' fees. . . .

"For the purpose of furthering the study of the sciences of anatomy and surgery the College annually grants prizes for the best essays on a surgical subject selected by the College for competition amongst its Fellows and Licentiates, and prizes to students for the best approved dissections of the human body, and on examination in *materia medica* and therapeutics. It also grants triennially a prize of £100 for the 'greatest benefit done to practical surgery' within the triennial period.

"For the last twenty-nine years the average revenue of the College from all sources has been £2478, and the average expenditure necessary to discharge its functions has been £1454. . . . The particulars of income and expenditure in the account for the year ended 30th September 1890 are as follows":—(Quoted below).*

* "INCOME.

"1. Sums received from candidates for the diplomas of Licentiate of the College, &c.,	£1652 5 0
Carry forward,	£1652 5 0

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

At the hearing the parties referred to certain additional facts in the history of the Royal College of Surgeons. These facts sufficiently appear from the opinion of the Lord President.

The surveyor argued;—The Royal College of Surgeons was not a scientific institution in the sense of the Act. They were simply a professional, or, rather looking to their origin, a trading body. Down to 1850 they were nothing else than one of the incorporated trades of Edinburgh, and at the present day they were a body whose main object was to promote professional as distinguished from properly scientific objects. Of course surgery being a science the promotion of the profession of surgery in a sense promoted science. But in order to come within the exemption the institution must promote the science as distinguished from professional interest and advantage of its members. It was on the ground of this distinction that the case of the *Writers to the Signet*¹ was decided on the one hand, and that of the *Institution of Civil Engineers*² on the other. The facts brought the present case within the former rather than the latter of these authorities.

Argued for the respondents;—The College was a scientific institution in the sense of the Act, instituted by royal charter for the advancement of science, and used for the purposes of the sciences of anatomy, surgery, &c., exclusively. The granting of licences, &c., was not only for the purpose of enabling the holders to enter the medical profession but was mainly and directly intended to raise the standard of proficiency in the study of medical science, acquired by systematic training through the medium of a compulsory curriculum and examination. The qualifications of "Licence" and "Fellowship" were instituted long before the Medical Act of 1858 was passed, by which the possession of medical and surgical qualifications was made necessary to enter the medical profession. The diploma of Fellow of the College was a stamp of proficiency in the science

	Brought forward,	£1652	5	0
2. Fees of Fellowship,	.	760	0	0
3. Rent of lecture-rooms,	.	236	6	6
4. Dividends and interest,	.	908	7	1
5. Fines recovered from Fellows,	.	3	9	6
		£3560	8	1

"EXPENDITURE.

EXPENDITURE		
1. Salaries, &c.,	£691 14 0	
2. Fees to examiners,	427 7 0	
3. Payments on account of buildings, repairs, rates, taxes, &c.,	784 17 7	
4. Additions to lecture-rooms,	100 0 0	
5. Law and Parliamentary expenses,	114 18 6	
6. Books and stationery,	277 19 0	
7. Museum,	77 1 2	
8. Donation—Nurses' Institute,	105 0 0	
9. Annuity—Society of Barbers,	10 0 0	
10. Widows' Fund for 12 members,	12 0 0	
11. Printing and advertising,	142 11 10	
12. College dinner,	75 8 11	
13. Postages, telegrams, &c.,	28 18 2	
	<hr/>	2847 16 2

Shewing a surplus revenue of £712 11 11"

¹ Society of Writers to the Signet v. Commissioners of Inland Revenue, Nov. 3, 1886, 14 R. 34.

² *In re* Duty on Estate of Institution of Civil Engineers, 1890, L. R., 15 App. Cases, 334.

of surgery, although the Medical Acts did not require it for general practice, and it conferred no pecuniary privileges on the holder.

No. 131.

At advising.—

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

LORD PRESIDENT.—The exemption from income-tax claimed in this case is rested on the following words in that part of Schedule A of the Income-Tax Act, 1842 (5 and 6 Vict. c. 35), which states the allowances to be made in respect of the duties in that schedule,—“Or on any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise.” The hall, museum, and library sought to be assessed are the property of the Royal College of Surgeons of Edinburgh, and accordingly the claim can only be allowed if that body is a “scientific institution” in the sense of the Act. That is the question we have to decide.

That every incorporated body of surgeons or medical men has a relation to physical science, and that the association of surgeons or medical men tends to promote physical science, are propositions which cannot be questioned. On the other hand, it is manifest that the term “scientific institution” cannot be applied indiscriminately to all incorporations or associations composed of surgeons or medical men. We must find out whether science is the object of the institution in some other sense than that in which it may grandiloquently be said that it is the object of the profession of surgery.

The mode of determining such questions is usefully illustrated by the two cases cited at the bar—*The Writers to the Signet*, 14 R. 34, and the *Institution of Civil Engineers*, L. R., 15 App. Cas. 334. Those cases arose under the Customs and Inland Revenue Act, 1885. The words in that Act, corresponding to those in the Act of 1842 now before us, confer an exemption on property legally appropriated and applied for the promotion of science, and as the exemption in those cases was claimed on the ground that the property was applied to the purposes of the institutions assessed, the question at issue was very nearly the same as that which more directly arises here, viz., is the institution a scientific institution? And the opinion of the noble and learned Lords and learned Judges have a very direct bearing.

Now, the existing charter of the Royal College of Surgeons of Edinburgh was granted in 1851 by royal charter granted in pursuance of an Act of Parliament. Down to 1851 the College was one of the fourteen incorporated trades of Edinburgh, as the Chirurgeons or Surgeons' Craft, being denominated at one time the Chirurgeons or Barbers of Edinburgh; afterwards the Chirurgeons or Chirurgeon-Apothecaries of Edinburgh; afterwards the College or Corporation of Surgeons of the City of Edinburgh, and having first received incorporation by royal charter in 1778 by the name of the Royal College of Surgeons of the City of Edinburgh.

In 1847, as is well known, the exclusive rights of the trades were done away with, and of course the growing dignity of the medical profession generally made the status of the trade guild inappropriate to a privileged body of surgeons. Accordingly, by the charter of 1851 the connection with the trades was terminated; arrangements were prescribed for the admission of new Fellows by diploma, and the granting of diplomas or licences entitling the recipients to practise anatomy, surgery, and pharmacy, and provisions were made for winding up a Widows' Fund connected with the institution.

At this stage it may be asked, Prior to 1851 was the Royal College of Sur-

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

geons or the Surgeons' Craft a scientific institution? I hardly think this question could be answered in the affirmative. It was a professional association, developed out of the original Surgeons' Craft, and I see in it no note of a scientific institution.

I turn now to the College as it exists. Much has been made of the expression which occurs in the preamble of the charter of Her Majesty's willingness to give all proper encouragement to the advancement of the science of surgery within her dominions, and to promote the good of the said College. I do not think that this use of the word "science" goes far to shew that the College is, in the sense we are now concerned with, a scientific institution. We must look at the facts. The Fellows are the governing body. They are qualified surgeons, admitted as a rule after examination, and by a vote as to fitness. The College grants licences after due examination. Neither Fellows nor licentiates receive pecuniary profit out of the funds. The Fellows have the use of the library and museum, both of which are valuable collections. The College does not publish any transactions, but (as may readily be supposed) many of the Fellows are individually contributors to medical journals.

The College is concerned with education in this way. Among the buildings belonging to it are class-rooms, in which are taught the subjects of which study is necessary to the attainment of a qualification to practise surgery. The lecturers on surgery and anatomy must be Fellows of the College, but the lecturers on other subjects need not be so. All lecturers before being allowed to lecture must satisfy the College that they have adequate means of illustrating their lectures. Rent is paid to the College for the lecture-rooms by the lecturers, who draw fees from the students. Attendance on the lectures is recognised as qualifying for the medical degrees conferred by the University of Edinburgh, which avail as a qualification to practise medicine or surgery.

So far as to teaching. The College examines candidates for the licences to practise surgery which it confers, and for diplomas in public health. It also gives prizes for the best essays on surgical subjects, for dissections of the human body, and for knowledge in materia medica and therapeutics.

Such, stated shortly, are the facts. From them I gather that the Royal College of Surgeons of Edinburgh is a professional body, whose members enjoy certain privileges, and which promotes the professional teaching of its licentiates, and also of those studying for the practice of medicine generally. It certainly promotes science, because the profession is a scientific profession, and the privilege of its Fellows and the education of its licentiates, and of all who learn their profession within its walls, conduce to the advancement of science. But its primary and proximate objects are professional, and its methods square with the requirements of the profession, and if it furthers research, it is only incidentally and indirectly.

My opinion is that the decision of the Commissioners was wrong.

LORD ADAM.—The question here—at least the leading question—is, whether the Royal College of Surgeons is a scientific institution? If it be not a scientific institution, there is no other question, because in that case the question as to the use of the buildings does not arise at all. If, in the sense of the Act, the main and leading purpose of the institution is the advancement of science, it will not, I think, be the less entitled to the exemption claimed because it aids incidentally and consequentially the promotion of professional purposes, and

appears to have been very much the case with the Institution of Civil Engineers in London. On the other hand, if the main and leading object of the institution be that of advancing the interests of a profession, then the fact that it may incidentally and as a consequence promote science will not the less make it other than a professional institution, and as such not entitled to the exemption claimed.

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

I must say I entertain no doubt that the College of Surgeons in its main and leading object is a professional institution. I think its main purpose is exactly that which is set forth in its recent charter. It says, that it shall be in the power of the said College, under its common seal, to grant diplomas or licences to practise anatomy, surgery, and pharmacy in such form as shall from time to time be thought fit to arrange, and then it goes on to say that such parties after examination shall be entitled to be admitted licentiates of said College, and shall be entitled to exercise and enjoy all the rights of practising anatomy, surgery, and pharmacy which are commonly enjoyed by the Fellows of the said College, and which have heretofore been enjoyed. I think that is the leading purpose of this institution. It is for the purpose of qualifying persons to practise, and giving them licence to practise, anatomy and surgery, and if we look at the statement given us of the funds we see that it is from that source that the main portion of their funds is derived. One item of income consists of the sums received from candidates for the degree of licentiate of the College, and the next is exactly in the same position, namely, fees of Fellowship—the Fellowships being obviously taken, I think, for the purpose of obtaining a degree of superior reputation than that of a mere licentiate of the College. I need not repeat what your Lordship has said about the history of the institution. By producing learned men it necessarily promotes incidentally and consequentially the study of science, but that it does so I cannot think makes it a scientific institution in the sense of the Act. Its main and leading object is that of a professional institution for the encouragement and promotion of the practice of surgery, and not of science. On these grounds I entirely concur with your Lordship.

LORD M'LAREN.—The Act of Parliament gives no definition of a scientific or literary society, and we are left to define it, I presume, by a reference to the objects and practice of such associations. These, I think, may be stated generally to include the meeting for the discussion of such subjects of literature or science as the society undertakes to promote, the publication of papers, and the making grants to individuals who undertake to prosecute studies of scholarship or scientific research.

Now, in reading the opinions in the latest and most authoritative case on this subject—the case of the *Institution of Civil Engineers*—I think it is evident that in the opinion of all the law Lords who took part in the case, a body that is constituted for professional objects is not a literary or scientific society in the sense of the Act; and the distinction taken between the case of the *Institution of Civil Engineers* and that of the *Writers to the Signet* was this, that the Institution of Civil Engineers gave a professional qualification neither to members of the corporation nor to licentiates, and that while it was certainly an advantage to an engineer to be known to belong to such a society, it gave him no rights which he could exercise outside the walls of the association. And it appeared to their Lordships that this—though consisting of professional men,

No. 131.

Mar. 19, 1892.
Inland
Revenue v.
Royal College
of Surgeons of
Edinburgh.

because these were the only men competent to discuss such questions—was a body constituted for objects similar to those of societies which are universally recognised as scientific societies, such as the Royal Society or the Linnæan.

Now, in comparing the present case with that of the *Civil Engineers*, I think it is chiefly distinguished by the absence of those incidents which in the opinion of the House of Lords suffice to characterise the Institution of Civil Engineers as a scientific society, and we have all or nearly all the incidents which mark out the Writers to the Signet as a professional body who were not entitled to the exemption. It is true that the Fellowship of the College of Surgeons is not technically a professional qualification—a qualification to practise—and for this reason, that no one except honorary members can become a Fellow until he has already got a professional qualification. But then while the College of Surgeons does not and cannot by making a man a member of the corporation give him what he has already, they give professional qualifications to students. They have a school, and they have an examining body, and by Act of Parliament their licence given to their students is a professional qualification. That circumstance, I think, points out very clearly what is the true character and object of this College, and I am of opinion with your Lordship that they are not entitled to exemption, and the decision of the Commissioners ought to be reversed.

LORD KINNEAR concurred.

THE COURT reversed the determination of the Commissioners, and remitted to them to sustain the assessment.

SOLICITOR OF INLAND REVENUE—JAMES ROBERTSON, L.A.—Agents.

SUMMER SESSION.

No. 132.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

INSPECTOR OF GALASHIELS, Pursuer (Appellant).—*D.-F. Balfour—Dundas.*

INSPECTOR OF MELROSE, Defender (Respondent).—*Jameson—C. N. Johnston.*

Poor—Settlement—Alteration of parish boundaries by Boundary Commissioners—Local Government Act, 1889 (52 and 53 Vict. c. 50), secs. 49 and 50—Jurisdiction.—The transfer by the Boundary Commissioners of part of a parish to another parish has no effect on parochial settlements acquired prior to its date either by birth or residence in the part of the parish which has been so transferred.

Observations on the effect of an order of the Boundary Commissioners under the 49th section of the Local Government Act, 1889.

1ST DIVISION.
Sheriff of
Roxburgh,
Berwick, and
Selkirk.

At the passing of the Local Government Act, 1889, part of the area included within the municipal boundaries of Galashiels and county of Selkirk was part of the parish of Melrose.

On 13th December 1890 the Boundary Commissioners, in terms of the power conferred upon them by the Local Government Act, 1889, sec. 49,

* The Local Government (Scotland) Act, 1889, sec. 49, enacted,—“(1) The Boundary Commissioners shall proceed as soon as may be after such commencement . . . to inquire into the circumstances of the counties, burghs, and parishes, and detached parts of counties and parishes, and shall frame orders for dealing with such counties, burghs, parishes, and detached parts, so that each burgh and parish . . . may be within a single county, and that no part of a county or parish be detached therefrom, and such order may provide

issued an order in which they determined that that part of the parish of Melrose which was situate in the county of Selkirk should in future form part of the parish of Galashiels.* This order was confirmed by the Galashiels and Melrose Confirmation Act, 1891, which also provided that the order should come into force on 11th June 1891.

No. 132.
May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

On 26th August 1891 Mrs Hay, a widow, who had for five years prior to 11th June 1891 continuously resided in Johnston's Close, Galashiels, which was formerly in the parish of Melrose, applied to the inspector of Galashiels parish for parochial relief, which was granted.

The inspector of Galashiels thereafter sued the inspector of Melrose in the Sheriff Court of Roxburgh at Jedburgh for payment of the sum so given in relief, on the footing that Johnston's Close was, prior to 11th June 1891, in the parish of Melrose, and that the pauper's settlement was therefore in that parish.

The defender stated that from the date of the order of the Boundary Commissioners the relief and management of the poor in the transferred area fell to be administered by the parish of Galashiels. "As the transference of the area was made for all purposes, whether county council, Justices, Sheriff, militia, parochial board, school board, local authority, and as the parish of Galashiels levies the poor-rates in said area, it is liable in the relief and management, not only of the poor who had their settlements in respect of birth or residence in it, and who were on the roll at 11th June 1891, the date of the transfer, but also of the poor who shall become paupers, or be or have been placed on the roll after 11th June 1891, and whether in respect of settlement acquired before or after that date. . . . It is to be noted that under the Local Government (Scotland) Act, 1889, section 49 (6), the Boundary Commissioners are empowered as follows, viz.,—'When an order under this Act has taken effect, the Boundary Commissioners may provide for the adjustment and disposal of the property, debts, and liabilities of the various authorities affected

for such alteration of boundaries, whether of the county or of any other area, as may seem necessary for the said purpose, and such alteration shall have effect for all purposes, whether county council, Justices, Sheriff, militia, parochial board, school board, local authority, or other, save as hereinafter provided."

* "*Parishes of Galashiels and Melrose.*—Whereas each of the parishes of Galashiels and Melrose is situated partly in the county of Roxburgh and partly in the county of Selkirk: And whereas it appears to us, after communicating with the authorities and others interested, and considering all objections made to the terms of our draft order thereanent, to be expedient to alter and adjust the boundaries of the said counties and parishes in manner hereinafter provided: Now, therefore, we, the Boundary Commissioners for Scotland, do hereby, in pursuance of the powers conferred upon us by the Local Government (Scotland) Act, 1889, determine and order as follows:—

"(1) Subject to the provisions of the said Act, so much of the parish of Melrose as is situated in the county of Selkirk shall cease to be part of that parish, and shall form part of the parish of Galashiels.

"(2) Subject to the provisions of the said Act, the parish of Galashiels, as altered in area by this order, shall be wholly included in and shall form part of the county of Selkirk.

"(3) The Galashiels (Landward) School Board shall cease to have jurisdiction over any part of the parish of Galashiels comprised within the municipal boundaries of the burgh of Galashiels, and the school district of the burgh of Galashiels shall comprise the whole area within the said municipal boundaries.

"(4) This order shall come into operation, for the purposes of school board elections, on the 28th day of February 1891, and, for all other purposes, on the 15th day of May 1891."

No. 132.
May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

by the order, and for the settlement of differences arising out of the order'; and by section 50 of the said Act, the Boundary Commissioners are, *inter alia*, empowered to adjust as arbiters questions between authorities failing to come to an agreement as to the adjustment of property, debts, liability, or financial relations, and transfer of duties arising out of 'any order or other thing made or done in pursuance of this Act.' Failing a settlement therefor between the two parishes, the questions of liability and compensation which have arisen should have been referred to the Boundary Commissioners as authorised and empowered to deal therewith."

The pursuer pleaded;—(1) In respect the said Catherine Morrison or Hay has a residential settlement in the parish of Melrose, the pursuer is entitled to decree as craved. (2) The law regulating the settlements of paupers not having been altered by the Local Government Act, and the same being still in force, the pursuer is entitled to decree as craved.

The defender pleaded;—(1) In respect that the questions raised fall to be determined by the Boundary Commissioners under the Local Government (Scotland) Act, this action is incompetent, and it ought therefore to be dismissed, with expenses. (2) The said Catherine Morrison or Hay not having a residential settlement in the parish of Melrose, the defender should be assoilzied, with expenses. (3) The said Catherine Morrison or Hay's residential settlement being within the area transferred to the parish of Galashiels, and the relief and management of the poor in or belonging to the transferred area being now administered by that parish, the defender's parish is not now responsible for her relief, and he should therefore be assoilzied, with expenses.

The Sheriff-substitute (Speirs), on 21st January 1892, dismissed the action as incompetent.

On appeal the Sheriff (Hope), on 19th February 1892, affirmed his Substitute's interlocutor.*

A second action was brought by Galashiels against Melrose for payment of relief afforded after 11th June 1891 to a pauper, John Austin, who was born in the transferred portion of Melrose parish in 1860, and had consequently a birth settlement in that parish. The Sheriffs pronounced similar interlocutors.

The pursuer appealed in both cases, and argued;—1. The case of *Borthwick*¹ was brought under the special provisions of the 50th section

* "NOTE.—I find it impossible in the face of the decision of the Court of Session in the case of *Temple v. Borthwick* (17th July 1891, 18 Rettie) to do otherwise than affirm the interlocutor appealed against. It was there decided that the Boundary Commissioners are the proper parties to decide the question which was raised, and which is the same as that raised in the present case. I am unable to understand the reasoning of the learned Judges by which their decision was supported, but it would not be becoming in me to say more on that point than that I read the provisions of the Local Government Act to mean that when the debts, liabilities, &c., of parishes have been fixed, the Commissioners have power to make such financial adjustments as may seem equitable in view of the altered circumstances brought about by the transference of a district from one parish to another.

"If it had been open to me to enter into the question of where the settlement of the pauper is, I should have held, as I did in another case before the decision referred to was reported, that the law of settlement has not been in any way altered by the statute, and that the pauper's settlement continues to be in the parish of Melrose. . . ."

¹ *Parochial Board of Borthwick v. Parochial Board of Temple*, July 17, 1891. 18 R. 1190.

of the Local Government Act at the instance of the Boundary Commissioners. This case raised a direct question of patrimonial right between one parish and another, and was one of the most ordinary kind. The Court clearly had jurisdiction, and the case of *Borthwick* was entirely different. 2. Leaving out of view the decision in *Borthwick*, it could not be said that an order of the Boundary Commissioners could operate a change in settlements already acquired. It was a pure accident in what parish a pauper became chargeable. It might have been in any parish in Scotland. Here the pauper merely happened to be in what had been part of the parish of Melrose, but now belonged to Galashiels. Residential settlement did not depend upon the part of the parish in which the pauper lived, but arose from a five years' residence within it. The transfer could make no difference until the lapse of the period of non-residence necessary to put an end to the settlement. Similarly, a birth settlement was acquired against a whole parish and not against any particular part of it. It was not disputed that the severed part of Melrose parish was now in Galashiels parish, but the Act could not be made retrospective.

Argued for the respondent;—1. Upon the authority of the case of *Borthwick*, the actions were excluded from the jurisdiction of a Court of law, and the questions were for the Boundary Commissioners to settle. The question presented in the case of *Borthwick* was a question of settlement, just like the present. Besides, the Court was not an expedient or convenient forum for the trial of such questions. They could more properly be submitted to the Boundary Commissioners under the provisions of the 49th section of the Local Government Act. The Commissioners were empowered by that section to lay down general rules for the adjustment of questions of liability between parishes. 2. It was said upon the merits that the question was one of personal status. But it was a status which was derived from residence in a particular place. The transference to Galashiels included under the 49th section of the Act a transference of all liabilities affecting the transferred area,—at anyrate for the future. Up to the date of the order paupers whose settlement depended upon residence in the transferred area fell to be relieved by Melrose, and after that date by Galashiels. It was only right that Galashiels parish, which now levied the assessments over the transferred area, should also discharge the liabilities thence arising.

LORD PRESIDENT.—These are actions brought by the Parochial Board of Galashiels against the Parochial Board of Melrose to recover monies disbursed, and to establish liability for monies hereafter to be disbursed by the former parish for the maintenance of two paupers, one of whom was born within a portion of Melrose parish, which, by an order of the Boundary Commissioners has been disjoined from Melrose parish and attached to Galashiels—and the other of whom has acquired an industrial settlement in Melrose parish by five years' residence in the same disjoined part prior to the date of disjunction. The Sheriff has dismissed the actions as incompetent, and the first question is whether these are sound judgments. The view of the Sheriff-principal is that the decision of this Division of the Court in July last in the case of *Borthwick v. Temple*, necessitated a dismissal of the actions, as he entertained the view that the Court had laid it down that a question of this kind cannot be raised in a Court of law but must be decided by the Boundary Commissioners. I think that is an erroneous view of the case of *Borthwick*; my opinion is that the jurisdiction, and that of the Sheriff Court, are not excluded by any provi-

No. 132.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

No. 132. sion of the Local Government Act, and that, as our jurisdiction is not excluded, we must proceed to exercise it.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

The case stands thus. The Local Government Act appointed a Boundary Commission for the purpose of squaring and redding up the boundaries of parishes and counties throughout Scotland. That involved an examination of the lie of the land ; of the interests of the several rating authorities in the portions which were proposed to be detached from one parish or county and attached to another, and generally of the social and economic conveniences of the parishes and counties concerned in the land which caused the anomalous boundary. The commissioners are authorised to pronounce orders which are to have the effect of rectifying the boundaries in terms of section 49 of the Act "for all purposes, whether county council, Justices, Sheriff, militia, parochial board, school board, local authority, or other, save as hereinafter provided." It is obvious that such changes might require financial adjustment between the two parishes or other areas, the one of which was losing and the other acquiring the land in question. The portion of land to be disjoined might be so mixed up with the rest of the parish as regards common assets and common liabilities that simply to disjoin might leave a very unjust balance between the parish gaining and the parish losing ; and it requires very slight stretch of imagination to picture cases in which such pecuniary adjustments would be required. The two parishes concerned, therefore, are authorised to make these adjustments for themselves, if they can, and, failing them, the Commissioners have power, after they have made an order as to the boundaries, to follow that up by another order effecting such an adjustment as appears appropriate in each case. All that is a comparatively simple proceeding in point of principle, for it relates entirely to the settlement of details, and it does not involve that the parties or the Commissioners are authorised to determine what are the rights of the two parishes apart from such adjustment. Indeed it is difficult to discover when the Act has said that an order of the Commissioners shall have effect for all purposes, including "parochial board" purposes, that that means that the question of the legal effect of the change is to be handed over to the Commissioners for arbitrary decision. It is said that such a question is excluded from the jurisdiction of Courts of law according to the decision in the case of *Borthwick*. That decision appears to me to have proceeded upon the very special provisions of the 50th section of the Act. That section imposes upon the Court the duty of answering certain questions of law arising in the course of the work of the Boundary Commissioners and brought before the Court at the instance of the Commissioners. Here we are not considering a special case, and we have not to ascertain whether the position is one in which the Court is authorised and bound to advise the Commissioners. We are dealing with two disputants, the one asserting a right to so much money, and the other denying it. Accordingly I regard the case of *Borthwick* as a decision solely on the limits of the new jurisdiction conferred on the Court by sec. 50, and I do not accept it, and am not called on to accept it, as applicable to a totally different case.

The case made by the parish of Galashiels is very simple. They say, we have now a piece of Melrose, and one result of that is that we have now to look after the paupers on that piece of ground, but we find that one of these paupers has no settlement in Galashiels because he was born in Melrose and has acquired no settlement by industrial residence for the requisite number of years, or otherwise, in Galashiels. Another is in the same situation, because she has ac-

industrial settlement in Melrose and has none in Galashiels. The answer to that is a very singular one. It is said that the words of the 49th section (which purport to be words dealing with the future) carry with them the result that historical facts are to be distorted to this extent that whereas the place where this old woman lived was, in law and in fact, down to 11th June 1891 in the parish of Melrose, she is now to be held, contrary to law and fact, as having all that time lived in Galashiels. In like manner, as regards the birth settlement, this man was born thirty years ago at a place which in law and fact was then in Melrose; the contention is that the result of the Act of 1889 is that he is to be held to have been born in Galashiels. These would be very startling results, and I think it unnecessary, in order to satisfy the language of the requirements of the section, to reach them. The good sense of the thing points to what is, I think, the result of the enactment. The Act changes the poor-law authority for the detached district, but it carries over the district without affecting existing liabilities, and among others the liabilities of the old parish which the individual history of paupers may have created against it.

No. 132.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

When the nature of the case is thus looked at, two things seem clear. In the first place, this is a purely legal question relating to the effect of the Local Government Act upon the previous statute law regarding settlement. The case of *Borthwick* is a decision only on the special question which was submitted by the Boundary Commissioners under the 50th section of the Act, and does not touch the jurisdiction of the Courts of law to determine the effect of the Local Government Act on a patrimonial claim for relief of a pauper raised by one parish against another. In the second place, the case upon the merits presents no difficulty. I read the Local Government Act as affecting settlements only to this extent—that any birth or residence occurring after the date of the order of the Commissioners in a detached portion is to have effect so far as poor-law rights are concerned, according to the new boundaries. I find nothing in the Act which ascribes a retrospective effect to the change, so as to alter the liability in the case of individuals otherwise than it would have been altered had the individuals migrated into the new parish at the date of the order.

I am therefore for recalling the interlocutors of the Sheriffs, and for giving decree in both actions.

LORD ADAM.—There are two actions here with which we have to deal—the more prominent is that involving the case of Mrs Hay who had resided in Galashiels for a continuous period of five years prior to 11th June 1891. On that date an order was issued by the Boundary Commissioners which separated that part of Melrose in which Mrs Hay lived from the rest of that parish and adjudged it to belong in future to Galashiels. On 26th August 1891 Mrs Hay became a proper object of relief in the parish of Galashiels, and that parish, as its duty bound, gave her relief. The object of the present action is to obtain a return of the money so expended. The action is of a most ordinary kind, and is one of which we have constant experience, and I can see no reason why we should not decide a question of the kind raised as it is between these two parochial boards. It is said that we are precluded from entertaining the question by the decision in the case of *Borthwick*. I agree with your Lordship that this is not so. The case of *Borthwick* was a very peculiar one, which was not brought by two competing parochial boards, but at the instance of the Boundary Commissioners in the form of a special case inviting the opinion of the

No. 132.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

Court under the 50th section of the Local Government Act. Whether the Court was right or wrong in the view which was taken of that case, I do not think it has any bearing upon the present. Here there are two litigants, each with a patrimonial interest in the result of the action, and accordingly the present action is clearly differentiated from the decision in the case of *Borthwick*.

Upon the merits the question is whether the inspector of Galashiels is right in his contention that Melrose is the parish of the pauper's settlement. It is not disputed that prior to 11th June 1891 the pauper had acquired a settlement in Melrose by a residence of upwards of five years. Has she been deprived of the benefit of that settlement, or has she done anything to lose the residential settlement so acquired? All that has happened is that by the order to which I have referred a portion of the parish of Melrose has been detached and is for the future to be treated as part of the parish of Galashiels. The circumstances are not different from what they would have been if this pauper had voluntarily left the parish and had gone to live in another. It was said by Mr Jameson that it is the particular piece of ground on which the pauper lived which must be looked at, and that being so, that it must be held to be part of the parish of Galashiels for all purposes. This is not so. The simple question which we have to consider is where was the residential settlement acquired, and upon the merits of that question I think the inspector of Galashiels is right. I am therefore of the same opinion with your Lordship.

In the other case, where the settlement is a birth settlement, I think the same result must follow.

LORD M'LAREN.—These two actions are of the nature of claims of relief by the inspector of poor of one parish against the inspector of another. The actions are in a form with which we are familiar, and of which there are abundant examples in the reports. The question comes before us for decision in precisely the same way as if the pauper were himself suing for relief, because it is in right of the pauper's claim that the parish which afforded temporary relief comes to the Court asking to have the incidence of the relief shifted to the parish of settlement.

I am not surprised that the Sheriff should have been embarrassed by the opinions in the case of *Borthwick v. Temple*, but I agree with your Lordships that apart altogether from that case we must decide the question of right when brought before us in a competent form. At the same time I also think that the case of *Borthwick*, when rightly understood, is in no way inconsistent with the decision which we are going to pronounce. The case of *Borthwick* was brought under the 50th section of the Local Government Act, which conferred what may be called a consultative jurisdiction upon the Court, and, as we understood the statute, that jurisdiction was confined to questions of law in which the Boundary Commissioners had an interest. The present is a question of fact, not of law, although, no doubt, as in many questions of fact, there is law underlying it. The question of fact is, where has this pauper her settlement? There are, perhaps, some expressions in the opinions of the Judges in the case of *Borthwick* which go beyond what was necessary for the immediate decision of the case, and I take my full share of responsibility for these. But plainly what was decided there was only this, that in the exercise of this special statutory jurisdiction we did not see our way to deal with a claim relating to the liability for the maintenance of an individual pauper, and still less

with the possible consequences which were the subjects of the second and third questions of the case. **No. 132.**

Coming to the merits of the two actions which we are here considering, I think it is possible to arrive at a satisfactory determination without taking any account of the cognate question where a pauper has resided for the necessary period partly in a detached portion of a parish and partly elsewhere in the parish. Taking first the case of the residential settlement, as the point presents itself to my mind, the woman had acquired an industrial settlement by residing for five years in the parish of Melrose, and consequently she has a claim of relief against that parish. It is of no consequence, so far as that claim of relief is concerned, at what spot within the parish she resided, because the parish is an indivisible area in all questions of settlement, and it is by no means necessary to prove all the various places where the pauper has resided, if only the general fact of an industrial residence within the parish is made out. The law is clear that an industrial settlement once acquired will continue until it is lost by non-residence, or until, as in the case of marriage or forisfiliation, a new settlement has been obtained. Prior, then, to the disjunction of a part of Melrose parish, the pauper had acquired a settlement in that parish, and such a settlement, according to settled principles, must remain until it is lost in the ordinary way. I quite grant that it may be lost by carrying away that part of the parish in which she is living, just as it would be lost by migration to another parish. But time is the important element, and the settlement will not be lost by migration or by the disjunction of the pauper's abode from the parish except by non-residence for the necessary legal period. The cases which have been figured of residence in various parts of the parish do not, therefore, appear to me to affect the case, and I think the birth settlement is really identical with the residential, because it will continue until another settlement has been acquired, and none has been acquired here.

On these grounds, I am of opinion that the claim of the inspector of Galashiels is well founded.

LORD KINNEAR was absent.

THE COURT pronounced this interlocutor in both cases:—"Recall the interlocutor of 21st January 1892 and subsequent interlocutors; repel the defences, and decern in terms of the prayer of the petition; find the appellant entitled to expenses," &c.

BRUCE & KERR, W.S.—ROMANES & SIMSON, W.S.—Agents.

MAY M'CALL OR WEBSTER, Pursuer (Appellant).—*Younger*.

ALEXANDER BROWN, Defender (Respondent).—*Sym.*

No. 133.

Reparation—Known danger—Landlord and Tenant—Lease.—The tenant of a house raised an action against the landlord to recover damages for injuries sustained by slipping upon an outside stair leading to the house on 9th March 1891. She averred,—"After Whitsunday 1890, when the pursuer entered into possession of the said house, she found that the steps, five in number, from the level of the street up to the outside door, were much worn and in a dangerous condition for her use as a tenant." She further averred that she had complained to the defender's factor of the defect, and that the defender had in the autumn of the same year announced his intention of putting in new steps.

The Court dismissed the action as irrelevant, in respect that the pursuer's statements shewed that knowing the danger she had for ten months continued to occupy the house and to use the steps.

May 12, 1892.
Inspector of
Galashiels v.
Inspector of
Melrose.

May 12, 1892.
Webster v.
Brown.

No. 133.

May 12, 1892.
Webster v.
Brown.

2D DIVISION.
Sheriff of
Lanarkshire.

Observed that if a tenant gives notice to his landlord of a serious defect in his house and the landlord fails within a reasonable time to remedy it, the tenant may leave the house or remain at his own risk.

MRS MAY M'CALL OR WEBSTER was tenant of a house at Garnethill, Glasgow, the property of Alexander Brown, for the year from Whitsunday 1890 to Whitsunday 1891.

On 21st January 1892 Mrs Webster raised an action in the Sheriff Court at Glasgow against Brown, concluding for damages for injury sustained by her falling on an outside stair leading to her house. She averred,—(Cond. 3) “The said house is two stairs up, and is one of four houses which comprise the tenement No. 77 Hill Street foressaid, and the tenants of all the houses in the tenement enter from the street by the same outside door.” (Cond. 4) “After Whitsunday 1890, when the pursuer entered into possession of the said house, she found that the steps, five in number, from the level of the street up to the said outside door, were much worn, and in a dangerous condition for her use as a tenant. Complaints were made among the pursuer and the other tenants as to the condition of the steps and conveyed to the defender, with the result that in the autumn of the same year the defender visited the property and expressed his intention of putting in new steps, which intention he carried out shortly after the date of the accident after mentioned, by putting in new steps, or at least by putting new covers on the old steps; and prior to the said accident the pursuer frequently complained to the defender's factor, J. Campbell Brown, who is a son of the defender and resides with him, as to the dangerous condition of the said steps, requesting him to have them put right.” (Cond. 5) “The steps were originally very steep and narrow from front to back, with a bottelling on the front corner of each step about two inches deep and protruding about two inches to increase their width. The steps were of soft sandstone, and being exposed to the weather were, by the passenger traffic, worn on the fronts of their upper surfaces, for a width of two or three feet up the centre of the entrance, to such an extent that the bottelling had disappeared, and the steps presented the appearance of a sloping declivity. It was thus very difficult, especially in going down, to avoid falling.”

The pursuer then stated that on 9th March 1891, as she was leaving her house, her foot slipped on the first step from the top, and that she fell and received serious injuries through the fault or negligence of the defender in not putting and maintaining the said steps in a good and safe condition for the use of the pursuer as a tenant.

She pleaded ;—(2) The defender, being proprietor of the house of which the pursuer was the tenant, was bound to put and keep the house in good tenantable condition and repair, including a good and safe mode of access thereto, and he having failed to keep the steps, which were the only mode of access thereto, in a good and safe condition for her use as a tenant, is liable for the loss and injuries the pursuer has thereby suffered, and decree should be granted as craved, with expenses. (3) The pursuer having sustained permanent injuries by the failure of the defender to provide and maintain the said steps in a good and safe condition for her use as a tenant, though informed and well aware of their condition, the defender is bound to compensate her for the loss and injuries she has thereby sustained, and decree should be granted as craved, with expenses.

The defender denied fault.

The Sheriff-substitute (Guthrie) having allowed a proof, the pursuer appealed for jury trial, and proposed an issue.

In the Court of Session the defender added a plea to the relevancy.

Argued for the defender ;—The pursuer's averments shewed that she

was well aware of the condition of the steps for a long time prior to the accident. She stated that she found the defect to exist "after Whit-sunday 1890, when the pursuer entered into possession of the said house." No. 133.
 The remedy of a tenant who found that the subjects let to him were in a dangerous state was to leave the house and take another at the landlord's expense, not to remain and sue the landlord for damages.¹ That this was on the pursuer's case a very serious defect was clear, for she said that the steps formed a sloping declivity. In *Fulton's* case, where there was much similarity on the facts to the present, the person using the stair was not a tenant. He was a third party on the premises by invitation of the owner.² May 12, 1892.
Webster v. Brown.

Argued for the pursuer;—It did not seem to be disputed that the defender would have been liable to one of the public. In a question with his tenant he was bound to provide a house with a safe access, and was responsible in damages for the result of having failed to do so. It was said that the pursuer could have left the house. That was a question depending on the importance of the defect, and the difficulty of removing it. The pursuer, according to her averments, had complained to the defender's factor, and expected the defender to fulfil his promise to remedy the defect, and therefore was not bound to leave the house.

LORD JUSTICE-CLERK.—The pursuer states her case on the footing that she was tenant of a house for nine months, and that after she had entered upon a new term, and in the tenth month of her tenancy, an accident occurred to her on account of the defective state of the stairs leading from the street to the outside door of her house. It is not alleged that between the date on which she entered into possession and the date on which the accident happened any change had taken place in the state of the stairs. Thus for nine months she had continued to use them. If a person becomes tenant of a house, and if defects in the house or its approaches become known to him, there are two courses open to him—(1) he can remain in the house, which implies that he considers the defects trifling, and is willing to overlook them; or (2) he can give the landlord notice to have the defects remedied, and if the landlord does not make the necessary alterations within a reasonable time he can leave the house. I do not suggest that the tenant in discovering the defects should instantly leave the house and charge the landlord with the expense of acquiring a new tenancy; but he is bound within a reasonable time to bring the matter under the notice of the landlord, and, upon getting no remedy, to leave the house, or remain at his own risk. But in this case the pursuer has occupied this house for many months, and during the whole of that time she has known the defective state of the stairs.

In the circumstances I must hold that there is here no relevant case stated for the pursuer.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I also agree. I think the pursuer's averments in condescendence put her out of Court. She there avers,—“When the pursuer entered into possession of the said house she found that the steps, five in number, from the level of the steps up to the said outside door, were much worn, and in a

¹ Scottish Heritable Security Co., Limited, v. Granger, Jan. 28, 1881, 8 R. 50.

² Fulton v. Anderson, Nov. 18, 1884, 22 S. L. R. 100.

- No. 133.** dangerous condition for her use as a tenant." For nine or ten months she continued to use these steps. I think, therefore, she acted in face of a known danger, and must take the consequences. It is the duty of a tenant who discovers a serious defect in the condition of the house when he enters into possession immediately to give notice of the defect to the landlord, and insist on its being repaired, and if the landlord fails to repair the defect within a reasonable time, the tenant may leave the house. If, however, the tenant does not do so, but continues, notwithstanding the defect, to occupy the house, the tenant must just take the consequences.

May 12, 1892.
Webster v.
Brown.

THE COURT dismissed the action as irrelevant.

SIMPSON & MARWICK, W.S.—ALEXANDER WYLIE, S.S.C.—Agents.

- No. 134.** JANET CARRUTHERS OR BRAND AND ANOTHER, Pursuers (Respondents).—*Asher—Salvesen.*
WILLIAM JOHN BRAND AND OTHERS (Scott's Trustees), Defendants (Reclaimers).—*Dickson—Younger.*

May 13, 1892.
Brand v.
Scott's Trustees.

Succession—Incidence of burden—Proof—Testament—Extrinsic evidence.—J. S. in 1879 executed a settlement in which he conveyed to trustees his whole heritable and moveable estates with this direction,—"After payment of all my just and lawful debts . . . my said trustees shall pay and make over to" his sister-in-law Mrs B., wife of W. B., in liferent, and her children in fee, one-half of the residue of his estate, and to his brothers and sisters the other half of the residue.

On 4th January 1881 J. S. executed a bond over his house and grounds of L. for £4000 in favour of the firm of W. B. & Company to whom he was owing £10,000, and the bond was recorded.

By a codicil dated in 1889 the testator conveyed to Mrs B., the widow of W. B., in liferent, and to J. B., their daughter in fee, his house and grounds of L. as occupied by him, with the household furniture, silver plate, and other moveables therein, stating that he revoked the settlement "only in so far as it conveys generally the said dwelling-house," &c., "hereby confirming the same in all other particulars."

After the death of J. S., Mrs B. and her daughter raised against the trustees an action for declarator that the bequest of the house and grounds was not burdened with the debt contained in the bond, and that the trustees were bound to pay it out of the deceased's other estate on the grounds (1) that the settlement and codicil implied a direction that the debt in the bond should be paid out of the general estate exclusive of the subjects conveyed by the codicil, and (2) *separatim*, that the settlement and codicil were to be construed under reference to the facts of the case, and that so construed they implied this direction.

In support of the latter plea the pursuers averred that at the date of the bond J. S. was owing to the firm of W. B. & Company a debt of £10,000, and that being then apprehensive that his affairs might become embarrassed he voluntarily offered the security to these creditors, and asked them to send to his agent authority to record the bond; that this authority was given, and the bond recorded, but that he retained the bond in his own possession; that he never intended the bond to be acted upon, except in the event of his bankruptcy, and that subsequently, when his affairs became prosperous, he destroyed the bond; that his house and grounds were never worth more than £4000, and that at the date of the codicil and at the date of his death they were not worth more than £3000, and that that being less than the amount of the bond, their bequest would be of no value, which could not be presumed to have been the trustee's intention.

Held that the pursuers' averments were not relevant, and action dismissed.

DR JOHN SCOTT, of Langshaw, Moffat, died on 22d July 1890, unmarried. He left a settlement dated 26th August 1879, and a codicil thereto dated 6th August 1889. No. 134.

By the settlement Dr Scott conveyed his whole estate, heritable and moveable, to William Brand and others as trustees. He directed the trustees (who were also nominated executors), "after payment of all my just and lawful debts," to make over one-half of the residue of the trust-estate to Janet Carruthers or Brand, his sister-in-law, wife of William Brand, in liferent for her liferent allanarly, and to her daughter Jane Ann Scott Brand, and other children in fee, according to certain proportions, and to make over the other half of residue to his sister Isabella Scott, and his half-brother Samuel Kennedy, and other half-brothers, equally among them. May 18, 1892.
Brand v.
Scott's Trustees.
2D DIVISION.
Lord Kin-
cairney.

By the codicil, Dr Scott conveyed to Janet Carruthers or Brand, in liferent allanarly, and to Jane Ann Scott Brand, and her heirs and assignees whomsoever in fee, his house and grounds of Langshaw, "all as now occupied by me, . . . together with the whole household furniture, silver plate, and other moveables in the said dwelling-house; and I hereby revoke the said settlement only in so far as the same conveys generally the said dwelling-house," &c., "hereby confirming the same in all other particulars."

At Dr Scott's death there existed over Langshaw a bond and disposition in security in favour of William Brand, as trustee for his firm of W. & H. Brand & Company, for the sum of £4000. This bond was recorded on behalf of William Brand, as trustee, on 5th January 1881.

At the death of Dr Scott he was indebted to William Brand's firm in a sum of about £9097. His trustees paid up to the firm that amount, receiving a discharge for the debt, and an assignation to the bond for £4000, to enable them to operate their relief so far as competent.

On 15th December 1891 Mrs Brand and Jane Ann Scott Brand raised an action against Dr Scott's trustees for declarator "that under and in virtue of the said settlement and relative codicils of the said Dr John Scott, particularly a codicil dated 6th August 1889, the pursuers, for their respective rights of liferent and fee as therein provided, obtained a valid and effectual bequest, and are now in right, of" Langshaw, "and that the bequest of the said dwelling-house and lands in their favour is not burdened with the debt contained in" the bond above mentioned, or with said bond itself; but it should be found "that the pursuers are entitled to hold and possess the said lands free and disencumbered of the said bond and of the debt, and that the defenders, as trustees foresaid, are bound to deduct the said sum of £4000, being the amount of said bond, together with interest . . . from the moveable estate of the deceased," and that before dividing the residue among the parties entitled thereto; or otherwise, the defenders should be ordained "to free and relieve the pursuers and the said house and others of the said bond, and the debt therein contained, and to charge the same against the general estate of the said deceased; and in any event, the defender should be ordained to execute in favour of the pursuers a valid discharge of the said bond and disposition in security at the pursuers' expense."

The pursuers stated that at the time at which Dr Scott executed the settlement he was proprietor of a sugar plantation in Demerara, which W. & H. Brand & Company managed for him, and that they had made advances for him to a large amount. "In consequence of the depressed state of the sugar market these advances continued to increase until, on 4th January 1881, they amounted with periodical interest at five per cent, which was annually charged against Dr Scott, to the sum of £11,764, 2s. 7d. Dr Scott was about that date apprehensive that, in the

No. 134.
 May 13, 1892.
 Brand v.
 Scott's Trus-
 tees.

event of the sugar plantation in question continuing to cause him loss, his affairs might become embarrassed, and was anxious that Messrs W. & H. Brand & Company, who were his largest creditors, and had throughout shewn him the utmost consideration as regards the debt due to them, should be protected to some extent against his possible bankruptcy. He accordingly, at his own instance, caused his agent Mr Tait, Moffat, to prepare a bond and disposition in security over his estate at Langshaw to the amount of £4000, and on 11th December 1880 he wrote to William Brand, senior partner of the said firm, as follows:—‘My dear Brand,—I have requested Mr Tait to make out a bond, giving you a lien on Langshaw for four thousand pounds (£4000). As the document will have to be registered in Edinburgh, I think you had better write Mr Tait, authorising him to do so. This falls far short of your claim upon Zeelugt, but you may rely upon me doing everything in my power to protect your interests. JOHN SCOTT.’ Mr Brand sent the authority asked for in said letter, and the bond was recorded by Mr Tait on 5th January 1881.” (Cond. 5) “At the time said bond was executed it was not intended by the parties that it should ever be acted upon, except in the event of Dr Scott’s bankruptcy. Accordingly the bond was never delivered to the creditors therein, but was retained by Dr Scott in his repositories. At his death a careful search was made, but the bond was not amongst the papers of the deceased, and the pursuers believe and aver that it was intentionally destroyed by the deceased after his affairs had become more prosperous, in the belief that by so destroying it the bond would cease to be operative. . . . In the year 1885 the testator sold the sugar plantation, and so relieved himself of what had been a constant source of loss and anxiety. From that time onwards his affairs were not subject to any serious fluctuation, his estate being securely invested, and his own expenditure being considerably less than the income which he regularly received. . . .” (Cond. 6) “At or about the time when the bond in question was written out, Dr Scott also placed certain other securities, intended by him to protect the said firm of W. & H. Brand & Company in the event of his bankruptcy, in a canister which he kept in the Bank of Scotland at Moffat. At his death there was found a memorandum in the following terms:—‘(Private) Your bond on Langshaw has been registered, and I have enclosed some railway scrip in an envelope addressed to you, saying you hold it as security for your advances on Zeelugt. Should anything happen to me, you will find these documents in a canister in the safe of the bank of Scotland. JOHN SCOTT.’ This memorandum, which is holograph of the testator, was enclosed in an envelope, and addressed in his handwriting, ‘Wm. Brand, Esq.,’ amongst whose papers it was found after his death. None of the documents mentioned in said memorandum were found in the canister kept by the testator at said bank, or in his repositories, and as already stated, the probability is that he destroyed the bond after the purpose for which it had been made out at the testator’s request had been in his view served.”

The pursuers further stated that in 1882 Dr Scott contemplated selling Langshaw in order to pay off the debt to Brand & Company, but was dissuaded by Mr William Brand, but that in and after 1885, having been assured that there was no danger of his creditors in Demerara endeavouring to make a claim on Langshaw he determined to retain it; that Langshaw was at the date of the codicil, as well as at the date of Dr Scott’s death worth not more than £3000; that they (the pursuers) were on affectionate terms with him; that he knowing them to be attached to the place, and wishing that it should be the permanent home of some members of the

No. 134. The defenders reclaimed, and argued;—The action was irrelevant. The pursuers' pleas were clearly unsound in requiring the settlement to be construed by the extraneous facts they wished to prove. It was irrelevant to say that the bond had been destroyed by Dr Scott. It was a recorded deed. Not only the bond but the debt subsisted. It was not alleged that Dr Scott put the value of Langshaw at less than £4000. There was no instance in which such a parole proof had been granted. *Glendonwyn v. Gordon*¹ was appealed to. But there no such parole proof was said to be competent; Lord Colonsay, whose opinion went furthest in that direction, only referred to "formal deeds" subsequent to the settlement, as throwing light upon it. The alleged ambiguity about debts occurred in every settlement.

May 13, 1892.
Brand v.
Scott's Trustees.

the personal estate with an heritable debt; but it was laid down that the indications of the testator's intention to that effect must be of an unmistakable kind. On that point the Lord President says,—'I am not disposed to extract from these authorities so strict a rule as this, that nothing but an express statement or declaration by a testator that one heir or executor shall relieve another heir of the burden affecting the subject bequeathed to him is necessary; but I do think we gather from them this conclusion, that nothing but an indication so strong as to be equivalent in effect to an express declaration will be sufficient to justify such a result.'

"Taking the rule to be as thus expressed, the question is whether there are sufficient grounds for departing from it in the present case.

"It is not said that there is any testamentary or written expression of Dr Scott's desire to that effect. The pursuers seek to infer Dr Scott's intention from the facts and circumstances which they aver. They are certainly extremely peculiar and special. It is averred that Dr Scott became indebted to his relatives, the Messrs Brand, and was anxious to give them some security for their debt. Accordingly in 1881 he ultroneously granted them a bond and disposition in security for £4000 over his property, consisting of the house in which he lived, and the grounds around it. His debt to Messrs Brand considerably exceeded £4000, but that was apparently the full value of Langshaw. The bond was registered in the Register of Sasines, but it was never, except by this registration, delivered to the creditors. It was retained by Dr Scott, and has now disappeared altogether. Dr Scott's circumstances improved after he granted the bond, and his estate became amply sufficient to pay the advances of his relatives without taking Langshaw into account.

"The pursuers further aver that at the date of the codicil the lands of Langshaw were of less value than £4000, so that the bequest of it by the codicil was of no value at all unless it were relieved of the heritable bond.

"These averments do not seem very seriously disputed by the defenders; but if these had been all the averments, I could not have considered them relevant. I should not have felt warranted in inferring from these facts only, either that Dr Scott did in fact destroy the bond, or that he did so with the intention and in the belief that it would thereby be rendered inoperative as a burden on Langshaw.

"But then the pursuers have averred that the bond 'was intentionally destroyed by the deceased, after his affairs had become more prosperous, in the belief that by so destroying it the bond would cease to be operative.'

"If the pursuers should prove that averment in all its particulars so as to place it beyond the region of conjecture, and should also prove the other averments, I am not at present prepared to say what the result might be.

"I am therefore not prepared to throw out the action as irrelevant; but I have thought it desirable to indicate what appears to be the clear requirement of the law on the question, because it would be regrettable if the pursuers should incur the cost of a proof, and should in the end have no more than conjecture to offer in support of the averment to which I have specially adverted.

¹ *Glendonwyn v. Gordon*, July 20, 1870, 8 Macph. 1075, 42 Scot. Jur. 63; affirmed May 19, 1873, 11 Macph. (H. L.) 33, 45 Scot. Jur. 183.

Argued for the pursuers;—A proof should be allowed. The first purpose of the settlement was to pay “debts.” There was latent ambiguity in the phrase in the circumstances. The proof would construe the term “debts” in this settlement. There were three things to be proved which were important to the decision. First, the bond was granted ultroneously to Mr Brand by Dr Scott. Second, the value of Langshaw was less than the bond. He intended to give the pursuers a valuable gift, and it was unreasonable to suppose that he meant them to take Langshaw with a burden larger than its value. Thirdly, the bond had disappeared in Dr Scott’s hands under circumstances pointing to intentional destruction. Such evidence as these three points afforded was competent, for, in the words of Lord Colonsay in *Glendonwyn v. Gordon (supra)*, the Court could “take into consideration circumstances calculated to throw light on the intention of the testator, whether found within the deed or collected from external sources.” The Court, in order to get into the position of the testator, must consider the value of his estate. The Court did so every day.

No. 134.

May 13, 1892.

Brand v.
Scott’s Trustees.

LORD YOUNG.—Before the debate I had read the record and the note of the Lord Ordinary, and I have carefully attended to the argument. The facts stated lie in small compass. The testator Dr Scott died in 1890 leaving property worth about £10,000 or £12,000. Part of it consisted of the villa of Langshaw. It appears from the statements on record also that he was engaged in some West Indian sugar transactions along with Mr Brand, and got into debt to him to an extent which, in 1880, he was unable to meet. Being desirous that Mr Brand should be secure from loss, he, with the advice of Mr Tait, of his own accord, executed a bond and disposition in security over Langshaw for £4000, and informed Brand (who seems not to have been asking any security but to have been quite satisfied) that he had done so, and authorised him to get Mr Tait to record it. That was done in 1881. It is not disputed that thereby a document of debt was created in Brand’s favour, and that Langshaw was burdened with this debt. Now, Dr Scott made his will in 1879, and by it he conveyed his estate to trustees, with directions, in the first place, in the usual form which we so often meet with, “to pay debts,” and with directions also to divide his property into two parts, one part of which was to go to Dr Scott’s brothers and sisters, the other to his sisters-in-law.

In 1889 Dr Scott executed a codicil conveying Langshaw to his sisters-in-law in liferent and their children in fee. It is not disputed that at that date the debt for £4000 was a subsisting debt, and that Langshaw was burdened with it. Dr Scott having, as I already mentioned, died in 1890, the question is whether Langshaw is not still burdened with it. The first conclusion of the summons seeks to declare that the bequest of Langshaw to the pursuers is valid and effectual, and is not burdened with the debt, and that is supported on the ground that the testator’s intention was to leave it free of the debt. It is further concluded that, to that end, this property (Langshaw) ought to be relieved out of the rest of the estate. It is admitted that this conclusion is contrary to the ordinary rule of law. The bond subsisted. The debt subsisted. A direction to trustees to pay debts in words such as we have here does not extend so as to authorise them to pay out of the general estate debt secured on a particular subject specially conveyed to beneficiaries. And the pursuers admit this general rule, but say that they have averred facts and circumstances which are relevant to make the case exceptional, and to avoid the rule, and lead us

No. 134.
 May 13, 1892.
 Brand v.
 Scott's Trustees.

to the conclusion that Langshaw is to be free of the debt. What are these facts? The first is, that the bond was granted ultroneously when the creditor was making no demand. The second is, that Langshaw was not worth £4000, and that at the date of the codicil, as well as at the date of Dr Scott's death, it was not worth more than £3000, whereas the bond was for £4000. The third and only other fact is that the original bond has disappeared, and disappeared in such circumstances as to make it the reasonable conclusion as to its disappearance that Dr Scott himself destroyed it on purpose.

These then are the specialties on which proof is desired that the rule may be avoided. I think that if these facts were established never so clearly they would not avoid the rule. Take the fact I stated first—that the bond was ultroneously granted. Dr Scott wrote to Mr Brand making him aware of it, and it was by Dr Scott's instructions recorded by Mr Tait, which was equivalent to delivery. I think the whole details as to this are summed up in saying that the debt subsisted and the property remained burdened. The second fact, that the property was worth much less than the bond, is legally immaterial. We are all quite alive to the good sense of the remark that Dr Scott intended the pursuers to get some benefit from the codicil giving them Langshaw, whereas they get none unless this debt is paid off by the trustees out of the rest of the estate. But there is no authority and no principle for giving such effect to that consideration as to make the trustees pay off this heritable debt out of the other funds of the trust. I put it to the pursuers' counsel, Is the value to be regarded as at the date of the will or codicil, or at any other period? He said at the death of Dr Scott, and that leads to this result, that the interpretation of a direction to the effect that the rule is to be departed from may depend upon the rise or fall in the value of the property up to the date of the death. The rule is that the beneficiary shall take the subject burdened as it is, largely, lightly, or not at all, and we cannot entertain the suggestion of the pursuers. After the date of his will a testator may pay off, or reduce, or increase the burden, and it would be very singular that if the debt were half the value, or any other sum less than the whole the beneficiary must bear it, but if it had become greater than the value, then the residue must pay it. There is no authority and no reason for that.

The only other thing relied on is the disappearance of the bond. It is said to be probable that Dr Scott destroyed it, and that though that has no effect as between creditor and debtor, and though the debt subsists and the property is burdened yet, as between the heirs of Dr Scott, that is a direction to the trustees to pay the amount of it out of the general estate. Now, I think it likely enough that Dr Scott looked upon this bond as a mere money debt. Many people do so and in the law of England such debts so secured are so regarded. But while I am quite willing to assume that he did not understand that those taking Langshaw would have to bear the whole debt on Langshaw, but supposed that those taking his money would have to bear part of it, I cannot give any effect to that assumption without violating the firm rules of law.

I am therefore of opinion that no facts have been averred to make this an exceptional case, and that the interlocutor allowing a proof should be recalled. In this I do not think I am differing from the opinion of the Lord Ordinary on the legal question, for he gives none to the contrary of what I have said. He says only that if the pursuers prove their whole averments he is not prepared to say what the result might be. I think even proof of the intentional destru-

tion of the bond would not avail the pursuers, and that it would be idle to allow them a proof. No. 134.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

May 13, 1892.
Brand v.
Scott's Trustees.

THE COURT recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

BOYD, JAMESON, & KELLY, W.S.—BRUCE & KERR, W.S.—Agents.

ELIZABETH M'CONNON OR REID, Pursuer (Appellant).—*Shaw—Mac Watt.* No. 135.
EDWARD COYLE, Defender (Respondent).—*Dickson—Burnet.*

May 13, 1892.
Reid v. Coyle.

Reparation—Issue—Slander—Privilege.—A midwife raised an action of damages for alleged slander against a doctor, averring that she had been called to attend a woman (Mrs Moore) in labour, that she had given her a certain drug which was the proper treatment, that the defender having been called in to see the woman, "he, without so much as inquiring at the pursuer what the drug was, or what dose had been given, and conceiving that it would be a favourable opportunity for indulging his hostile and malicious feelings towards her, falsely, wickedly, calumniously, and maliciously stated to Mrs Moore's husband, the said Stephen Moore, that the pursuer had poisoned his wife." Further, she averred that this statement was made "in a malicious spirit, with a view of injuring the pursuer in the practice of her art as a midwife."

She proposed an issue whether the defender "falsely and calumniously" stated that the pursuer had poisoned the patient. The defender maintained that malice and want of probable cause ought to be put in issue.

The Court *refused* to insert malice and want of probable cause in the issue, on the ground that the pursuer's statements did not necessarily disclose a case of privilege, and that if a case of privilege arose at the trial it was in the power of the presiding Judge to direct the jury accordingly.

ELIZABETH M'CONNON OR REID, residing at Whiteinch, raised an action in the Sheriff Court at Glasgow against Edward Coyle, Licentiate of the Faculty of Physicians and Surgeons, Glasgow, and practising at Partick, to recover damages for alleged slander. 2D DIVISION.
Sheriff of
Lanarkshire.

The pursuer stated that she was a qualified midwife in extensive practice; that on 12th October 1891 she had been called to attend a Mrs Moore at Whiteinch, who was in premature labour, and that she administered to her half a teaspoonful of ergot of rye, which was proper treatment,—(Cond. 6) "The pursuer believes and avers that Mrs Moore's illness continued, and that the defender was called to see her on Wednesday, 14th October 1891, and, on hearing that the pursuer had given her a drug to soothe her pains, he, without so much as inquiring at the pursuer what the drug was, or what dose had been given, and conceiving that it would be a favourable opportunity for indulging his hostile and malicious feelings towards her, falsely, wickedly, calumniously, and maliciously stated to Mrs Moore's husband, the said Stephen Moore, that the pursuer had poisoned his wife. This statement was made in the said Stephen Moore's house at 42 Smith Street, Whiteinch, and was made in a malicious spirit, with the view of injuring the pursuer in the practice of her art as a midwife."

The pursuer also set forth further statements alleged to have been uttered to Stephen Moore, and also to a detective-officer.

The Sheriff (Spens) having allowed a proof, the pursuer appealed for jury trial. She proposed, *inter alia*, the following issue:—"1. Whether, on or about 14th October 1891, in the house 42 Smith Street, Whiteinch, occupied by Stephen Moore, the defender falsely and calumniously stated to the said Stephen Moore that the pursuer had poisoned his wife, Mrs

No. 135. Agnes Moore, or used words to a like effect, to the loss, injury, and damage of the pursuer?"

May 13, 1892.
Reid v. Coyle.

The defender argued;—There was here a case of absolute privilege, and no issue should be allowed. A doctor making such a statement as the result of an inquiry in the course of his duty as to his patient's symptoms was absolutely privileged. [LORD YOUNG.—Not so, if, as the pursuer says was the case, the doctor made the statement "maliciously" and "for the purpose of indulging hostile and malicious feelings."] It was not said the words were spoken without inquiry of anyone, only that they were spoken without inquiry of the pursuer. At all events, malice and want of probable cause must be put in issue. The doctor had a duty to inquire and to state his opinion, and was not responsible in damages, unless he spoke maliciously and without probable cause.¹ It was not only persons acting in a public capacity to whom this rule applied. It was enough that there was a duty.² At all events a *prima facie* case of privilege was set forth, and therefore the issue proposed could not be allowed.

LORD JUSTICE-CLERK.—To use an expression used by one of your Lordships, I think it is not "to demonstration plain" at this stage that this is a case of privilege. I think it very highly probable that it will be the duty of the Judge who tries the case to direct the jury that the evidence submitted by the pursuer raises a case of privilege, and if so, that they must be satisfied that the evidence shews that the defender was actuated by malice. But that point is not at this stage absolutely plain, and it would be the better course to leave the issues as they stand.

LORD YOUNG.—I concur. I do not think either party is greatly interested in the insertion or non-insertion of malice in the issue. Even when it is in the issue a Judge may direct the jury, that from the nature of the allegation and the circumstances and the absence of justification, they are entitled to assume it. Again, if it is not in the issue, a Judge may tell the jury that malice is not to be implied from the mere fact that the defender made a particular statement, and that it must be proved to their satisfaction that malice existed.

It seems probable that this case will present a question of the latter sort at the trial. If a doctor is called to attend a patient, and is led to ask who attended, and being told "A B did so, and gave some drug," says, "that woman has poisoned the patient," I do not imagine that anyone will say that malice is to be presumed in that. I think it better to say that it is not clear to demonstration at present that we have a case of privilege, but I think it will prove to be so at the trial.

LORD RUTHERFURD CLARK.—In this case I think it is safe to leave any question of privilege intact. It may arise at the trial.

LORD TRAYNER.—I am of the same opinion. The leaning of my own mind was that the case on record is one of privilege, and that malice should be put in the issue. But I do not dissent, for the defender cannot suffer from the non-insertion of malice, and if a case of privilege arises, the presiding Judge will tell the jury that unless there was malice there cannot be a verdict for the pursuer.

THE COURT approved of the pursuer's issue.

CARMICHAEL & MILLER, W.S.—CUTHEBERT & MARCBANK, S.S.C.—Agents.

¹ Croucher v. Inglis, June 14, 1889, 16 R. 774; Lightbody v. Gordon, June 15, 1882, 9 R. 934.

² Hill v. Thomson, Jan. 16, 1892, 19 R. 377.

ALEXANDER FLEMING AND OTHERS (M'Culloch's Trustees), First Parties. No. 136.

JAMES M'CULLOCH AND OTHERS, Second Parties.—*Dickson.*

ALEXANDER M'CULLOCH AND OTHERS, Third Parties.—*Ure.*

May 14, 1892.
M'Culloch's

Succession—Accretion—Children taking parents' share.—A trustor by trust-disposition directed that the residue of his estate should be divided among his brothers and sisters who might survive him, jointly with the legal issue of any of them who might predecease him. He further restricted the share of A., one of his sisters, to an alimentary liferent, giving her children the fee, and in the event of her dying without lawful issue he destined her share to her brothers and sisters who might be surviving at the date of her decease, jointly with the lawful issue of such of them as might have deceased. By codicil the trustor revoked "all share" that a brother R. would have been entitled to under the will, and left "that share" to R.'s family. On A.'s death, without issue, held that R.'s family were entitled to participate in the accreting share, just as their father would have been had he not been disinherited.

Observations (per Lord M'Laren) on M'Nish v. Donald's Trustees, Oct. 25, 1879, 7 R. 96.

WILLIAM M'CULLOCH, grocer and wine-merchant, Glasgow, died in 1ST DIVISION. 1880, leaving a trust-disposition and settlement dated in 1873.

That deed contained this provision in regard to the residue of the estate:—"And, in the last place, my trustees shall hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate, and the interest and produce thereof, equally to and for behoof of my brothers and sisters who may survive me, jointly, with the lawful issue of any of them who may have predeceased me leaving issue, the division being *per stirpes*: Declaring that the right and interest of my youngest sister Isabella M'Culloch, presently residing at Brodick, Island of Arran, in the share original or accreting falling to her of my means and estate shall be, and is hereby restricted to, an alimentary liferent of said share, not affectable by the debts or deeds of herself or of any husband she may marry, or attachable by the diligence of her or his creditors, and the fee of the said share shall be held and applied for behoof of the lawful child or children of the said Isabella M'Culloch, equally among them if more than one, whom failing, for behoof of my brothers and sisters who may be surviving at the date of her decease, jointly with the lawful issue of such of them as may have deceased leaving issue, the division being *per stirpes*."

The testator executed this holograph codicil, dated 27th May 1876:—"I hereby revoke and cancel all share that my brother Richard would have been entitled to from my last will (as prepared by Mr Cowan); . . . I leave that share (that my brother Richard would have got had he conducted himself towards me with anything like a brotherly feeling, of which, I am sorry to have to say, he is totally wanting, . . .) to his family (James, Agnes, and Gartshore), to be equally divided, under direction of my trustees (their father to have no say in the matter), James and Gartshore to get their share in full when they arrive at twenty-eight years of age, and Agnes to have her share vested in my business, property, or whatever security the trustees may think proper, so that she will only receive the interest on her share, and this interest is not to be given to her till she is eighteen years of age; should she die without lawful issue, her share to go back to my brothers and sisters (always exclusive of my brother Richard); should I die before James and Gartshore are twenty-eight years of age, the trustees to have full power to give their share to them in part or whole as they (the trustees) may deem proper."

The testator was survived by his brothers Richard and Alexander, by a sister, Isabella, by the children of a deceased sister, Mrs Taylor, and by the children of his brother Richard.

No. 136. Owing to the death of the testator's sister Isabella, then Mrs Dunn, without issue, on 27th January 1890, the share of the estate liferented by her, amounting to about £2700, fell to be distributed in accordance with the terms of the settlement and codicil.

May 14, 1892.
M'Culloch's
Trustees.

Questions having arisen in regard to the rights thereto, a special case was brought by (1) the testator's trustees; (2) Richard M'Culloch's three children; and (3) the other beneficiaries interested in the residue, viz., the testator's brother Alexander, and the children of a deceased sister Mrs Taylor.

The second parties maintained that they had a right to one-third of the share of residue liferented by Mrs Dunn, and the third parties maintained that the whole fell to be paid to them.

The questions were:—“(2) Are the second parties entitled to one-third of said share? (3) Are the third parties entitled to payment of the whole share of residue liferented by the late Mrs Dunn?”

Argued for the third parties;—The codicil substituted Richard's children only to the effect of taking their father's original share. They were not entitled to participate in the share which accrued to him through the death of Mrs Dunn. The substitution of issue in the trust-settlement could not include the issue of a disinherited brother. If that had been intended, it would have been so stated at anyrate in the codicil. The words “share” as used in the codicil meant original share, and could not extend to the accreting share.¹

Argued for the second parties;—The true reading of the codicil was that the testator intended that Richard's children should represent their father, and accordingly that they took his accruing share.² The language of the deeds here was different from that in *M'Nish's* case. There there was an initial gift to a beneficiary who failed, but here the children took as immediate beneficiaries.

LORD PRESIDENT.—The question in this case is, what is the meaning of the words “that share” contained in the codicil dated 27th May 1876? Does the share include the accresced fund,—that is, the portion of the share which lapsed by the decease of Isabella M'Culloch? or is it confined to the original share of the residue which fell to Richard M'Culloch? I cannot think that this is left in doubt by the testator, or that we require to analyse the decisions which have been cited in support of the two contentions. The *catena* of the language used by the testator in the settlement and in the codicil is close and clear. The words “that share (that my brother Richard would have got)” relate to the words in the initial part of the codicil “I hereby revoke all share that my brother Richard would have been entitled to.” I think these words are of such extension as to have an effect equivalent to that of the words which were the subject of decision in *Laing v. Barclay*,—in short, that they mean everything that Richard would have taken as the result of the will.

LORD ADAM concurred.

LORD M'LAREN.—In this case apparently there is no doubt as to the true meaning and construction of the residuary clause in the original will, but the question is as to the extent and effect of the direction given in the codicil. The codicil is evidently prepared by the testator himself, and while sufficiently clear is not quite accurate in its language. It begins, “I hereby revoke and cancel all share that my brother Richard would have been entitled to from my

¹ *M'Nish, &c., v. Donald's Trustees*, Oct. 25, 1879, 7 R. 96, Lord Gifford, p. 92.

² *Laing v. Barclay*, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95.

last will," and I take that to mean "I revoke and cancel all provisions under which my brother Richard takes any share of my estate." The words "all share" are sufficiently comprehensive in my view to include every right and interest arising to Richard under the will. Accordingly, when the testator goes on to say that he does not wish the children to suffer by the fault of their father, and proceeds to leave them that "share which my brother Richard would have got," it is obvious that he has given to them precisely what he has previously taken from their father by the words of revocation.

No. 136.
May 14, 1892.
M'Culloch's
Trustees.

The argument addressed to us was founded upon a distinction to be taken between the language of the destination in the will and the language in the codicil. It was said that the testator when he meant to deal with interests in his estate arising by accretion took care to say that these interests were included, and it is quite true that in the will, which is drawn by a lawyer, when he is dealing with the event of one of his brothers dying and leaving issue, he does say that the issue shall take the share "original or accrescing" which the parent would have taken. These words "original or accrescing" are properly introduced for the purpose of making clear what might otherwise have been in question, viz, whether accrescing shares were intended to be included. But it does not appear to me that there was any necessity for repeating these words in the codicil. Besides, it is announced at the outset of the codicil that what the testator is there proposing to deal with is all right and interest—so I interpret the words—that Richard would have taken under the will.

I should like to add, as the case of *M'Nish* has been referred to, that I should not be disposed to assent to the proposition that there is any artificial rule of construction which obliges us to hold where a residue is disposed of among different members of a family that the children of one of the residuary legatees who may die leaving issue are cut out from what their parent would have taken by accretion. In some cases that might come to be a very large interest, because it might be that in a family of five or six all had died except one—one only of those who had died leaving issue,—and to apply the doctrine that issue take only their parents' original share in such a case would reduce their interest to a fraction of what the testator really intended them to receive. When the case of *M'Nish*—which was cited as the strongest authority in support of that artificial rule—comes to be examined, it is seen that in that case the testator had begun by expressly giving over the interest of such of the legatees as might die without issue to the survivors, and so he dealt completely and exhaustively with accrescing shares. Consequently, when the testator goes on to say what is to be the benefit taken by the children of a predeceasing child, one must look to what he has already done in dealing with interests arising by accretion, and put such a construction upon the word "share" as will be consistent with what the testator has already announced. But I do not think that a decision on the terms of a will so expressed would be a decision to the effect that, irrespective of the language there used, the Court is to be hampered by a general rule that all gifts in favour of issue are to be strictly construed, and, if possible, cut down, I do not think the Court ever intended to lay down any rule adverse to the rights of the children of a predeceasing member of a family to whom a residuary bequest has been made, whose claims on the testator are precisely of the same nature as are those of other members of the family.

These observations are perhaps not necessary to the decision of the present case, but as the case of *M'Nish* was commented upon, I think it right to say

No. 136. that the question, although supposed to be concluded by authority, is one which I think must remain for subsequent consideration when a case properly raising it shall arise.

May 14, 1892.
M'Culloch's
Trustees.

LORD KINNEAR was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the second parties are entitled to one-third of the share of residue liferented by Mrs Dunn, and find it unnecessary to answer the other two queries, and decern."

MILLAR, ROBSON, & COMPANY, S.S.C., Agents.

No. 137. SIR ROBERT C. SINCLAIR, BART., Complainer (Reclaimers).—*Dickson—Cullen.*

May 17, 1892.
Sinclair v.
Brown.

ROBERT BROWN, Respondent.—*Jameson—M'Lennan.*

Lease—Compensation—Sufficiency of notice to landlord—Reference—Agricultural Holdings Act, 1883 (46 and 47 Vict. c. 62), sec. 7, and Schedule, part iii.—The 7th section of the Agricultural Holdings (Scotland) Act, 1883, enacted that a tenant claiming compensation for improvements under that Act should give notice in writing "of his intention to make a claim" at least four months before the termination of his tenancy, and that every such notice should state "so far as reasonably may be, the particulars and amount of the intended claim."

Opinions that the notice should contain specific information as to the various items, e.g., the quantity, nature, quality, and date of application of manure, claimed as improvements within the schedule to the Act, such as will enable the landlord to judge whether he will entertain it or not.

Terms of a notice of claim, which in the opinion of the Court was insufficient.

Lease—Compensation—Reference—Agricultural Holdings (Scotland) Act, 1889 (52 and 53 Vict. c. 20), sec. 2, subsec. 3.—The Agricultural Holdings (Scotland) Act, 1889, sec. 2, subsec. 3, enacted,—"If at the determination of the tenancy the parties shall not have appointed a referee, then on the application of either party the Sheriff shall within fourteen days appoint a competent and impartial person to be referee."

A petition for the appointment of a referee was presented to a Sheriff on 27th July in vacation, and answers were lodged. At the first vacation Court, held on 18th August, the petitioner moved to have the appointment made. The Sheriff dismissed the petition, on the ground that appointment could only be made within fourteen days of the presentation of the application. The petitioner presented a second petition. *Held* that a second application for an appointment was not incompetent.

1ST DIVISION.
Ld. Kyllachy.

ROBERT BROWN was tenant of the farm of Upper Downreay, belonging to Sir Robert Charles Sinclair, Bart. of Murkle and Stevenson, under a lease for twenty-three years from Whitsunday 1879. There was a break at Whitsunday 1891, of which Sir Robert duly intimated to Brown that he was to take advantage.

On 13th January 1891 Brown sent the following notice of claim under the Agricultural Holdings (Scotland) Act, 1883, to Sir Robert's factor,—*"Dear Sir,—I hereby give notice, in terms of Agricultural Holdings (Scotland) Act, 1883, that I propose making the following claim:—First. The sum of £237, 12s. 1d. for unexhausted value of manure, artificial, as applied to holding. Secondly, The sum of £217, 17s. 6d. for unexhausted value residue of cake, corn, and other feeding stuffs consumed on the holding by cattle, sheep, and pigs. Thirdly, For general improvements of the farm during the currency of the tenancy, the sum of £500."*

On 27th July 1891 Brown presented a petition in the Sheriff Court at Wick under the Agricultural Holdings (Scotland) Acts, 1883 and 1889, for appointment of a referee under the notice of claim.

In his defences to that petition, which were lodged on 10th August, No. 137. Sir Robert Sinclair, *inter alia*, stated that "he has all along been willing to concur in the appointment of a referee or referees to deal with the first two items in the respondent's claim," and his sole pleas in law on the merits were to the effect that the third item of the respondent's claim was barred on the ground of insufficient specification in the notice of claim, and that the appointment of a referee must be limited to the first two items in the said notice of claim.

May 17, 1892.
Sinclair v.
Brown.

The Sheriff Court of Caithness being then in vacation, there was no opportunity of moving in the petition until the first vacation Court day on 18th August, when the Sheriff (Thoms) proceeding upon the provisions of subsection 3 of section 2 of the Act of 1889,* pronounced this interlocutor:—"The Sheriff, in respect that no appointment of a single referee can in the present proceedings be made within fourteen days of the presentation of the application, dismisses the petition."

Brown thereafter, on 14th September, withdrew the third item in his notice of claim, and on 31st October presented a second petition for appointment of a referee. On 10th November following the Sheriff-substitute (Mackenzie) pronounced this interlocutor:—"Finds that in the circumstances the application is competent, therefore repels the pleas in law for the respondent: Finds the pursuer is entitled to obtain the appointment of a joint referee as craved, in so far as relates to the matter contained in the first two heads of his notice of claim: Dismisses the petition *quoad* third head of the notice of claim: Appoints Mr Robert Morris, Reiss Lodge, Wick, to act as referee as craved under the above-mentioned restrictions."

Sir Robert Sinclair then presented a note, praying that Brown and the referee should be interdicted from following out or in any way acting in the notice of claim and reference.

The note having been passed upon caution, and a record made up, the complainer founded upon the provisions of the 7th section of the Act of 1883,† and stated that "The said Act confines the statutory right to compensation to certain specified classes of improvements expressly enumerated in the schedule annexed to the Act, provided these improvements have been executed within the periods specified in the said Act, and in all other respects meet the statutory requirements. The said alleged notice of claim is inept, and does not comply with the requirements of the statute in many respects, and in particular in respect that there is in said notice no sufficient specification of the alleged claim to shew whether the alleged improvements are of the nature contemplated by said Act, or whether they were executed within the period for which the said Act allows compensation." He further averred that the second petition for appointment of a referee was incompetent, and that the Sheriff-substitute's interlocutor was *ultra vires*.

* The Agricultural Holdings (Scotland) Act, 1889, sec. 2, subsection 3, enacted,—“If at the determination of the tenancy the parties shall not have appointed a referee, then on the application of either party, the Sheriff shall, within fourteen days, appoint a competent and impartial person to be referee.”

† The Agricultural Holdings Act, 1883, sec. 7, enacted,—“Notwithstanding anything in this Act, a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act. Where a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter notice in writing to the tenant of his intention to make a claim for compensation under this Act. Every such notice and counter notice shall state, so far as reasonably may be, the particulars and amount of the intended claim.”

No. 137.

May 17, 1892.
Sinclair v.
Brown.

The respondent, Brown, stated in answer,—“Explained that the respondent, in order to obviate all questions in regard to the third item of the said notice of claim, withdrew the said third item by intimation to the complainer’s agent prior to instituting the proceedings suspension and interdict of which is sought in the present process. The first and second items in said notice of claim fall under the class of improvements specified in part third of the schedule annexed to the said Act, and are in accordance with articles 16 and 17* of said part third.” He further averred that the whole proceedings had been perfectly regular and competent, and in terms of the statutes.

The complainer pleaded;—Suspension and interdict should be granted as craved, in respect (1) The petition by the respondent, Brown, was incompetent. (2) It was illegal, incompetent, and *ultra vires* for the Sheriff-substitute to appoint a referee. (3) The respondent’s alleged notice of claim was incompetent, *et separatim* was irrelevant.

The respondent pleaded, *inter alia*;—3. The note of suspension and interdict should be refused with expenses, in respect (1) That the respondent’s notice of claim is regular and sufficient so far as relates to the first two items thereof, which alone are now insisted in; (2) that the complainer has judicially admitted, in the process on which he founds as excluding the process under suspension, that he is bound to acquiesce in the appointment of a referee to deal with the said two items; and (3) that the respondent’s application to the Sheriff to appoint the referee, who is now sought to be interdicted from acting, was competent and legal, and in accordance with the terms of statutes.

The Lord Ordinary (Kyllachy), on 26th March 1892, recalled the interim interdict, and refused the prayer of the note.†

The complainer reclaimed.

Argued for him;—(1) The notice of claim was bad, as it did not contain “the particulars and amount,” as required by the 7th section of the Act. Under the first item of the claim it was not said that the manure had been purchased, as required by the schedule to the Act, part III., 22. Nothing was said as to the quality of the manure, or the date of its purchase and application. Nor was it said that the feeding stuffs were not produced on the holding. In short, “reasonable particulars,” as stipulated for in the 7th section, were wholly wanting, and the landlord was without the data which it was his right to have.¹ They were all within the tenant’s knowledge, and without them the landlord could not be expected to make the tenant an offer, as it was contemplated by

* “16. Application to land of purchased artificial or other purchased manure.

“17. Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.”

† “NOTE.—The Lord Ordinary has carefully considered the various objections to the procedure which were urged by the complainer at the debate, but he has come to the conclusion that none of these objections are well founded. The respondent’s notice of claim might no doubt have been expressed with greater precision, but the Lord Ordinary sees no reason to apprehend that the arbiter will not strictly confine himself to claims competent under the statute; and indeed he does not consider that, fairly read, the claim, as made, embraces anything which is outwith the statute. It would of course have been better if in the second head of the claim the words ‘not produced on the holding’ had been inserted, but the reference to the statute seems to make it sufficiently plain that these words must be held implied.

“As to the question of the fourteen days, the Lord Ordinary can only say that he sees no reason for differing from the conclusion of the Sheriff-substitute.”

¹ Sinclairs v. Oliver’s Trustees, Dec. 17, 1887, 15 R. 185.

the Act he should do. There was nothing in the Act to shew that No. 137.
written pleadings were necessary at any stage of the proceedings. Hence
there was the greater necessity for a full disclosure *in limine*. (2) The
tenant's right to have a referee appointed ceased when his first applica- May 17, 1892.
tion was refused. Otherwise it would be in his power to present an end- Sinclair v.
less series of petitions, if each became abortive. The view taken by the Brown.
Sheriff-substitute and the Lord Ordinary made the time limit useless.

Argued for the respondent;—(1) What the 7th section required was
“notice of intention to make a claim.” From the notice, as sent to the
landlord, he could at once see under what heads of the schedule the
different items fell, and no more was necessary. Indeed, it would be im-
possible to give the particulars asked by the complainer, because the
notice of claim had to be given four months before the ish of the tenancy,
when the catalogue of improvements might be incomplete. It was too
late to take exception to the items, because before the Sheriff the com-
plainer had stated his willingness to go to the referee on them, the only
one he objected to at that time having been withdrawn. (2) What had
prevented the appointment of a referee on the first application in the
Sheriff Court was the fact of the Court being in vacation. There was no
provision for finality in the Act.

LORD PRESIDENT.—The reclamer has maintained two objections to the pro-
ceedings in this case. I shall first deal with the objection which was argued
last, viz., the alleged incompetency of the appointment of a referee by the Sheriff
on the application which was made to him after the first application had proved
abortive. When an appointment was asked under the first application, the
fourteen days within which it fell to be made under the provisions of the
Agricultural Holdings Act, 1889, had expired; and I do not think that the
Sheriff could have done otherwise than refuse the petition. But the statute
does not limit the capacity or power of either landlord or tenant to one applica-
tion to the Sheriff; and, looking to the nature of his jurisdiction under this
statute, I think we should be going to an unwarrantable extent in the direction
of strictness if we were to hold the second application, which was granted within
the fourteen days specified in the Act, to be incompetent.

The other objection is a much more important one. The reclamer has argued
that the notice in question was insufficient in specification of the tenant's claim.
The objection applies to the two first heads of the claim. I think the objection
is a formidable one. The Act of Parliament states (sec. 7) that the tenant who
proposes to exercise the privilege conferred upon him shall not be entitled to
compensation unless he gives “notice in writing to the landlord of his intention
to make a claim for compensation under the Act,” and further, that “every such
notice and counter-notice shall state, as far as reasonably may be, the particulars
and amount of the intended claim.” The claims are necessarily founded upon
the enacting part of the statute along with the schedule—and it would plainly
be insufficient for the tenant to give notice to his landlord by merely saying that
he intended to claim under the Act—nor would it be enough for him to say that
he intended to claim under, e.g., the 16th and 17th heads of the schedule to the
Act. All are agreed that there must be more specification than that, and it is
to be observed that the particulars required are distinguished from and must be
stated as well as the amount. As regards the amount, it is plain that it must
say, at least approximately, how much is claimed. I say “approximately,”
because I concur in the view that there may be cases where the last four months
of the lease will yield something in the way of claim, the amount of which can-

No. 137.

May 17, 1892.
Sinclair v.
Brown.

not be specified beforehand. But in that case the natural and proper thing to do would be to state the ascertained amount, and explain how and to what extent there comes to be a margin of unascertained claim.

Again, what is the meaning of "the particulars of the intended claim" which the statute says the notice must state "as far as reasonably may be." We derive some light as to the meaning of the latter words from the schedule. Taking the 16th head of the schedule, which is one of those entering this case, by way of illustration, "applications to land of purchased artificial or other purchased manure," what would be reasonable particulars in a notice from a tenant claiming under that head? In the first place, he must know what kind of purchased manure, artificial or otherwise, he had applied, and the amount of it. He knows whether it was phosphates or bones or what else—and indeed to use the term artificial is to generalise from the concrete facts which are in his knowledge. The time of its application would also be a very material element, and equally certain to be in the knowledge of the tenant. I further think that, if the farm were a large one, it would be right that the tenant should state upon what fields the manure was put. He might also (although I do not say it would be essential) easily add the date of purchase and the source of the supply. These would appear to me to afford no more than reasonable information to the landlord. They are material to him, and they lie ready to the hand of the tenant, and give him no trouble to mention.

I pause here to look at the procedure contemplated by the Act. The Act was intended to conduce to the prompt and amicable settlement of the rights of landlords and tenants; and it provides in the 8th section that it shall be in the power of parties to settle their claims by conference, after the notices have been interchanged. It is only after failure to settle the claim that the matter is to go to arbitration. It seems to me that the duty of the tenant is frankly to possess his landlord of such facts as would enable him to say whether the claim was good or not. If the tenant confines himself to generalities—missing out particulars—the result would be that there would be a high probability of the landlord saying that he must go to arbitration. I do not think that Parliament can be blamed for requiring a frank communication of particulars, the ascertainment of which would give no trouble to the tenant, and the production of which would, in all probability, save a litigation. In considering the effect of the provisions of the Act, I have been struck with the fact that there is no provision for the production of any other particulars of claim before the arbiter than those exchanged between the parties. Under the 12th section of the Act, the arbiter has power to call for the production of vouchers or other documents necessary for the determination of the matters referred to him. That provision looks as if it were the policy of the Act that the notice of claim should contain sufficient information to enable the landlord and tenant to sit down together and, if possible, reach an amicable settlement; and it is only in the event of their failing to reach such a settlement that there is any necessity for appealing to the referee.

Such is my opinion of the fair working of the Act generally. Turning to the case before us, I find that the claim of the tenant does not mention the year of the application of the manure, nor the kind and amount applied, nor the part of the holding on which it was placed. The whole information given is that he claims "£237, 12s. 1d. for unexhausted value of manure, artificial, as applied to holding." Unfortunately, the notice comes to less than if he had said "I claim £237, 12s. 1d. under the 16th head of the schedule." Accordingly,

"amount" being, as I have pointed out, something different from "particulars," No. 137. there are simply no particulars whatever supplied in this head of the notice. I am therefore bound to say that if it were not for a peculiarity in the case I should have considerable difficulty in holding that there was sufficient notice under the Act. In this respect, the second head of the claim under the 17th article of the schedule is equally deficient with the first. No particulars are given as to the date when the feeding stuffs were consumed, and nothing is said as to the amount of each, and the same observations apply as in the case of the first head.

May 17, 1892.
Sinclair v.
Brown.

Accordingly, if there were no other ground of judgment, I should have had great hesitation in adhering to the Lord Ordinary's interlocutor. But I think there is a clear ground of judgment otherwise. The reclaimer asks the Court to hold that the notice is bad, inasmuch as it does not state the particulars and amount of the claim as far as reasonably may be. I cannot understand this position, when we find that in the Sheriff Court in a petition by the tenant for appointment of a referee the reclaimer held up the first and second heads, which he now makes the subject of attack, by way of contrast to the third, and stated that while there was "no sufficient specification" in the third, he had all along been willing to concur in the appointment of a referee to deal with the first and second. He thus, in substance, judicially admitted that the first and second items of the claim were sufficiently stated. My judgment is accordingly rested on the fact that whether the notice of claim is sufficient or not, the landlord has himself at a previous stage treated them as good.

It is upon that ground only that I am for adhering to the Lord Ordinary's interlocutor, although I have thought it right to express my opinion upon the merits of the question, for it would be unfortunate if landlords and tenants were to do otherwise than make a frank interchange of information lying ready at their hands, that being by far the simplest way of avoiding litigation and expense to both parties.

LORD ADAM.—Sir Robert Sinclair, the reclaimer, contends that the notice of claim given by the respondent is irrelevant, because, in the first place, there is no assertion in it that the manure—one of the items of claim—was purchased, and in the second place, because it is not said that the feeding stuffs—the other item of claim—were not produced on the holding. These are objections which arise upon the terms of the 16th and 17th heads of the schedule to the Act, which specifies the improvements for which compensation is allowed. I mention this because it appears to me that this is the only view of the case with which the Lord Ordinary has dealt. His Lordship does not touch upon the aspect of the case under the 7th section of the Agricultural Holdings Act of 1883. That section provides that the notice of claim "shall state, as far as reasonably may be, the particulars and amount of the intended claim." It is for the Court before whom the question comes to say whether the notice does give such particulars as are reasonable. In that view, I should have been disposed to say that particulars given here were not reasonably sufficient. But it is said that the words used in the Act are that the tenant "shall give notice in writing of his intention to make a claim." In my opinion, the word "intention" is used because the claim to be made was a future claim, which only emerged at the date of the expiration of the tenancy, and the tenant is to give particulars of his intended claim upon that footing. He cannot give the exact value and amount—as they

No. 137.

May 17, 1892.
Sinclair v.
Brown.

will stand if the claim comes to be referred to an arbiter—but he is to send to the landlord his intended claim. Accordingly the provision is that this is to be done four months before the end of the lease, and that the landlord may give a counter notice, the scheme of the Act being that if possible litigation shall be avoided. If this is found to be impossible, and the landlord and tenant cannot come to terms, then their differences must be settled by a referee. What is to be referred is the claim which the tenant made four months before, and there is no provision in the Act for any further claim being prepared or submitted.

The question then is, are the “particulars” given in the claim sufficient? I cannot say that any are given. It appears to me that the tenant, when he first prepares his notice of claim, should supply the information which he will ultimately have to give when the matter comes before the referee. He has not done so here, and I should not therefore have much difficulty in holding that the notice was not sufficient.

But it is a different matter when we find it under the hand of the reclaimer himself that he considers the particulars given as to the two first items sufficient, and that he is ready to go to the arbiter upon them.

Upon the other point, relating to the appointment of the arbiter, I am of the same opinion with your Lordship.

I therefore concur upon both points.

LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE COURT adhered.

J. & J. H. BALFOUR, W.S.—PHILIP, LAING, & Co., W.S.—Agents.

No. 138.

FORFAR AND BRECHIN RAILWAY COMPANY, Complainers (Reclaimers).—

C. J. Guthrie.

May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

ALEXANDER BELL AND OTHERS, Respondents.—*Johnston—G. R. Gillespie.*

Railway—Compulsory powers—Compensation—Tenant's interest—Notice—Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 19), secs. 17 and 115.—Section 17 of the Lands Clauses Act, 1845, enacts,—“When the promoters of the undertaking shall require to purchase any of the lands which . . . they are authorised to purchase or take, “they shall give notice thereof to all the parties interested . . . and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof, . . . and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made. . . .”

Section 115 enacts,—“If any party having a greater interest than as tenant for a year, or from year to year, claim compensation in respect” of his interest. “the promoters of the undertaking may require such party to produce the lease . . . or other legal evidence thereof in his power; and if after demand made in writing by the promoters of the undertaking such lease . . . or other legal evidence thereof . . . be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding from year to year, and be entitled to compensation accordingly.”

A railway company gave notice to an agricultural tenant that they intended to take part of his farm under the Lands Clauses Act, and that they required him to state his claim for compensation, and that they were willing to treat with him in regard to it, and at the same time demanded that if he claimed compensation under an unexpired lease he should produce the lease or other evidence

along with his claim within twenty-one days, and that failing his doing so, he would be considered as a tenant from year to year in terms of section 115. No. 138.

Held that the railway company was not entitled under section 115 to demand production of the lease until a claim for compensation had been made by the tenant. May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

THE FORFAR AND BRECHIN RAILWAY COMPANY, incorporated by Act of Parliament in 1890, were authorised to construct certain railways in the county of Forfar, and to enter upon and use certain lands for this purpose. 1ST DIVISION.
Ld. Wellwood.

In pursuance of the powers of that Act, and of the provisions of the Lands Clauses Consolidation (Scotland) Acts, 1845 and 1860, therein incorporated, they served a notice on 30th July 1891 upon Alexander Bell, tenant of the farm of Broomfield, belonging to the tutors of the Earl of Dalhousie.

The notice stated that it was the intention of the company to take a portion of the farm, and required from him the particulars of his interest in the lands so to be taken, and of the claims made by him, and intimated that the company was willing to treat for the purchase of the lands and as to the compensation to be paid for any damage he might sustain through the exercise of their powers; "and also, if you claim compensation in respect of any unexpired term or interest under any lease, missive of lease, or grant of such lands, that you will produce to them such lease, missive of lease, or grant, or other evidence thereof in your power, along with your claims, at least within twenty-one days after this notice; and that failing your doing so, you will, in terms of section 115* of the said 'Lands Clauses Consolidation (Scotland) Act,' be considered as a tenant holding only from year to year, and be entitled to compensation accordingly. And I hereby apprise you that if, for twenty-one days after this notice, you fail to state the particulars above required, or to treat with the said company in respect of your claims, such measures will be adopted as are authorised by the said Acts, and the amount of compensation to be paid by the company will be settled in the manner provided by the said second and third mentioned Acts," i.e., the two Lands Clauses Acts.

On 31st August following Bell served upon the company a statement of claim of damage which he would sustain owing to the taking of the lands in question from Martinmas 1891 to the expiration of his lease, through loss of tenant's profits, &c. He subsequently served upon the company an amended claim, which concluded with a demand to have the claim settled by arbitration, and the railway company having refused to acquiesce in the claim, Bell proceeded to nominate an arbiter on his behalf.

The railway company brought a suspension of these proceedings, asking that Bell be interdicted from taking any proceedings to have his claims valued either by arbitration, jury trial, or otherwise than under the 114th section of the Lands Clauses Act, 1845 (i.e., on the footing that he was only a tenant from year to year, and that his claims accordingly fell to be determined by the Sheriff).

They stated;—"The respondent, Alexander Bell, failed, after being called upon in writing, to produce his lease, missive of lease, or grant of said lands, or other legal evidence thereof, in terms of section 115 of said Lands Clauses Act" (quoted in rubric), "and is, in terms of said section and Act, a tenant holding only from year to year, and the complainers have ever since 20th August 1891—that is, ever since the expiry of the twenty-one days allowed in the said notice served upon him on 30th July 1891, for production of any lease, or missive of lease, or grant of said farm

* Quoted in rubric.

No. 138.

May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

—considered and regarded him as a tenant, holding only from year to year. The whole proceedings of the complainers were taken in accordance with the provisions of the said statute, and in accordance with the practice of other railway companies in Scotland."

The respondent denied that he had failed to comply with the terms of the Act.

The complainers pleaded ;—(1) The respondent, Alexander Bell, having failed to produce to the complainers the lease or other writing condescended on, under which he makes the claims, requisitions, and nomination of arbiter condescended on, although called upon to do so by the complainers, in terms of the statute, they, the complainers, are entitled to suspension and interdict as craved. (3) The respondent, Alexander Bell, being only a tenant from year to year, any right of compensation he may have must be determined by the Sheriff of Forfarshire.

The respondent pleaded ;—(1) The respondent being entitled, under the provisions of the Lands Clauses Consolidation Act, to have his claim for compensation determined by arbitration, the complainers have no right to interdict him from doing so. (3) The respondent being in fact a tenant for a period longer than from year to year, and not having forfeited his right to claim compensation as tenant for such longer period, the present application should be refused.

The Lord Ordinary (Wellwood), on 17th March 1892, pronounced this interlocutor :—" Finds that the respondent, Alexander Bell, has not been called upon, in terms of section 115 of the 'Lands Clauses Consolidation (Scotland) Act, 1845,' to produce the lease under which he claims compensation : Therefore repels the first plea in law for the complainers."*

* "OPINION.—The question which I have to decide at present is one of general interest, as it affects the existing practice of railway companies in Scotland in giving notices to treat for the taking of lands. It is whether, in consequence of the respondent not having produced the lease under which he holds his farm within twenty-one days of the notice to treat served upon him by the company on 30th July 1891, he is foreclosed from proceeding to arbitration, and must, without further inquiry, and whatever the extent of his interest may be, be considered as a tenant holding only from year to year, and entitled to compensation accordingly. This, on its face, is a strong proposition. The consequences which the complainers maintain flow from the respondent's alleged neglect are highly penal, and therefore the statutory provisions on which the company found must, I think, be construed strictly against them.

"The complainers, reading the 115th section of the Lands Clauses Consolidation (Scotland) Act, 1845, into the 17th section, added to the particulars required by the latter section to be inserted in the notice to treat a requirement under the 115th section† upon the parties on whom the notice was served to produce the leases under which they held, or other legal evidence of their right within their power. They thus sought to utilise one and the same period of twenty-one days for the purposes of both sections.

"If these two sections are read together, it will be seen, I think, that the latter section refers to something not concurrent with the notice to treat, but which is to follow and depend upon the nature of the response that is made to the notice to treat. The notice to treat should, according to section 17, demand from the parties interested merely 'the particulars of their interests in such land and of the claims made by them in respect thereof.'

"When the particulars so demanded are given, and claims made in respect thereof are formulated, the promoting company will be in a position to decide whether or not, with a view to determining the proper mode of fixing compensation, they should demand from the parties who have stated their interest

† [These sections are quoted in the rubric, *supra*.]

The complainers reclaimed.

The respondent was not called upon.

No. 138.

May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

lodged a claim in respect thereof, production of the lease, missive of lease, or grant, on which they found, or other legal evidence thereof in their power.

"Giving the words used in the two clauses their natural construction, I cannot see what other interpretation can fairly be put upon them. The 115th section says,—'If any party having a greater interest than as tenant for a year or from year to year claim compensation.' Does not this imply that the party must have previously stated the nature of his interest and the particulars of his claim, or at least had an opportunity of stating his interest and lodging a claim?

"The complainers' counsel maintained that the word 'claim' in section 115 must be read as equivalent to 'entitled to claim.' But I do not find in the statute any warrant for such a construction. It is true that, according to the decisions, notice to treat operates as an acceptance of the offer to sell which is held to be made by the statute; and thus an inchoate contract of purchase and sale is completed to certain effects. But a claim for compensation is a separate and distinct matter, and the language used in other sections of the statute, and in particular in sections 17 and 19, shews that the word 'claim' is used in its natural sense of making a claim.

"Again, it is suggested that the company would be placed at a disadvantage if a tenant by not claiming prevented them from setting the provisions of section 115 in force. I do not think there is much in this objection. It would be a much less strained construction of the Act than that now contended for by the complainers to hold a party who has failed to claim within twenty-one days from the date of the notice to treat as having claimed, so as to entitle the company to proceed as in a case of disputed compensation. This is just what is provided by section 19 in regard to the matters dealt with in that section; and the same rule might reasonably be applied so as to let in the operation of section 115.

"What I mean is this,—Section 17 provides for the particulars that are to be stated, and the claims that are to be lodged, and section 19 says that if 'within twenty-one days after the notice to treat the party fails to state particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, . . . then the amount of compensation to be paid shall be settled in the manner hereinafter provided.' Thus, though the company do not actually know the interest of the party or particulars of the claim to be made, they are to proceed just as if the claim was in. I think the same principle should be applied to section 115. If, after notice to treat, the party on whom the notice is served does not lodge his claim, then he should be dealt with just as if he had made a claim, and the company should, under section 115, treat him as having made a claim, and give him notice that they wish to see the deed or writing, if any, on which he founds. Or else the company might proceed to summon a jury under sections 36 and 37 of the statute, and that would lead to a fresh notice. The party would then have to lodge his claim under certification of being taken before a jury; and if it turned out that he was merely a tenant from year to year, in all probability he would have to pay the expenses of the abortive trial. Or, in any case, the company might, under section 84, enter upon the lands.

"The complainers founded strongly upon the practice of railway companies to insert in the notice to treat a demand for production of the lease, grant, or other evidence. They also referred to the form given in the appendix to Mr Deas's work, p. 245, which is in accordance with the practice relied on. I do not know whether the form in Mr Deas's book is taken from the previous practice of Scottish railway companies, or whether the practice has been adopted from the book. The form given in the latest edition of Hodges on Railways (vol. ii., p. 410), does not contain any such requisition, although the English Act contains a clause which corresponds to section 115 of the Scotch Act. It is not, however, maintained that the practice can rule if it is not warranted by the statute; and in my opinion it is not. . . ."

No. 138.

May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

LORD PRESIDENT.—I think the Lord Ordinary is right. The 115th section of the Lands Clauses Consolidation Act, 1845, which is invoked by the railway company, involves serious consequences to the tenant, if he does not act in conformity with the notice therein referred to. The provision is that even although he may have right to compensation under an unexpired lease, yet, if he does not within twenty-one days table the document of lease, he shall lose his right and be treated as a year to year tenant. It is necessary to see whether the event has occurred which alone entitles the railway company to enforce these serious consequences. The terms of the section are as follows,—“If any party having a greater interest than as tenant for a year or from year to year claim compensation in respect of any unexpired term or interest under any lease, . . . the promoters of the undertaking may require such party to produce the lease, . . . and if, after demand made in writing . . . such lease . . . be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly.”

Applying plain sense to the language of that section, I think the situation contemplated by it is this,—that a tenant has already asserted his claim to compensation in respect of an unexpired interest under his lease—in that event, the promoters shall be entitled to call upon him to instruct the claim he has made by producing his lease within the time limited in the section, and if he fails to do so, he shall forfeit his right to claim under it upon the footing of the rule *de non apparentibus et non existentibus eadem est ratio*.

It appears to me that the complainers have proceeded in this case to amend or alter the statute by introducing a much more short-hand method than it provides. They issue a notice under the 17th section of the Act that they are authorised to purchase and take certain lands, and demand from those interested particulars of the lands so taken and of the claims so made; and they append to this notice a further intimation that if compensation in respect of any unexpired term or interest under any lease is claimed, the lease or other evidence thereof shall be produced within twenty-one days. In short, the complainers propose to engraft upon the original notice under the 17th section the procedure of the 115th section of the Act, whereas the latter section clearly contemplates a state of matters several stages in advance, and assumes that a response has already been made to the notice under the 17th section. It comes to this, that the complainers contemplate that there shall be a period of twenty-one days only allowed to the tenant from the first moment that he is apprised that his interests are to be affected until he has to produce his lease, and that the penal consequences of the 115th section are to apply to a person who is for the first time invited to consider what his claim is. This seems to me to mix up two stages in the procedure, and I think that to engraft the provisions of the 115th section upon those of the 17th would lead to an abridgement of the rights of the tenant in a very serious and wholly unauthorised way. I am therefore of opinion that we ought to adhere to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD M'LAREN.—I concur, and I only wish to add that it may often be convenient, especially where the number of persons to be treated with is large, that the company should combine the notices, at least to this extent, that they should add a request for particulars of the claim to the notice to treat. In many cases,

no doubt, these particulars would be supplied, because parties are generally willing, if they have the power, to dispense with formalities. But in this case the complainers have combined two distinct steps of procedure for which separate notices are required by the statute, and then they propose to abridge the time allowed to the tenant to produce evidence of his claim. This is clearly inadmissible. The tenant is not to lose his right to claim because the company has not given him the opportunity of sending particulars at the proper time. Plainly, the tenant must have the same rights as if he had first made his claim, and had then, in the second place, been asked to produce the lease or other evidence of his right. I think the Lord Ordinary has taken the true view of the case in allowing the tenant now to produce his lease, or evidence of a lease, in order to enable the Court to determine the nature of his tenure as a basis for the arbitration.

LORD KINNAR was absent.

THE COURT adhered.

REID & GUILD, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

ANDREW LOUTTIT AND OTHERS (Louttit's Trustees), Pursuers (Reclaimers). No. 139.
—C. J. Guthrie—Craigie.

HIGHLAND RAILWAY COMPANY, Defenders (Respondents).—Johnston—
Macphail.

Sale—Property—Breach of contract—Rescission—Damages—Actio quanti minoris.—Where a piece of ground was sold with absolute warrandice, and, while things remained entire, it was discovered that the ground was subject to restrictions against building. Question whether the purchaser was entitled to claim damages and retain possession.

Observations (per Lord McLaren) on the remedies open to a purchaser of moveable or heritable property in cases of breach of the contract of sale.

Property—Sale—Conveyance—Whether implied right of access.—Where in a conveyance of property a roadway is mentioned as a boundary it is not *prima facie* included in the grant, nor does the mention of it imply that it is always to be kept open as a roadway, and although a sale of heritable subjects always implies a right of access to these subjects, the right is satisfied if the disponee retains such access as existed at the date of the grant.

In 1874 the Sutherland and Caithness Railway Company, afterwards the Highland Railway Company, purchased from James Henderson of Bilbster certain subjects in the neighbourhood of Wick, being part of the policy grounds at Rosebank belonging to him, amounting to 3 roods in extent, for £200. In the disposition conveying the subjects it was declared "that the said railway company shall not be at liberty to erect any houses on the said portion of policy ground hereby conveyed, but that the same shall be used only for a road or approach to the railway station of Bankhead, and for a line of railway to the harbour of Pulteneytown or elsewhere; and also declaring and providing that the said policy ground shall, on the side next to Rosebank House, be fenced by the said railway company with a substantial stone and lime fence with a freestone cope, which shall be ever after maintained in good order and repair by the said railway company." The ground in question was an irregular sloping piece of ground abutting on the river of Wick. The road to the station at Bankhead was thereafter formed and fenced off from the rest of the ground, access being obtained to the latter by a gateway adjoining a bridge over the river, the gate being 3 feet wide.

No. 138.

May 17, 1892.
Forfar and
Brechin Rail-
way Co. v.
Bell.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

1ST DIVISION,
Ld. Wellwood.

No. 139.
 May 18, 1892.
 Louttit's
 Trustees v.
 Highland
 Railway Co.

By disposition, dated 16th and 18th June 1883, James Louttit purchased from the railway company the portion of the above subjects lying between the road to the station and the river of Wick, extending to 1 rood and 32 poles, and described as bounded on the south "by the road-way leading from Wick railway station to the said bridge." The disposition contained a clause of absolute warrandice. The price paid for the subjects was £115.

At the date of the sale to Louttit neither seller nor purchaser was aware of the building restrictions contained in the titles, which were only brought under the purchaser's notice by the agent of the proprietor of Rosebank some months later. The latter when applied to declined to relax the prohibition. Louttit thereafter brought the existence of the restrictions to the knowledge of the railway company, who thereupon offered to cancel the sale, and bear the whole expense of the transaction, but this was refused.

Nothing followed until Louttit's death on 9th May 1891. His trustees then brought an action against the railway company, in which they asked for declarator that the defenders were bound to free and relieve the subjects in question from the restrictions contained in the original disposition to them, or, in the event of their failure so to do, for decree against them for payment of £2500 of damages.

The pursuers averred that the subjects were originally bought for building and feuing purposes, the frontage being of considerable extent, and the ground being valuable and favourably situated for these. "With the said restrictions, the said subjects have been since their acquisition and are of little or no value, and in the event of the defenders failing to get them removed, the pursuers have suffered, and will suffer, loss, injury, and damage to the extent of the sum specified in the alternative conclusion of the summons."

The defenders offered anew, under reservation of their pleas, to cancel the sale, defray the expense of the original transaction, and repay the £115, with interest; and further explained that they had attempted without success to obtain the consent of Mr Henderson's representatives to the discharge of the restrictions. They denied that the subjects in question could be profitably used for building purposes.

The pursuers pleaded;—(1) On a sound construction of the said disposition in favour of the said James Louttit, the pursuers are entitled to decree of declarator in terms of the first conclusion of summons, with expenses. (2) Alternatively, the pursuers having suffered loss, injury, and damage in respect of the existence of said restrictions, are entitled to reparation, and the sum sued for in name of reparation being reasonable in amount, decree for £2500 should be granted as concluded for.

The defenders pleaded, *inter alia*;—(4) The contract founded on having been entered into under essential error on both sides, the defenders, in respect of their offer and the offer of the Sutherland and Caithness Railway Company to cancel the same, are entitled to have the action dismissed, with expenses. (5) In any view, the sum sued for is excessive.

Proof was led on the question of the value of the subjects as feuing ground in order to instruct the claim of damage put forward by the pursuers, but in view of the opinions expressed by the Judges in the Inner-House, it is only necessary to refer to the Lord Ordinary's note for a summary of the evidence.

The Lord Ordinary (Wellwood), on 28th January 1892, pronounced this interlocutor:—"Finds that the pursuers are entitled under the petitory conclusion of the summons to reparation in respect of the restriction against building specified in the record: Assesses the damages due at the

sum of £250, and decerns against the defenders for payment of the said sum to the pursuers : Assolzie the defenders from the declaratory conclusions of the summons : Finds the pursuers entitled to one-half of their expenses," &c.*

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

* "OPINION.— . . . It is not disputed that at the date of the disposition in favour of James Louttit neither the railway company nor the purchaser were aware of the restriction in the company's title from Mr James Henderson. . . . All that can be said is, that if Mr Louttit intended to build upon the ground, and saw his way to do so to profit, he made a very good bargain, as he got the ground merely at grazing value. I think that in all probability it did not occur to the railway company that, looking to the configuration of the ground, it could be profitably used for building, and their contention now is that it cannot. But I am of opinion that if the present pursuers can shew that they have sustained damage in consequence of the restriction, they will be entitled to such damages as they may instruct, because in that case they will have suffered eviction to the extent to which the restriction affects them.

"In order to instruct the damages which they claim, the pursuers have produced a feuing-plan, No. 20 of process, and have adduced witnesses of considerable standing and experience to speak to the return which might be expected if the ten lots shewn on the plan were feued.

"If the feuing-plan could be carried out in its integrity, I am inclined to think that a fair return might be obtained. The pursuers' skilled witnesses speak with more information and authority than those adduced for the defenders. They put the average feuing value at 6s. the lineal foot of frontage, yielding about £90 of feu-duty annually, which, capitalised at twenty-two years' purchase, would give £1980. I think that this is somewhat a sanguine estimate, looking to the expense of the under-building; but, on the whole, I am disposed to think that at least 4s. the lineal foot might have been obtained overhead for the feus shewn in No. 20 of process.

"But unfortunately the feuing-plan relied on by the pursuers is open to this very serious objection, that it is prepared on the assumption that the road to the station would be available throughout its entire length as a frontage and access to the houses to be erected. I do not think that under their title to the piece of ground the pursuers have any such right of access. The ground conveyed to them was described as being bounded on the south by the roadway leading from the Wick Railway Station to the Bridge of Wick. No part of the roadway was conveyed to them, and no right of servitude over it was conferred by the disposition. Although *ex facie* of the disposition the pursuers may have all the rights of property over the ground conveyed, including that of building on it, the conveyance was not framed with a view to the erection of buildings, and accordingly does not contain any stipulations on that subject. In this respect the case differs widely from the case of the *Argyllshire Commissioners of Supply v. Campbell*, 12 R. 1255, and other cases relied on by the pursuers.

"It is not disputed by the defenders that they are bound to give the pursuers access to the ground. But they maintain that they are not bound to do more than continue and preserve the access which existed at the date of the sale, viz., the gateway near the Bridge of Wick. They further point out that it may be necessary for them, in the management of the railway, to shut up the access in question or construct a line upon it. I so far agree with them that I think that their obligation as to access will be sufficiently satisfied if the pursuers obtain access at the point where the present gate stands. At the same time I must not be understood as holding that the access at that point must be limited to the width of the gate. I think that, taking a reasonable view, the entry must be such as to admit of the entry of carts and carriages.

"If, as I hold, the defenders are right upon this point, the value of the feuing-plan and the evidence depending upon it is seriously impaired, because the result is that the pursuers, if they feu the ground, will be obliged to form a roadway and footpath on the ground itself, thus taking off a strip of about 23 feet. The question is whether after this is done any margin of profit remains.

No. 139.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

The pursuers reclaimed.

It was stated at the bar for the respondents that they were satisfied with the Lord Ordinary's award as an assessment of damages, and that as they had gone to trial without objecting to the competency of the action, they did not now propose to take exception to it.

Argued for the reclaimers;—The subjects here being described as bounded by a roadway, it was necessarily implied that a right of access to and from them by that roadway was thereby given.¹ The disponent here was in the position figured by Lord Shand in his opinion in the case of the *Argyllshire Commissioners of Supply*.¹ The case of a road fell to be assimilated to that of a river, and where it was the boundary between two properties, it belonged half and half to each.² It was different from a fixed boundary, like a wall or ditch. What was asked was nothing more than the equivalent of such uses as were within the reasonable expectation of parties, and were necessary to the proper enjoyment of the subjects at the date of the purchase. The purchaser was entitled to have as many accesses to the lane as were required for the comfortable enjoyment of the property;³ and the feuing-plan shewing that ten tenements could be erected on the subjects, it was not extravagant to ask that there should be an access to each. Failing that, the defenders were bound to have provided something better than a mere wicket-gate three feet in width. An access for carts and carriages would have been only reasonable. The Lord Ordinary's award of damages was too little, either (1) upon the assumption that the disponent was entitled to the larger right of access, or (2) the smaller, such as would suit horses and carriages. In the first case 6s. per lineal foot was the average feuing value; in the other case 3s. per foot,—the first bringing out a sum of £1980, and the second of £990.

Argued for the respondents;—Assuming the competency of the claim, the Lord Ordinary's award ought not to be increased. The boundary by which the subject of a conveyance was described was never included in the grant, an exception being made in the case where the boundary was a non-navigable river.⁴ But that was because the use of the water was common to both opposite proprietors, and the alveus must belong to someone. No reason was given or authority quoted to shew why there should be a right of property in the road by which a subject was bounded. No such right was given in the conveyance. If it had been intended, it would have been so expressed. The principle of an implied right of access was based upon a state of facts leading to the presumption that

The pursuers' witnesses admit that the value of the feus would be reduced by more than a half; the defenders' witnesses say there would be no profit left at all. I am not prepared to say that the ground has absolutely no value for building purposes; but, having regard to the diminution in value consequent on the station road not being available as an access and the great expense of under-building, I cannot, on the evidence, put a higher value upon it than about 1s. the lineal foot. After taking everything into consideration, I assess the damages due to the pursuers in respect of the restriction at £250. But as this sum is only one-tenth of the sum sued for, and as the pursuers' claim as laid was, in my opinion, framed upon an erroneous basis, I shall make a substantial deduction from the pursuers' expenses. . . ."

¹ *Argyllshire Commissioners of Supply v. Campbell*, July 10, 1885, 12 R. 1255.

² *Wishart v. Wylie*, 1 Macq. 389, Lord Chancellor Campbell, p. 390; *Ran- kine on Land-Ownership* (2d edn.), 98; *Wilson v. Laing*, Nov. 16, 1844, 7 D. 113.

³ *Cochrane v. Ewart*, Jan. 13, 1860, 22 D. 358, 32 Scot. Jur. 160, *affd.* March 25, 1861, 4 Macq. 117.

⁴ *Gibson v. Bonnington Sugar Refining Co.*, Jan. 20, 1869, 7 Macph. 394.

both seller and purchaser would have agreed when they entered into the contract of sale as to the importance or necessity of such access.¹ Everything here was against such a presumption, and the disponee was entitled to no larger access than he had at the date of his purchase. This he had already. The case of the *Argyllshire Commissioners* was very different. It was not decided upon the terms of the title, but upon the plans and other facts of the case.

No. 139.

May 18, 1892.

Louttit's
Trustees v.
Highland
Railway Co.

LORD PRESIDENT.—In 1883 the pursuer of this action bought from the Highland Railway Company a strip of ground lying alongside of the river Wick, paying for it the sum of £115. The strip lies between the river on one side and a road which leads from the highway to the railway station on the other. At that time the ground was in grass, and had been used for the purpose of pasturing sheep, and previously for miscellaneous purposes, such as a building-yard and the temporary accommodation of tombstones. Shortly after the purchase the buyer discovered that the title of the railway company contained a clause prohibiting building on the ground in question. This was a discovery both to the disponent and the disponee, and was fortunately made soon after the conclusion of the transaction, and before any change on the subjects had taken place. The railway company promptly and unreservedly acknowledged responsibility for their mistake, and offered to relieve the disponee of the bargain he had entered into under this material misconception. The offer was not accepted, and a counter proposal was made that the railway company should obtain a relaxation of the prohibition contained in the title. This the railway company tried to do without success, and therefore the title was acknowledged by both parties to the contract as one which must be held to contain a restriction against building, and accordingly the offer of the railway company to release the disponee was renewed. The offer was not accepted, the correspondence closed, and nothing was done until 1891, when the pursuers, founding on the state of the title, made a claim against the railway company, which they ultimately brought into Court in the action which is before us.

The action calls on the railway company, in the first place, to clear away the restriction in the title, which they cannot do, and, in the second place, to pay the sum of £2500 as damages on account of the restricted state of the titles, the pursuers at the same time retaining the property in question. The parties have come to trial and to proof on the record in the case, and the Lord Ordinary has given decree to the pursuers for the sum of £250, as the difference in value between the subjects as they are and as they would have been without the restriction which the title contains.

The first observation which I have to make on the state of the record is, that this is a very singular action, because it is not, according to the admissions of Mr Guthrie, of a kind known to the books that a person should retain possession of a heritable subject sold to him, and at the same time claim damages for the difference in value between a clear and a restricted title, those damages amounting to far more than the price paid. We are not, however, called upon to decide on the validity or indeed the legal possibility of such a claim, because the defenders do not plead that such a claim is inadmissible, and that the only remedy was what was offered to the pursuers, namely, the rescission of the bargain.

¹ *McLaren v. City of Glasgow Union Railway Co.* July 10, 1878, 5 R. 1042; *Trustees v. Mealls*, May 28, 1875, 2 R. 729; *Wheeldon v. Burrows*, 1879, L. R., 12 Chanc. Appa. 31, L. J. Thesiger, p. 48.

No. 139. They have stated that they are content to abide by the decision of the Lord Ordinary, even on the footing that the subjects should be retained by the disponees. Under these circumstances we are not called upon to do more than remark on the singularity of the action, and put on record the fact that our judgment is not asked on the question of law which might have been raised.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

The Lord Ordinary has given decree for a sum of £250, and the pursuers have reclaimed, on the ground that that award is insufficient. Their claim for ten times that amount is rested on a theory requiring careful examination. Mr Louttit bought the strip of ground in 1883 for £115, but his trustees say that the property, if well laid out, would be very valuable as feuing ground, and would yield a very large return to the disponee. Their case entirely depends upon their having a legal right to ten separate accesses to the roadway which runs from the bridge of Wick to the railway station, and their claim to have ten separate accesses requires to be contrasted with what was the existing access at the date of the sale. At that time the ground in question was not landlocked, but had an access near the bridge—a small access, it is true, just as the piece of ground itself was small—indeed it appears to have been only three feet in width—but it is necessary to notice that that which was and is the sole existing access is entirely disregarded by the pursuers in their claim. Their right to claim damages on the footing of their present claim depends on their establishing that under the title they have such rights of access as I have mentioned to the roadway leading to the railway station.

I turn first to the title itself, because the pursuers have founded their rights of access upon the terms of the title. The words on which they found their claim are contained in the description of the subjects, which are described as “all and whole that strip of ground extending to one rood thirty-two poles or thereby imperial measure, bounded as follows, viz, . . . on the south by the roadway leading from the Wick Railway Station to said bridge”; and the question is, do these words in the description of the boundaries of the property confer a right to ten accesses to the roadway mentioned? We are first entitled to inquire for purposes of identification what is the nature of this roadway, and it is not disputed that it is one belonging to the railway company. It is not said that it is a highway or a public right of way, and I take it that the railway company are entitled to alter their access to the station, and, if they choose, to shut up the roadway or convert it to their own uses. Does the fact, then, that the railway company in their disposition of the property describe the subjects as bounded by this roadway bind them to dedicate it always to the purposes of a roadway? When a roadway is mentioned as the boundary of a subject it is, I think, in contradistinction to the subject granted, and therefore, *prima facie*, I should say that the roadway was not included in the grant. But it is said to be the import of the authorities that when a subject is described as being bounded by a roadway, it is implied that such roadway shall remain in the condition of affording access to the grantee to the subjects disposed to him. Only one case was cited—*Argyllshire Commissioners of Supply v. Campbell*—but it is not an authority for that proposition. In that case the elements and circumstances were different and stronger than we have here. The subjects of the sale were no doubt described as bounded by a lane, but the question raised was, whether the lane was to remain as an access to the subjects conveyed. The ground so described was sold under the condition that it was to be used for the purpose of erecting upon it a Court-house. That is one point of difference. In the second

place, the Court-house was to be erected according to a design to be approved by the superior. The plans which were prepared made the Court-house open on to the lane, and not only were they approved by the superior, but in the third place, the superior, after approving of the plans, and after the lane had *de facto* served as an access to the Court-house for years, made up a title to his own property in which there was an express reservation to the adjoining feuars of their right of access by the lane, "which they at present possess." I have gone into the particulars of that case because it appears to me to be quite erroneous to cite it as an authority for the view that if only mention is made of a roadway as the boundary of subjects disposed, the roadway must be maintained as an access to the subjects in all time coming. Accordingly, I do not hold that there is a servitude created in favour of the disponee by the words in the title founded on by the pursuers.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

A second argument has been advanced, which is not merely based upon the state of the title. It is said that the case of *Ewart v. Cochrane*, and the doctrine contained in that case, afford countenance to the notion that a disponent must give such accesses to the ground conveyed as are found necessary by the disponee. Here again one fortunately finds that the familiar doctrine of *Cochrane v. Ewart* has been discussed with reference to the question of the accesses to be given to the disponee in cases where there has been an access of some sort in existence at the date of the sale. I should like to refer to one of the subsequent cases, namely, the case of *Walton Brothers v. Magistrates of Glasgow*, July 20, 1876, 3 R. 1130, where the Lord President says this (p. 1133)—"When a man sells a portion of his ground which has an access through the other portion which he reserves, there is an implied grant of that access. That is the principle of the case of *Cochrane v. Ewart*, and a number of other decisions, and it is consistent with equity and legal principle. Nothing is better settled than that the conveyance of a piece of property implies a right of access to it. No one can possess a piece of ground without having a right of ingress and egress, and the way that is to be obtained if the conveyance is silent is just the existing way." Now, applying that to the present case, all that *Cochrane v. Ewart* laid down was that if a disponee retains the right of access existing at the date of the disposition his right is satisfied.

I am therefore not prepared to accept the suggestion of the Lord Ordinary, which indeed does not underlie his decision, that there is some elasticity in the rights of the disponee entitling him to more ample access than existed at the date of the disposition. It is true that in the present case that access is not extremely ample, but it was adapted to the uses of the property at the time of the sale, and the disponee purchased the property at the price he did on the footing that he was to have that and no other access. This is not the case of a land-locked property, and the law is that a disposition of a subject having an existing access implies no more than a continuance of the existing access. If this statement of the law is sound, it is impossible to calculate the damages due to the pursuers on the footing that they are entitled to ten new accesses to the roadway.

I therefore reject the contention of the pursuers for a high scale of damages, holding as I do that the legal basis for it is unsound. I am afraid I must add that I think the law goes further, because I doubt whether an award of £250 could have been sustained. But we are not required to enter upon a consideration of this question because the defenders do not object to the sum awarded

No. 139.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

by the Lord Ordinary. I said that I rejected the higher scale of damages claimed by the pursuers, but it is maintained that, even supposing the views of the Lord Ordinary as to their right of access are accepted, his decision is not satisfactory in respect that the sum which he has awarded is too little. The evidence, as is usual in such cases, is more or less speculative, and this is necessarily more or less a jury question, and if I were at one with the Lord Ordinary as to the measure of the pursuers' rights I would not be disposed to disturb his estimate of the damages due.

LORD ADAM.—This is an action, as pointed out by your Lordship, at the instance of the late Mr Louttit's trustees concluding, in the first place, for decree ordaining the defenders to clear their title of a restriction which it contains against building, and alternatively for damages. It is not in the power of the defenders to comply with the first conclusion, as their author refuses to relax the restriction against building, and consequently the alternative conclusion is the one insisted in. I concur with your Lordship in having great doubts whether the form in which the action is brought is competent. The pursuers claim damages, but at the same time keep the subject of sale, and it is, I think, doubtful whether that is a competent form of action. If the pursuers were very dissatisfied with the bargain they ought to have given up the subjects and claimed damages for breach of contract, but they have not taken this position, and as no objection is taken by the defenders, we have to deal with the action on the footing that the claim for damages is competent.

The claim is for £2500, and it is obvious from the facts of the case that the amount of damages depends on the pursuers' rights in law, arising upon a construction of the title. The ground disposed is bounded on one side by a roadway leading from the bridge over the Wick to the railway station, and the pursuers' claim is, in the first place, that they have a right of access, not only at ten separate places, but at every part of the roadway. Alternatively they claim, in the event of their failing to make good the larger right, that they are entitled to have an access for carts and carriages at the point where a more limited access at present exists. The measure of the damages due to them will of course be greater in the event of their succeeding in their first claim than under the alternative claim, but in the latter case it will still be considerable. If, however, they have no right to any other than the existing access by a wicket gate three feet wide, Mr Guthrie himself admitted that they had suffered no damage.

Mr Guthrie stated two propositions which are quite untenable, and which I was surprised to hear stated by him. The first was that if a subject of sale is described as being bounded by a roadway, the disponee's title extends to the *medium filum* of the road. In the second place, he said that the proper construction of the title is that the "roadway" does not include the path running alongside of it, but only the cart and carriageway. I know no authority for these propositions. The description in the title seems to me itself to exclude the roadway from the subjects disposed, because if in a disposition the subjects are described as being bounded by a roadway, it seems to me that every part of the roadway is excluded from the grant. I know no reason why less respect should be paid to a private road than to a field or private avenue. I therefore think that the pursuer has no right of access to the private roadway, which the railway company may, when they choose, shut up or convert to other uses.

No. 139.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

The next question is, if no such unlimited right of access belongs to the pursuers, have they a right to an enlarged access at the place where an access already exists? My opinion is that they have not. The presumption is, that when parties enter into a transaction for the purchase of a piece of ground, they see with their own eyes the advantages and disadvantages which the ground possesses, and if the disposition is silent on the matter of access, and says nothing about increased access, I think the presumption is almost irresistible that the land is sold with the existing access. That is the principle of the case of *Cochrane v. Ewart*, and I think it applies with great force to the present case. If the existing access was not sufficient for the purpose to which the disponee intended to put the ground, he could have stipulated for additional accesses. I am far from saying that there may not be circumstances arising out of the transaction and appearing on the face of the title to shew that it was not the intention of the parties that the disponee should be restricted to such access as existed at the date of the transaction. When ground is actually land-locked there is an irresistible presumption that the parties must have intended that the disponee should have an access to the ground sold to him. *Res ipsa loquitur*. And in the same way when land is feued out for building, as in the Glasgow case *McLaren v. Glasgow Union Railway Company*, 5 R. 1042, there is a presumption that parties really meant that the disponee should have the access necessary to make that purpose effectual. But we have no case of that kind here. The presumption seems to me all the other way. The piece of ground for the time immediately preceding the sale had been used for pasturing sheep or for storing tombstones. No one thought of building on it. The price was small. Everything pointed to the idea that the use which was to be made of it was the use it had already been put to, for which the existing access was amply sufficient, and I think there is no reason for holding the pursuers entitled to the additional access claimed. I am therefore of opinion that the measure of damage to which the pursuers are entitled must be calculated on the footing that they have right to no other access than that which existed when the ground was sold, and as they are not proved on that supposition to have sustained any damage, it would be my opinion, if that question were open, that they were entitled to none. But the Lord Ordinary assessing the damage as a jury has awarded £250, and the defenders do not seek to disturb that award, and that being the position of the case, I must of course concur in what seems to me to be the extremely handsome award of the Lord Ordinary.

LORD McLAREN.—I concur in the opinion of your Lordship in the chair on the merits of the action, and if I add anything it is only to explain my views as to the nature of the remedy which the law allows to persons in the position of the pursuers.

If the subject comes to be examined in a subsequent case, it will, I think, be found that there is no essential difference in the remedies which the law affords to purchasers for non-fulfilment of contract in the two cases of sales of personal and heritable property. We are more familiar with the subject in its application to personal property, because the cases are more frequent, arising out of the seller's inability to provide goods of the quality he has undertaken to provide. So far as I know, there are only two remedies open to a purchaser which are known to jurisprudence. He has in the first place a right to rescind the contract conditional on his rejecting the goods or heritable property, and to

No. 139.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity, either in the title or the quality of the subjects sold, discovered when matters are no longer entire. At one time it was doubted whether we had this form of action in relation to sales of moveable property, but it was never doubted that under the clause of warrandice such a right did belong to the purchaser of heritable estate, who discovered that some part of the subject of sale had not been conveyed to him. Now, however, it is quite settled, and has been explained in the valuable expositions of the law of sale given by the late Lord President, that in such cases as sales of ships and fixed machinery, which cannot be returned after they have been in use, if it is discovered after they are in use that the extent or quality of the subjects sold is disconform to contract, the purchaser's remedy takes the shape of an *actio quanti minoris*. Under this form of action the pursuer may recover such sum as will enable him to put the subject in proper repair, or compensate him for loss of profit, where the subject is of less value than he originally bargained for. I must say I see no reason in principle or on authority why the remedies in the cases of personal and heritable property should not be of the same kind. There certainly is authority for the proposition that when a purchaser of lands or houses finds some defect in his title, or in the subjects conveyed to him, if matters are entire, it is his duty to reject the subject of sale, and to claim damages. That is quite settled in England, and the Court of Chancery never gives the purchaser in such a case damages beyond the expense to which he has been put in investigating the title. But if after buildings have been erected on the ground sold or outlay has been incurred, the purchaser discovers that there is a servitude affecting the property, or part of the property is carried away from him, that is a proper case for making effectual the protection secured to him under the clause of warrandice,—that is to say, his remedy is just the second form of action which has been referred to, the *actio quanti minoris*.

With regard to the damages to be given to the purchaser the very name of the action suggests a limitation of the amount, and I know of no case in which damages exceeding the value of the subjects have been given. Without laying down any absolute rule, I think it would be a very peculiar case in which more was given by way of compensation than what the parties thought the fair value of the property at the time of the sale, because part of the subjects had not been made over to the purchaser or an easement was discovered which prevented the purchaser obtaining the full enjoyment of the estate. I can understand as a matter of policy the attitude adopted by the railway company in not objecting to the award of the Lord Ordinary, but I do not wish to countenance the view that the amount of damage which may be awarded is whatever the witnesses say is the profit which would have resulted from a speculative use of the property.

The claim made by the pursuers is framed on the theory that they have right to ten accesses to the roadway which bounds the property on the south. The theory is ill-founded, and I may add that, supposing the pursuers were to open gates in the railway company's road, they could make no use of it except by the tolerance of the railway company, because the railway company is entitled to shut up the road, or, while maintaining its use as an access to the railway station, to interdict the pursuers from using it as an access to their houses. The grounds, therefore, on which the pursuers' claim is founded are altogether

unsubstantial, and on the whole matter I agree that the judgment of the Lord Ordinary should be affirmed. No. 139.

LORD KINNEAR was absent.

THE COURT adhered.

PHILIP, LAING, & Co., S.S.C.—J. K. & W. P. LINDSAY, W.S.—Agents.

May 18, 1892.
Louttit's
Trustees v.
Highland
Railway Co.

ALEXANDER MIDDLETON, Pursuer (Respondent).—*Jameson—Kemp.* No. 140.
MISS LAMOND LESLIE AND OTHERS, Defenders (Reclaimers).—*Dickson—*
Abel.

May 19, 1892.
Middleton v.
Leslie.

Process—Decree ad factum præstandum—Enforcement of obligation to build.
—A feuar was taken bound to erect certain buildings on his feu within two years from the date of the feu-disposition. In an action by the superior for implement of the obligation, the Lord Ordinary ordained the feuar “forthwith” to erect the buildings in question.

On a reclaiming note the Court recalled the Lord Ordinary’s interlocutor, and holding that a decree *ad factum præstandum* should not leave the defender in doubt as to the measure of his obligation, decerned against him to erect the buildings in question “within one year” from the date of the interlocutor, parties having agreed that that time should be fixed.

Observations on the nature and effect of a decree ad factum præstandum.

By feu-disposition, dated in May 1889, Alexander Middleton disposed a piece of ground of about 255 feet in length situated on the south side of Belmont Road, Aberdeen, to Roderick M’Kay, contractor there, the latter being taken bound, “within two years from the date of entry, to erect on the ground hereby disposed one or more dwelling-houses or shops,” similar to those already erected by the superior, and of the value of at least £1000. The buildings were to be erected in security of the payment of a feu-duty of £25. 1ST DIVISION.
Ld. Kyllachy.

A few days after the execution of the feu-disposition M’Kay disposed the subjects to Miss Lamond Leslie and her two sisters.

No buildings having been erected, Middleton in November 1891 brought an action against Miss Leslie and her sisters, concluding that they should be ordained “forthwith to erect” dwelling-houses as provided for in the feu-disposition, and failing that to pay damages.

The defenders stated that their delay to erect the buildings was due to the fact that negotiations were proceeding as to the formation of a new street, which would affect the feu, that the feu-duty had always been regularly paid, and they offered security for its payment in future.

The Lord Ordinary (Kyllachy), on 3d February 1892, gave decree “in terms of the first and leading conclusion of the summons.”

The defenders reclaimed, and argued;—The Court generally allowed a reasonable time within which to fulfil such conditions of the feu as were here in question, assuming that there were not—as it was contended there were—justifiable grounds for delay. The interlocutor should in any view be varied, and a specific time for the erection of the buildings should be named.¹

Argued for the respondent;—No exception could be taken to the Lord Ordinary’s interlocutor. If the pursuer acted unreasonably in putting it in force, a suspension might be brought.

LORD PRESIDENT.—On the record in this case I do not think that any relevant

¹ Napier v. Speirs’ Trustees, May 31, 1831, 9 S. 655, 3 Scot. Jur. 458; Magistrates of Glasgow v. Hay, Feb. 23, 1883, 10 R. 635.

No. 139.
 May 18, 1892.
 Louttit's
 Trustees v.
 Highland
 Railway Co.

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unsubstantial, and on the whole matter I agree that the judgment of the Lord Ordinary should be affirmed. No. 139.

LORD KINNEAR was absent.

THE COURT adhered.

PHILIP, LAING, & CO., S.S.C.—J. K. & W. P. LINDSAY, W.S.—Agents.

May 18, 1892.
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The defenders stated that their delay to erect the buildings was due to the fact that negotiations were proceeding as to the formation of a new street, which would affect the feu, that the feu-duty had always been regularly paid, and they offered security for its payment in future.

The Lord Ordinary (Kyllachy), on 3d February 1892, gave decree “in terms of the first and leading conclusion of the summons.”

The defenders reclaimed, and argued;—The Court generally allowed a reasonable time within which to fulfil such conditions of the feu as were here in question, assuming that there were not—as it was contended there were—justifiable grounds for delay. The interlocutor should in any view be varied, and a specific time for the erection of the buildings should be named.¹

Argued for the respondent;—No exception could be taken to the Lord Ordinary’s interlocutor. If the pursuer acted unreasonably in putting it in force, a suspension might be brought.

LORD PRESIDENT.—On the record in this case I do not think that any relevant

¹ Napier v. Speirs’ Trustees, May 31, 1831, 9 S. 655, 3 Scot. Jur. 458; Magistrates of Glasgow v. Hay, Feb. 23, 1883, 10 R. 635.

No. 140. defence has been stated. I do not discover in the statement of facts for the
 May 19, 1892. defenders any justification for their not having fulfilled their contract obligation.
 Middleton v. Indeed, it does not appear to me that the question admits of very serious argu-
 Lealie. ment; and accordingly I think that decree *ad factum præstandum* in some form
 must be pronounced.

The Lord Ordinary has granted decree in terms of the first conclusion of the summons, ordaining the defenders "forthwith" to erect the buildings stipulated for. In pronouncing decree *ad factum præstandum*, the Court has to bear in mind the consequences and sanctions of such a decree. Failure to implement such a decree exposes a defender to the penalty of imprisonment which it is in the power of the pursuer to put in force. I therefore think that in the case of decrees which may be thus enforced, or which expose a defender to penal consequences, it is right that the Court should so express the decree that the defender shall be in no doubt regarding the obligation he has to discharge. To take an illustration, if a person who has been interdicted commits a breach of interdict, he is liable to prosecution and imprisonment, and accordingly, the Court always frames its interlocutor in these cases so that there shall be no vagueness, and that the person who has been interdicted shall be in no doubt as to the measure of his liability. It appears to me that the same reasoning applies to such a decree as is here in question, and I cannot acquiesce in the demand of the pursuer to pronounce a decree for implement of the obligation "forthwith." Such a decree would be appropriate in the case of a single act, such as the delivery of a writ, which is completed instantly on its commencement; but it is not so in the case of the building of a house, which must be a long operation, and requires a tract of time for its execution, even where the greatest despatch is used.

If we were to pronounce decree that these houses should be erected "forthwith," we should leave to the arbitrament of the person in whose favour it was pronounced the interpretation of the word "forthwith," and the result would be that the person against whom it was pronounced would be in the difficult position of not knowing when he was in default. For that reason, I think that decree in the terms used by the Lord Ordinary ought not to issue.

On the question of what time should be allowed, we are relieved from the difficulty of determining what would be a suitable period, by the agreement of counsel that it should be a year from the date of the interlocutor we pronounce. It must be remembered that we do not ourselves fix that date, and that we are not laying down any precedent.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE COURT pronounced this interlocutor:—"Recall the decerniture contained in the Lord Ordinary's interlocutor: Decern the defenders, in implement of the obligations contained in the feu-disposition libelled, to erect within one year from the date of this interlocutor, on the piece of ground described in the summons, one or more dwelling-houses, or shops and dwelling-houses combined, all as specified in the summons and feu-disposition: *Quoad ulterius*, adhere to the said interlocutor of the Lord Ordinary, and remit to his Lordship; and find no expenses due to or by either party since the date thereof."

HENRY & SCOTT, W.S.—THOMAS DALGLEISH, S.S.C.—Agents.

GEORGE AITKENHEAD, Pursuer (Respondent).—*Aitken*.
 WILLIAM BUNTEN AND COMPANY, Defenders (Appellants).—*Ure*.
Et e contra.

No. 141.

May 19, 1892.
 Aitkenhead v.
 Buntten & Co.
et e contra.

Process—Mandatory—Foreign.—Circumstances in which the Court refused *hoc statu* to ordain a party litigant who had gone to America to sist a mandatory.

GEORGE AITKENHEAD, grain and storekeeper, Glasgow, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against William Buntten & Company, drysalters, Glasgow, for payment of £292, 7s. 3d. for storage charges, and William Buntten & Company brought a counter action against George Aitkenhead for £470, 9s. 6d., the value of certain goods stored with him, which, as they alleged, he had failed to redeliver.

The actions were conjoined, and on 23d March 1891 the Sheriff-substitute (Lees) gave decree in Aitkenhead's favour for £87, 16s. 3d. in the action in which he was pursuer, and assolized him in the other action. On 23d March 1892 that interlocutor was affirmed on appeal by the Sheriff (Berry).

Buntten & Company then appealed to the Court of Session.

When the case was called in the Single Bills the appellants moved that the Court should ordain the respondent to sist a mandatory.

It was stated that Aitkenhead had been sequestrated in 1879, and that the trustee on the estate had been discharged in 1881. The bankrupt did not receive his discharge, and since then he had been allowed, without interference by his creditors, to carry on business on his own account. The accounts payment of which was sued for were incurred in 1885. Aitkenhead was now in America.

Argued for the appellants;—It was admitted that the Court would not in every case require a party litigant who had left the country even *animo remanendi* to sist a mandatory. It was a matter of discretion, but the rule was now less flexible than the earlier cases shewed. In the *Simla Bank case*,¹ where a motion of the kind had been refused, the circumstance that the debt sued for was contracted in India had weighed with the Court. In the case of *D'Ernesti*,² an action of divorce, the pursuer's motion was refused because the Court doubted its jurisdiction, and the defender was in very impecunious circumstances. But it was there stated by Lord Fraser, adopting Lord Fullerton's opinion in *Ranken v. Nolan* (26th Feb. 1842, 4 D. 832.), that the rule requiring a mandatory was absolute. In *M'Donald's case*³ the absence was temporary. The appellants here had been brought into Court, and it was only just that they should have some responsible person to look to for their expenses.

Argued for the respondent;—He was in a more favourable position than an ordinary defender, because the pursuers held in their hands £87 of his money. In the larger matter in dispute, the respondent really occupied the position of defender. The rule even in the earlier cases was not so strong as was stated by the appellants. A bankrupt defender had been found entitled to be heard without finding caution for expenses, although the trustee declined to sist himself.⁴

LORD PRESIDENT.—All such cases as this are cases of circumstances, and it cannot be asserted that there is any general inflexible rule which forces the

¹ *Simla Bank v. Home*, May 21, 1870, 8 Macph. 781, 42 Scot. Jur. 443.

² *D'Ernesti v. D'Ernesti*, Feb. 11, 1882, 9 R. 655.

³ *M'Donald's Trustees v. Stewart*, Feb. 6, 1891, 18 R. 491.

⁴ *Bell v. Forrest*, July 17, 1840, 2 D. 1460; *Scott v. Gillespie*, Jan. 29, 1823, 2 S. 165.

1st Division.
 Sheriff of
 Lanarkshire.

No. 141.

May 19, 1892.
Aitkenhead v.
Buntin & Co.
et c contra.

Court to order the sisting of a mandatory where a party litigant has left the country and is resident abroad, even where he is so resident *animo remanendi*. I can quite understand that the other party who is at home may desire to have someone in Court to represent his adversary, but this must be on the ground that the case is not in responsible hands, or that it is not being duly conducted. Accordingly, if a motion to sist a mandatory is refused by the Court, the refusal must always be *in hoc statu*, as the circumstances might alter and call for such an order being made.

That being so, we have to consider the grounds upon which this application is made. It is not presented because objection is taken to the conduct of the case. The argument has proceeded rather on a view of the financial position of Mr Aitkenhead and his creditors. I think Mr Aitken is right in the way in which he puts his case. His client has been found entitled in the inferior Court to £87, and this money is in the hands of his adversary. Mr Ure on behalf of the latter admits that that sum must be paid, unless he succeeds in establishing a claim which he asserts against Mr Aitken's client, and which has been negatived in the Court below. Mr Aitken's client is accordingly in the position of a defender, and of a defender holding a decree of absolvitor, which appears to be a doubly advantageous position. Under these circumstances, I do not think that we are compelled to order Mr Aitkenhead to sist a mandatory. and I am for refusing the motion.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

THE motion was accordingly refused.

WEBSTER, WILL, & RITCHIE, S.S.C.—J. & J. ROSS, W.S.—Agents.

No. 142.

ISABELLA HORN OR THOMSON AND OTHERS, Pursuers (Appellants).—

W. Campbell—Hunter.

May 19, 1892.
Thomson v.
Dick.

GEORGE DICK, Defender (Respondent).—*G. R. Gillespie.*

Reparation—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1.—A builder's labourer was killed by the fall of a scaffolding on which he was working in the demolition of an old building. In an action by his widow against his employer, to recover damages under the Employers Liability Act, it was proved that the scaffolding had been erected by P., a foreman labourer, with the assistance of the deceased and of another labourer; that these three persons were all experienced in such work; that the materials were good, and the manner of constructing the scaffolding such as was usual for such work; that the cause of the accident was that while a stone was being removed from the old building, it broke and a piece of it struck a projecting part of the scaffolding, and brought down the scaffolding; that while it would have been possible to take such precautions as would have prevented the scaffolding being brought down, such precautions were not usually taken even by careful workmen doing such work. *Held* that the defender was not liable in damages under the Employers Liability Act, 1880.

2D DIVISION.
Sheriff of Fife.

ISABELLA THOMSON AND OTHERS, the widow and children of Andrew Thomson, a labourer in Dunfermline, raised an action in the Sheriff Court there against George Dick, builder there, to recover damages for the death of Thomson, which they alleged happened through the defender's fault.

The action was founded on the common law and on the Employers Liability Act, 1880. The latter ground of action only was insisted on in the Court of Session.

The facts established by a proof were as follows. The defender was employed to take down the gable of an old building in Dunfermline. For this purpose a scaffolding was erected by three of the defender's men, Robert Philp, a foreman labourer, Abel Shand, another labourer, and the deceased, all of whom had experience in such work. The nature of this scaffolding was thus described by the Sheriff-substitute, with whose judgment the Court agreed, viz.:—"The scaffolding was constructed in the usual way that masons' scaffoldings are constructed, with alternate tiers of battens (6½ inches wide) and trestles; there were three tiers of trestles one above the other, the trestles composing the lower tier being larger than those of the upper tier, so that the structure was 15 to 18 inches wider below than above; the trestles and battens composing the scaffolding were sound and strong, and the scaffolding was well constructed according to the standard of care usual among masons; the heads of the trestles were hard against the gable, but the feet of the trestles were not tied or secured so as to prevent movement."

No. 142.

May 19, 1892.
Thomson v.
Dick.

Philp and the deceased stood upon a platform upon the top of this scaffolding. While they were doing so, and engaged in lifting stones from the chimney and throwing them down, a stone broke in their hands. It appeared that the stones had been subjected to the action of fire, and were therefore more likely to be "rotten" and to break. One of the broken pieces in its fall struck one of the projecting battens which supported the second tier of trestles and made it "spring," and so loosened some of the upper tiers. In consequence the scaffold fell. Philp and the deceased fell with it. The latter was seriously injured and died the same day.

The pursuers stated that the scaffolding was unsafe, dangerous, and defective, because the trestles rested on single battens; that these battens were not made fast to the walls or secured in any way, and the feet of the trestles were not secured; further, that the work of pulling down an old wall being dangerous a safer and more substantial scaffolding was required. They further stated that the scaffolding was constructed by Philp, to whose orders the deceased was bound to conform; that Philp ordered the deceased to work upon it, and that the deceased was conforming to Philp's orders when the scaffolding fell.

The Sheriff-substitute (Gillespie), on 7th January 1892 (after findings in fact with regard to the scaffolding to the effect above narrated), found "that while it would have been quite possible to have taken precautions to secure the trestles from moving, such precautions are not usually taken even by careful masons: Finds in law that the defender is not liable for the accident."

On appeal the Sheriff (Mackay) affirmed the Sheriff-substitute's judgment.

The pursuers appealed, and argued;—This scaffolding was erected by the defender's foreman. It was certain that the work to be done required care in erecting such a scaffolding. It was equally certain that a safe scaffolding for such work could easily have been erected. The Sheriffs had found to that effect, and the proof made it quite clear. That implied the absence of reasonable care in supplying the scaffolding on which the deceased was to work. The breakdown of it in the circumstances raised a presumption of fault.¹ It was true that the deceased helped to make it. But he was only a labourer obeying the orders of his foreman, and he had no responsibility.

Argued for the defender;—It was proved that the scaffolding was

¹ *Great Western Railway Company of Canada v. Braid* (1863), 1 Moore's P. C. Rep., N. S. 101; *Fraser v. Fraser*, June 6, 1882, 9 R. 896; *Walker v. Olsen*, June 15, 1882, 9 R. 946.

No. 142. erected, with the assistance of the deceased, who knew the work well, in a substantial way, and in the usual way in which such scaffoldings were erected. The case was one of mere accident.
May 19, 1892.
Thomson v.
Dick.

LORD JUSTICE-CLERK.—A decision in a matter of this kind must always be a decision with special reference to the facts of the particular case before us. I think it would not be possible to lay down a definite line beyond which we could say that the master was liable in damages for accidents to his workpeople and within which he was not so liable.

In this case, as disclosed in the proof before us, there is no room for doubt that this scaffold, if it was put up for the ordinary work for which a mason erects a scaffold, could not be impugned as not fit for an ordinary mason's work. It is, I think, proved that it was just such a kind of scaffold as would be put up by skilful and careful masons for the purposes of their work.

There is a good deal of evidence in the proof in regard to the difference between scaffolds put up by masons and scaffolds put up by joiners. No doubt joiners would put up a different kind of scaffold from that which masons would erect, because their habits of working are different. They are more addicted to the use of nails and bracings. But I do not think that that is of any importance to this case.

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The questions which we have to consider are, first, whether this scaffold was erected in the usual and ordinary way in which such scaffoldings are erected by masons, and second, whether the mode in which the scaffold was erected led to the accident. In reply to the first of these questions I think it is fully proved that the scaffold was erected in the usual and ordinary way, and that the mode of its erection did not directly lead to the accident.

In the next place, we have to consider whether there is anything in the circumstances of this case which would shew fault upon the part of the master in using the ordinary kind of scaffold for the work he used it for here. The special circumstances alleged in which this scaffold was used by the defender, and in respect of which it is sought to impute fault to him, were these. In the first place, it is said this scaffold was used in taking down an old wall, and in the second place, that the wall had been exposed to the action of fire, which would have an effect upon the stones of which the wall was composed so as to make them more friable. The workmen standing upon the platform at the top of the scaffold were taking down the stones which composed the chimney-stalks, and throwing them to the ground. Now, if this operation could be performed in safety from such a scaffold as this in ordinary circumstances, it would not occur to my mind that the special circumstances alleged in this case would make it so likely that one of the stones would break in two by its own weight, and fall where it should not have fallen, that it was necessary for the master to take special precautions against that happening. Scobie, one of the skilled witnesses, says that he has often taken down old walls in this way and that no accident had ever occurred, and the defender, who has had twenty-five years' experience, says the same thing.

Looking at the facts of this case, I cannot hold that the master, the defender here, was in fault through his foreman in not taking exceptional precautions to guard against the accident which actually did occur. I therefore am of opinion that the interlocutor of the Sheriff is right.

LORD YOUNG.—I confess I have found some difficulty as to the decision in

this case. The case was opened clearly and moderately—with all the more No. 142.
ability because moderately—by Mr Hunter, who stated every plea I think he
could present on behalf of his client. He put the case—and I think he rightly May 19, 1892.
put the case—entirely upon the provisions of the Employers Liability Act, Thomson v.
because under the common law the master was clearly not under any liability Dick.
to the pursuer. I assume that the scaffold was insufficient for the purpose for
which it was erected; indeed it proved to be so, because it tumbled down.

I think there has been some misunderstanding with regard to the rules of the
common law as to whether the master is liable to his workmen for injuries
caused through improper materials for their work supplied by him to them. I
am not prepared to state, as a rule of law, that if a master supplies bad material
or does not give sufficient material to enable the workmen to do their job in
safety, and they proceed to do their work with the improper materials, that the
master will be liable for any injuries occasioned thereby. The men ought not
to have gone on with their work with the improper materials.

There is, however, no case of that kind here; it is admitted that the master
had supplied proper materials and in sufficient quantities for putting up a good
scaffold. The only question, then, that arises is as to the way in which the
materials were used in putting them into their proper places. Of the three men
employed in erecting this scaffold, one of them is described as a foreman, and under
the old law the master would not have been responsible for any act done by him,
but the Employers Liability Act makes the master in some cases responsible for
the actions of the foreman. I think that the clause of the statute under which
the pursuer brings this action, and by which it is sought to make the master
liable for the actions of his foreman, requires some consideration. I am not pre-
pared to say that any one of these three labourers engaged in pulling down this
old wall was in any different position from the men who were working along-
side him. It is said, however, that this foreman was in a different position from
the other labourers, and that if he committed any fault in the carrying out of
the work which they were all engaged in, the master is liable to any other of
the workmen injured through that fault. I am not prepared to assent to that
as a general proposition. I think that the amount of liability must always
depend upon the circumstances of the case, and upon the good sense shewn in
carrying out the work. But the liability of the master in this case was sought
to be put upon him through the fault of Philp, the foreman. Now, I do not
think that Philp was guilty of any fault for which the master can be made
responsible. I cannot help thinking that this scaffold was not a good and suffi-
cient scaffold for the purpose for which it was erected, because it came down
and life was lost, and the fall did not occur from any wonderful or out-of-the-
way circumstance. I think that if a scaffold is put up for the purpose of pulling
down an old wall the men employed upon that work ought to be able to
do their work in safety. But there is certainly evidence that this scaffold was
the ordinary kind of scaffold used by masons, and was as strong as they are
usually made. There is some evidence the other way, but there is certainly a
reasonable amount of evidence that the scaffold was an ordinary masons' scaffold.
Both the Sheriffs have arrived at the conclusion that Philp was not liable in
any fault in concurring with the deceased Thomson, and the other labourer
engaged at the building of the scaffold, in the opinion that this was quite a safe
scaffold. But, then, if there was not fault on Philp's part, which made him
liable to the pursuer, it is impossible to make the defender liable for his fore-

No. 142.

May 19, 1892.
Thomson v.
Dick.

man. I have had some difficulty with this case, but I wish to indicate the difficulties it presented to my mind, and to shew why I am not prepared to dissent from the conclusions at which both the learned Sheriffs have arrived.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The accident out of which this action has arisen is regrettable, but I think no ground has been stated to justify us in holding the master liable in damages for it. The deceased, along with a workman in a superior position to himself, were sent to put up a scaffold for a particular purpose, and they did put up a scaffold, not only such as they were accustomed to make, but such as masons all over the country are accustomed to put up for similar work. It would, in my opinion, be a strong thing to hold a master liable for an accident to a workman on the sole ground that the scaffold which the workman had erected for himself proved to be insufficient for the purpose for which it was to be used. That, however, appears to me to be the only ground of claim established by the proof in this case. I agree with the opinions of both the Sheriffs when they say that this scaffold was erected by the workmen in the usual way, and as there is no suggestion that the materials supplied by the master for the erection of the scaffold were otherwise than perfectly suitable, I fail to see any ground on which the present claim against the defender can be sustained.

THE COURT pronounced this interlocutor:—"Affirm in fact and in law the judgments of the Sheriff and Sheriff-substitute appealed against; dismiss the appeal."

BOYD, JAMESON, & KELLY, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 143.

May 26, 1892.
Davidson's
Trustee v.
Urquhart.

JOHN ANDERSON (Davidson's Trustee), Appellant.—*Rankine—Watt*.
BEAUCHAMP COLCLOUGH URQUHART, Respondent.—*Johnston—*
A. S. D. Thomson.

Bankruptcy—Compensation—Lease—Sum payable by landlord on valuation—Arrears of rent.—A landlord on his tenant dying insolvent entered in terms of the lease into possession of the farm, and became liable for the value of the grain crop at a valuation. The tenant's estate was afterwards sequestered.

In a question between the trustee and the landlord, held that the latter was entitled to set off his claim for arrears of rent against the trustee's claim for the value of the grain.

2d DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

By lease, dated 2d December 1889, Beauchamp C. Urquhart, of Meldrum and Byth, let the farm of Auchnagorth for nineteen years to John Davidson and his heirs, "excluding subtenants and assignees, legal or voluntary, and creditors, or managers for creditors, in any way or shape, unless with the consent of the proprietor."

By this lease it was declared that the general conditions, articles, and regulations * established by the proprietor for the tenancy of all farms on

* In the articles and regulations incorporated in the lease these provisions occurred:—"10. . . . The whole straw, chaff, turnips, and other green crops, and one-half of the hay, shall be consumed upon the farm, and none sold or carried off without the written permission of the proprietor first had and obtained. . . . and the tenant shall be bound to lay upon the farm all the dung produced upon the same, and never to sell any produced thereon . . . 14 In the event of any tenant becoming bankrupt, or being sequestered, or voluntarily divesting himself of his estate during the currency of his lease, or . . . the lease shall, in the option of the proprietor, become *ipso facto* void and null.

his estates were to "be held to form part" of the lease, and to be binding on the parties to it "as if they had herein been verbatim inserted." The lease further provided,—“In the event of this lease coming to a termination at any time during the currency of the period of let, then the tenant shall be bound to leave to the then incoming tenant or to the landlord, at the valuation of parties mutually chosen, whatever manure is made after the seed time of the last crop, and shall be entitled to receive payment from the then incoming tenant or the proprietor the value of the first year's grass, and of the grain crop, and for the ploughing and rent of fallow land, and for the wire fencing on the farm, as the same shall be fixed by arbitration, in the same manner as above provided for in regard to the incoming of the tenant under these presents.”

No. 143.
May 26, 1892.
Davidson's
Trustee v.
Urquhart.

On 13th September 1891 Davidson died insolvent, and none of his representatives desiring to carry on his farm, the landlord entered into possession himself. Thereafter Davidson's effects were sequestrated, and on 17th December John Anderson, farmer, Auchneive, Tarves, was appointed trustee in the sequestration.

By minute of reference, dated 7th January 1892, the trustee of the first part and Mr Urquhart entered into a reference. The minute, after narrating the above facts, stated that the parties had agreed to refer to arbitration “(1) The quality of the grain crop on said farm of Auchnagorth—said crop to be threshed out by at least two threshings at the mutual expense of the parties, and the price to be the fiars' prices of the county for crop 1891; (2) the value of the whole turnips on said farm; (3) the value of all the dung on said farm; (4) the value of the grass and clover seeds sown down with the grain crop of 1891; and (5) the value of the wire fencing and other paling on the farm; and whatever said arbiters or oversman shall determine in the premises, the said parties bind and oblige themselves to implement and fulfil to each other in every respect.”

On 25th February 1892 Mr Urquhart lodged a claim in the sequestration, in which he deponed that the deceased at the time of his death was resting owing for arrears of rent the sum of £331, 18s. 10d. This sum he proposed to compensate by setting off against it the sum of £321, 17s. 5d.* as the sum payable by him to the trustee for turnip crop, dung, grass, and clover seeds, and wire fencing, and also the grain crop of 1891 taken over by him under the valuation in terms of the lease. After making this calculation there remained a sum of £10, 1s. 5d. as the estimated balance to rank as an ordinary claim.”

The trustee pronounced this deliverance:—“Finds (1) that the claimant has no power under the lease to acquire a preference to the prejudice of other creditors; and (2) that as the turnip, crop, dung, grass, and clover seeds and wire fencing, and also the grain crop of 1891, were taken over by the claimant under agreement with the trustee under this sequestration and not from the deceased, there can be no compensation. The trustee accordingly disallows the said deduction of £321, 17s. 5d., and admits the claim to an ordinary ranking of £331, 18s. 10d. JOHN ANDERSON, Trustee.”

and he shall have power *brevi manu*, without any process of declarator or other process at law, to resume possession of the farm at the first term of Whitsunday or Martinmas after the occurrence of any one of these events, . . . and the tenant and his creditors shall be bound to remove from the farm at the first term of Whitsunday or Martinmas, after any one of these events shall have taken place. . . .”

* This was partly an estimate; the sum afterwards fixed by the arbiters was £362, 14s. 6d.

No. 143.

May 26, 1892.
Davidson's
Trustee v.
Urquhart.

Mr Urquhart appealed to the Sheriff-substitute (Brown), who, on 4th April, pronounced this interlocutor:—"Recalls the deliverance of the trustee: Finds that the appellant is entitled to compensate the amount due by him in respect of the valuations fixed under the minute of reference between him and the trustee by the arrears of rent due to him, including therein the interest on improvement expenditure agreed to be paid by the deceased John Davidson under agreement subsequent to the lease, and to be regarded as rent: Remits the appellant's claim to the trustee to be disposed of in accordance with the foregoing finding."

The trustee appealed to the Court of Session in terms of section 170 of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79).

Argued for the trustee;—The trustee's deliverance was sound. (1) This was simply an illegal attempt to create a security in the landlord's favour over moveables, the possession of which remained with the tenant,¹ and in a case in which, as here, the landlord had a right under the lease to buy stock at a valuation at the end of the lease, it had been held that that gave him no preference.² A landlord's claim for arrears of rent was not good against the pouncing creditors of the bankrupt tenant, and here the sequestration was equivalent to a completed pouncing in terms of section 108 of the Bankruptcy Act of 1856. The theory of the cases which established this proposition seemed to be that the landlord had only a personal right to get possession of the moveables on the farm on certain terms, and had nothing of the nature of a real security over them. But (2) the landlord had completely innovated on whatever rights he had under the lease by entering into the minute of reference with the trustee. The minute was a totally new arrangement apart from the lease.³ On either view, then, there was no room for the plea of compensation.

Argued for the respondent;—On the tenant dying insolvent the landlord (as he was entitled to do) entered into possession of the farm, with a right under the lease to take over the grain crop, &c., at a valuation. The turnips were practically in the same position as the grain crop. The lease prohibited the tenant from removing them, and the landlord was under no obligation to pay for them, although he was willing to do so. The minute of reference was entered into merely to explicate the rights of parties under the lease, and it in no way formed a new contract with the trustee.⁴ In short, the claim for the valuations and the arrears of rent arose *hinc inde* on the same consensual contract, viz., the lease. There was then *concursus debiti et crediti*, and the plea of compensation was fully justified. In *Stewart v. Rose*² the landlord had not obtained possession of the stock of the farm before the creditors. The facts of the case of *Macgregor v. Hunter*² did not bear out the proposition stated in the rubric, and relied on by the appellant. In *Taylor's Trustees v. Paul*³ the landlord derived his rights solely from an arrangement with the bankrupt's trustee.

LORD YOUNG.—The facts of this case are short and simple enough. A farm was let upon a lease containing clauses of a very familiar kind about the incoming tenant taking over at a valuation some fencing and grass and crop left

¹ M'Gavin v. Sturrock's Trustee, Feb. 27, 1891, 18 R. 576, per Lord Young, 581.

² Maclean's Trustee v. Maclean of Coll's Trustee (*Macgregor v. Hunter*), Nov. 21, 1850, 13 D. 90, 23 Scot. Jur. 22, per Lord Cuninghame, p. 97; *Stewart v. Rose*, Feb. 2, 1816, Hume's Dec., p. 229; 2 Bell's Comms. (Lord M'Laren's ed.) 132.

³ *Taylor's Trustee v. Paul*, Jan. 24, 1888, 15 R. 313.

⁴ *Moncreiff v. Hay*, Dec. 6, 1842, 5 D. 249, 15 Scot. Jur. 84.

there either by the landlord or the outgoing tenant at the time. Upon his outgoing the tenant is taken bound to leave the fencing, crops, seed in the ground, and some other things to be paid for in like manner at a valuation. The lease contains the ordinary stipulation that if the tenant should become bankrupt the contract of lease should thereby come to an end, and the landlord should be entitled to enter into possession.

No. 143.

May 26, 1892.
Davidson's
Trustee v.
Urquhart.

Now, the tenant here was not made bankrupt in his lifetime, but he died insolvent. It is admitted that he died in a state of insolvency in the month of September, and in the month of November, a few days after the term of Martinmas, his estate was sequestrated, and the appellant in this appeal appointed trustee. The landlord in fulfilment of his obligation took over the fencing, seed in the ground, and the grass crop and grain crop at a valuation. The case would have been the same, in my opinion, so far as the question of law raised is concerned, if there had been a fixed price stipulated. Upon the tenant's death in a state of insolvency the lease was at an end by its terms, and the landlord was entitled to enter into possession, and he did. If he had not, the place would have been vacant, for there was not anybody else entitled to enter into possession. There was at that time no trustee in bankruptcy, and even if there had been, he would not have been entitled to enter into possession, because the lease provided that it should terminate by the fact of bankruptcy, and that the landlord should be entitled to enter into possession. But he did enter into possession, including in his possession the fencing, the seed in the ground—anything that was growing—and the grain crop which was then upon the premises. Now, what was his obligation? His rights were satisfied by giving him possession of these things. What was his obligation? His obligation was to pay according to valuation.

As I have already pointed out, it would have been the same as regards the law if it had been an obligation to pay a fixed sum—say, £320. That was his obligation. In order to render it more specific, the trustee for the creditors in the discharge of his duty, entered with the landlord into a reference to competent people to determine the amount, and they determined it at £362, 14s. 6d. Well, that was what he was to pay for what he was in possession of in implement of the contract in the lease, and payment of that is demanded, and he says,—“Yes, but the party to whom I owe that is owing me £331, 18s. 10d., and I am entitled to set the one against the other”; and if the party who owed him that sum is the tenant or the tenant's representative in the tenant's obligation under the lease, that is, in my opinion, an unanswerably true and sound proposition. Now, the trustee here is not a creditor under any contract which he made as trustee. He made none. I think he made no contract as trustee. The agreement to nominate the valuers who were to determine the amount was not a contract under which any obligation to deliver goods or to pay the price of goods arose at all. It was merely explicating the contract which had been made by determining the sum of money. Well, then, the contract under which the tenant at the time of his bankruptcy—at the time of his death—and the trustee now coming in his place, is bound to pay rents amounting to £331, 18s. 10d. is the contract of lease between the landlord and the deceased bankrupt. The contract under which the landlord on his part is bound to pay the £362, 14s. 6d. is the contract of lease between the same parties. Why shall the one not be set against the other? There is no answer to that question except one—that there is no reason, and the one must be set against the other in that view.

No. 143.

May 26. 1892.
Davidson's
Trustee v.
Urquhart.

Then it is said that that is not the true view, the true view being that there was no contract of purchase or sale or other contract with the tenant under which the landlord was entitled to get possession of his goods on the one hand, and was bound to pay the price on the other. That is merely to say that he has right to get the articles, and his obligation to pay for them is under a contract entered into with the trustee in the bankruptcy. If that had been so in point of fact, I should have assented to the conclusion, but I am very clearly of opinion that it is not so in point of fact, and that the case in point of fact is correctly stated, as I have stated it already, that the landlord's right to the goods—the crop, seed, fencing, and anything else is under the contract of lease, and his corresponding obligation to pay the price now ascertained to be £362, 14s. 6d. is under the precise contract of lease between the same parties. I am therefore of opinion with the Sheriff-substitute that there is here a *concursus debiti et crediti*, and that in the balancing of accounts the one claim must be set against the other, and a ranking given for the balance.

I do not think it necessary in the view which I have expressed to enter upon any examination of any of the cases. I do not think there is any case to the effect that if a creditor has got possession of part of what would have been the bankrupt estate had he not got possession of it under a lawful contract with the bankrupt himself, he is not entitled to set any liability to pay money in respect of it against a similar liability on the part of the bankrupt in his favour. I put the case of a furnished house—the house is let on lease, the furniture is sold to the tenant, and the tenant is under an obligation at the termination of the lease to leave the premises, and to leave the furniture in it. It may be the same furniture or other furniture, the landlord being bound to take it, and bound to pay either a fixed price or a price to be ascertained by valuation. I put the case that this lease has endured for three years, and that then the tenant dies. The landlord enters into possession of house and furniture; he may let it as a furnished house to a tenant, *i.e.*, another tenant, or he may live in it, and occupy it himself. What is his obligation? The furniture is his; his obligation is to pay for it. But then there is a similar obligation on the part of the tenant to pay his rent, and the one may be set against the other. There is no case to the contrary of that, and I cannot distinguish between grain crops or wire fencing upon a farm and furniture in a house.

In short, my opinion is that the appeal ought to be dismissed, with expenses.

LORD RUTHERFURD CLARK.—The material fact in this case to my mind is that the landlord was in possession of all the articles upon the farm before the date of the sequestration. If that had not been so, I think some serious questions might have arisen for our determination, but as I hold that possession took place before the date of the sequestration, I concur.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

THE COURT adhered.

WINCHESTER & NICOLSON, S.S.C.—MITCHELL & BAXTER, W.S.—Agents.

JOHN CAIN, Complainer (Reclaimer).—*M'Lennan*.
MAGGIE M'COLM, Respondent.—*Cosens*.

No. 144.

May 31, 1892.
Cain v.
M'Colm.

Aliment—Arrears of aliment—Application for warrant to imprison—Civil Imprisonment (Scotland) Act, 1882 (45 and 46 Vict. c. 42), secs. 3 and 4.—It is competent for a woman holding a decree for aliment of her bastard child to enforce payment of arrears of the aliment against the debtor by an application for warrant of imprisonment under the Civil Imprisonment (Scotland) Act, 1882.*

Process—Application for warrant to imprison—Aliment—Civil Imprisonment (Scotland) Act, 1882 (45 and 46 Vict. c. 42), sec. 4, subsecs. 2, 3, and 4.—An application, under the Civil Imprisonment (Scotland) Act, 1882,* by a creditor in a decree for the aliment of a bastard child, is to be disposed of summarily by the Sheriff with reference to the circumstances of the debtor at the date of the application. It is not competent for the Sheriff, after having satisfied himself that the debtor is unable to pay the aliment, to continue the application for a definite period on the chance of the debtor's circumstances improving.

On 23d January 1891 a petition was presented in the Sheriff Court of Dumfries and Galloway, at Stranraer, at the instance of Maggie M'Colm, residing at Logan in the parish of Kirkmaiden, against John Cain, Auchness, Kirkmaiden, praying for a warrant to commit him to prison for a period not exceeding six weeks, or until he paid £1, 10s. of inlying expenses and aliment, commencing payment 17th October 1888, of a bastard of which he was the father, and expenses. It was also set forth in the petition that he had been charged to pay these sums on 15th January, and that the days of charge had expired.

At the hearing on 29th January, the Sheriff-substitute (Watson) did not pronounce any deliverance, and on 5th February he granted warrant to imprison, as craved, unless the sum of £12 was paid within ten days thereafter. This sum of £12 was duly paid.

On 3d September 1891 Maggie M'Colm presented another petition, founded on the first, and craving warrant to imprison Cain for six weeks,

* 45 and 46 Vict. c. 42, sec. 3.—“From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decreed for aliment.”

Sec. 4.—“Subject to the provisions hereinafter contained, any Sheriff or Sheriff-substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decreed for, . . . any person who wilfully fails to pay within the days of charge any sum or sums of aliment . . . for which decree has been pronounced against him by any competent Court, provided . . . (2) that the application shall be disposed of summarily and without any written pleadings; (3) that the failure to pay shall be presumed to have been wilful, until the contrary is proved by the debtor, but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-substitute shall consider reasonable; (4) that a warrant of imprisonment may be granted of new, subject to the same provisions and conditions, at intervals of not less than six months, against the same person in respect of failure to pay the same sum or sums of aliment. . . .”

No. 144.

May 31, 1892.
Cain v.
M'Colm.

or until he paid the sums set forth in the first petition, together with further sums of aliment since due, and expenses.

On 1st October the Sheriff-substitute, having heard parties, continued the consideration of the foregoing complaint until the lapse of twelve months after the 5th day of February last, and appointed the case to be enrolled on the first Court day after the lapse of said twelve months.

On 24th March 1892 the Sheriff-substitute granted "warrant to officers of Court to apprehend and commit the said John Cain, defender, to the prison at Maxwelltown, therein to be detained for the period of six weeks from the date of his imprisonment, unless the further sum of £10, in part payment of the balance of the sums specified and contained in the decree and charge therein referred to in the petition and condescendence annexed thereto, past due, and still unpaid, is paid within ten days from this date, and grants warrant to the keeper of said prison to receive and detain the said John Cain accordingly, all in terms of the Civil Imprisonment (Scotland) Act, 1882."

On 1st April Cain presented a note of suspension and interdict complaining of the latter interlocutor and whole proceedings. He averred, *inter alia*, that he had been denied by the Sheriff-substitute an opportunity of shewing, as he could have done, that he was unable to pay more than he had already done.

He pleaded;—1. The warrant of imprisonment complained of is incompetent and *ultra vires*, and suspension and interdict should be granted, as craved, in respect (1) That the complainer is due no sum in respect of aliment incurred since the date of the decree against him. (3) The Sheriff-substitute having previously, on 5th February 1891, found that £12 was the sum which fell to be paid by the complainer, as the condition of his escaping imprisonment, and the complainer having paid said sum of £12, and the whole sums of aliment which have subsequently fallen due, the warrant of imprisonment complained of was outwith the powers of the Sheriff-substitute. (4) The proceedings under the second petition for imprisonment were irregular and incompetent, and the warrant following thereon is null and void.

The respondent pleaded;—1. The complainer's statements are irrelevant, and insufficient in law to support the prayer of the note. 2. The warrant of imprisonment complained of being regular and proper, and in conformity with statute, the complainer is not entitled to suspension and interdict against the respondent.

On 1st April the Lord Ordinary (Stormonth Darling) granted interim interdict, and on 25th April the Lord Ordinary on the Bills (Rutherford Clark) refused the note and recalled the interdict.

The complainer reclaimed, and argued;—(1) It was incompetent for a creditor in a decree for aliment to enforce payment of arrears of aliment by a warrant to imprison the debtor under the Civil Imprisonment (Scotland) Act, 1882.¹ "Sums decerned for aliment" could only be sum-decerned for a period then current. As soon as the period elapsed, the debt ceased to be alimentary and enforceable by imprisonment. (2) The procedure in the cause had been grossly irregular. In an application for an order of imprisonment under subsection 2, section 4, of the Act of 1882 the Sheriff was to proceed "summarily" with reference to the debt and the circumstances of the debtor at the time of the application. Under subsection 3 of section 4, the debtor ought to have had an opportunity of

¹ Tevendale v. Duncan, March 20, 1883, 10 R. 852; Dove Wilson's Sheriff Court Practice (4th edn.), pp. 381 and 382.

showing, as he could have done, that he was too impecunious to pay No. 144.
 aliment.¹ By adjourning the case for five months the Sheriff-substitute
 had kept a possible warrant of imprisonment hanging over the debtor's May 13, 1892.
 head. Such a course was obviously inconsistent with "summary" dis- Cain v.
 posal of the application. M'Colm.

Argued for the respondent;—The statute contained no distinction between aliment for a current period and aliment in arrears. The case of *Tevendale*, relied on by the appellant, did not establish that arrears of aliment could not be enforced by warrant of imprisonment under the Act. The ratio of the judgment was that *Tevendale* was a quasi-assignee, and therefore not a person for whose benefit the aliment had been "decerned for" in the sense of the statute. (2) The procedure was not irregular. The Act contained no prohibition of the course adopted by the Sheriff-substitute, who thought that the debtor might be in a position to pay the debt in five months' time, and that the creditor would by the adjournment be saved the expense of a new petition.

Lord President.—The first ground upon which the reclamer relied was that it was not competent for the respondent to make an application for an order of imprisonment under the statute, because the monies due were payable, not for aliment to be furnished in the future, but for sums expended in the past.

The reclamer rested his argument upon the case of *Tevendale*, 10 R. 852. I am of opinion that the case of *Tevendale* does not sanction such a limitation of the statute. That was the case of a parochial board which, having disbursed certain sums by way of aliment for a pauper, turned round and asked decree for reimbursement from the pauper's son, and then sought to enforce that decree by imprisonment. The Court held that the remedy of imprisonment was not applicable to a claim of that sort, because the sums were not decerned for as aliment for the holder of the decree or the holder's child, and therefore were not decerned for as aliment in the sense of the statute. The statute which abolished imprisonment for debt made an exception of the case of non-payment of aliment—that is to say, enabled a person who was legally entitled to be alimented by another, to have her child alimented by another, to enforce that duty, which brooks no delay, by imprisonment. That ratio did not apply, the Court thought, to the case where the aliment had been supplied by a third party, and that third party sought reimbursement. That is quite a different case from the present, and I am of opinion that the first ground of suspension is not a sound one.

But another objection was stated to the Sheriff's interlocutor of a very different kind and quality. The interlocutor complained of, which contains a warrant of imprisonment, was pronounced upon 24th March 1892. That warrant was granted upon an application for summary imprisonment presented upon 3d September 1891. Now consider the procedure contemplated by the statute in dealing with applications for warrants of imprisonment as shewing their serious and peremptory nature. It is careful to provide that they "shall be disposed of summarily and without any written pleadings." The Sheriff here, taking up consideration of the complaint upon 1st October 1891, continued consideration of it until the lapse of twelve months from 5th February 1891. That is the way he dealt with the case by saying he would resume consideration of it after the lapse of four months. I do not think he was warranted in so dealing with

¹ Cook v. Wallace & Wilson, March 7, 1889, 16 R. 565.

No. 144. the matter, or that that was a proper way to treat an application for warrant of imprisonment. If a proper case had been made out before him for granting the warrant, he should have granted it at once, after satisfying himself that the debtor had no sufficient excuse for not paying. As he did not grant the warrant, it is plain that he did not consider the circumstances then justified his complying with the application. But then he seems to have made the conjecture that in four months the circumstances might justify the granting of the warrant, and he continued the cause accordingly. That is a somewhat odd way of summarily disposing of such an application, and I think it was an incompetent way. The Sheriff might no doubt have continued the cause for a few days to give the debtor an opportunity of explaining his position. But the long continuation is fatal to the respondent, for it shews the Sheriff thought the warrant of imprisonment would not be justified by the facts as they then stood. His expectations as to the future were entirely speculative; and I do not think it right to keep a possible warrant of imprisonment hanging over a debtor's head for four months. There being no grounds for the warrant at the time, the application should have been dismissed. If the debtor's circumstances altered, the respondent could have presented a new application. That would entail none but the most infinitesimal trouble or expense upon the respondent.

May 31, 1892.
Cain v.
M'Colm.

I think the adjournment was incompetent, and upon that ground I am for granting suspension as craved.

LORD ADAM.—Imprisonment for debt was abolished generally by the Act of 1882, but it is still competent in certain exceptional circumstances. Imprisonment for nonpayment of aliment is regulated by section 4 and its subsections, and upon the application of these sections this case arises. The first question is one of fact, whether the debt the reclamer was decerned to pay was a debt for sums of aliment, or of expenses of process for the recovery of aliment, or not. If it was, there can be no question that a warrant of imprisonment might have been pronounced upon nonpayment. I have no doubt that the sum which was decerned for at the instance of a mother of an illegitimate child was for an alimentary debt, and therefore so far I agree with the Lord Ordinary.

But I agree with your Lordship that the procedure adopted was not justified by the Act, which, as your Lordship has pointed out, contemplates summary proceedings without written pleadings. The parties are to appear, and the Sheriff is there and then to consider whether warrant of imprisonment should be granted or whether the person decerned against has any good grounds of excuse. If the Sheriff thinks the circumstances justify warrant of imprisonment he should grant it, and if not he should refuse the application. The Sheriff here did not follow either course, but continued the petition for four months. Where was his warrant for doing that? What was the view of the Sheriff? Did he think he was to consider the state of the circumstances at the date of the application or the state of the circumstances which might exist in four months? I do not think there was any foundation for his procedure in the statute. He had no justification, if there were no grounds for then granting the warrant, for keeping the application hanging over the debtor's head for four months. There would be unfairness also to the person in whose favour the decree for aliment has been pronounced. She has a right at any time to apply for a warrant of imprisonment, and the application ought to be considered according to the circumstances at the time when the application is made. I:

this procedure were countenanced, that right would not exist, for suppose she applied and her application was refused, but continued for four months, then if the debtor's circumstances altered in one month, *e.g.*, by his acquiring property, an application made by her would be met by the answer that there was a depending application which had been sisted for four months. No. 144.
May 31, 1892.
Cain v.
M'Colm.

Such procedure would thus be injurious to the debtor by keeping a possible warrant of imprisonment hanging over his head, and to the creditor by interfering with her right to apply for a warrant according to the circumstances of the time when she fancies she could make an application with success. I am for granting decree of suspension.

LORD M'LAREN.—I am satisfied that the Court in the case of *Tevendale* did not mean to decide anything except this—that right to a decree for aliment by assignation or other derivative title would not confer upon the person holding such decree, not being the person for whose benefit the aliment had been decreed, the right to enforce that decree by imprisonment. It does not appear that the Court meant to decide that imprisonment would be incompetent if arrears were mentioned. So to hold would, in my opinion, be contrary to the scope of the provisions of the Act for enforcing payment of aliment by means of imprisonment. I think the distinction cannot be maintained, and that a creditor is entitled to recover arrears by means of imprisonment against a debtor who has means at his disposal. The debtor always has the protection of the Sheriff if he can shew he is unable to pay.

I also agree with your Lordship in holding that the proceedings here are not in proper form, and are contrary to what the statute intended. Application for an order of imprisonment is to be summarily considered by the Sheriff with reference to the debt, and to the circumstances of the debtor, when the application is made. If the debtor by being out of work, or for any other sufficient reason, is not in a position to pay, then the motion—for it is nothing more—will be dismissed. The creditor may always apply again in case of a change of circumstances. I see no inconvenience in this, but great inconvenience in “continuing” such applications for a definite period.

LORD KINNEAR concurred.

THE COURT recalled Lord Rutherford Clark's interlocutor of 25th April 1892, and remitted to the Lord Ordinary on the Bills to pass the note.

ROBERT BROATCH, L.A.—SMITH & MASON, S.S.C.—Agents.

MRS ALICE GRAHAM OR FRASER AND OTHERS, Pursuers.—*Comrie Thomson* No. 145.
—*Guy*.

THE MAGISTRATES AND TOWN-COUNCIL OF BURGH OF ROTHESAY,
Defenders.—*Asher—A. S. Davidson.*

May 31, 1892.
Fraser v.
Magistrates of
Rothesay.

Reparation—Road—Unfenced road—Road trustees—Turnpike Roads Act, 1831 (1 and 2 Will. IV. c. 43).—It is a question of circumstances whether an unfenced road with a drop of eight or nine feet at one side is so dangerous as to impose on the road trustees the duty of fencing the road, either at common law or under the Turnpike Roads Act, 1831.

An action of damages was raised at the instance of the widow and children of the deceased Robert Fraser against the Provost and Magistrates of Rothesay, being the Local Authority of the burgh, in respect of the death of the deceased, and also at the instance of the widow for

No. 145. damages in respect of personal injuries sustained by her through an accident at an unfenced portion of road within the burgh.

May 31, 1892.
Fraser v.
Magistrates of
Rothesay.

The fault averred by the pursuers was that the defenders had failed in their duty of fencing the road—a duty imposed upon them at common law and by statute,* in respect that the part of the road in question was dangerous.

The case was tried before Lord Adam and a jury upon 20th, 22d, and 23d March 1892.

The following facts were proved. The deceased and his wife were on the evening of 29th August 1890 standing on the public road within the burgh of Rothesay, which led from Rothesay to Port Bannatyne, and which ran along the seashore. At the point at which they were standing there was a footpath on the side farthest from the sea, but none on the side nearest to the sea. The road was bounded and supported on the side nearest to the sea by a perpendicular retaining wall, the top of which was on the same level as the road, and the depth of the wall from the road to the shore beneath varied from about 8 to 9 feet, the shore below consisting of rock and shingle. There was no parapet fence or protection of any kind on the sea side of the road. Mr and Mrs Fraser were standing near the edge of the retaining wall looking out towards the sea. An open hackney carriage was being driven along the road at the time. When a short distance from Mr and Mrs Fraser, one of the wheels gave way, the horse ran off, and the horse, carriage, and its occupants were precipitated over the retaining wall on to the shore beneath. Mr and Mrs Fraser were swept over the wall, the former sustaining injuries from which he died in a few hours, and the latter suffering serious personal injury.

The jury returned a general verdict for the defenders.

The pursuers moved for a rule upon the defenders to shew cause why a new trial should not be granted, and argued that the bare fact of the existence of an unprotected drop of 8½ feet from the road to the shore pointed necessarily to the place being so dangerous as to impose an absolute obligation upon the defenders to have fenced it.

LORD ADAM.—One of the questions raised was, whether or not the particular part of the road where the accident happened was dangerous—in which case it was admitted that the defenders were bound both at common law and under the statute of Will. IV. to fence it.

On this question we had a large body of conflicting evidence. Witnesses were adduced who spoke to the condition of hundreds of miles of roads in the Highlands, in Argyllshire, Dumbartonshire, and in Ayrshire and other counties. Some of them said that roads like the present were always fenced, while others said that these roads were never fenced. I told the jury that I thought that evidence of little value, as we did not know the particulars of each case. There was also evidence on both sides of persons who were in the constant habit of using the road. That being so, it was for the jury to say whether they, taking all that evidence into consideration, and also the local circumstances, such as the breadth of the road, situation, lighting, and other surrounding circumstances, were of opinion that the road was in that particular part dangerous, and ought to have been fenced. I do not know what their opinion was for

* The Turnpike Roads (Scotland) Act, 1831 (1 and 2 Will. IV. c. 43), sec. 94, enacts,—“And be it enacted that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the said roads.”

the verdict they returned is a general one. There was clearly a conflict of evidence, however, on the question whether the place was dangerous, and their verdict on the matter must be given effect to unless the pursuers can shew that the mere existence of a drop of $8\frac{1}{2}$ feet from the road to the beach involves necessarily a dangerous place. If that proposition could be maintained, the verdict is contrary to the weight of the evidence. I do not think, however, that it can be maintained. On the whole matter, I see no ground for interfering with the verdict.

No. 145.

May 31, 1892.

Fraser v.

Magistrates of
Rothsay.

LORD M'LAREN.—The chief question to which argument for the pursuers was addressed was, whether the jury were wrong in coming to the conclusion that the place where the accident happened was not a dangerous part of the road in the sense of the statute.

Now, the question whether a place is dangerous is so evidently a question of fact that it may be said to be a matter peculiarly within the province of a jury, and I should not be disposed to interfere with the finding of a jury on such a question, unless that finding should stand condemned as being contrary to facts of general knowledge and experience.

When we come to consider the description of the road in question, the case seems to me to be a very simple one indeed.

If it had been intended that every road supported on a retaining wall exceeding 8 feet in height should be fenced, it would have been easy to frame an enactment to this effect. From one's knowledge of the roads of this country, it would be impossible to carry out such a provision without very great expense to the counties. Accordingly, no such absolute burden is laid on these communities, but they are to take into consideration whether particular parts of a road may not be so dangerous as to require fencing in the interests of the safety of the public.

There may be long stretches of straight road carried to a height much exceeding the height of the road in question, which would in the opinion of most persons be quite safe, because if the road is of sufficient breadth there would be no occasion to drive near the edge, and carriages meeting on the road would pass each other at a walking pace. One has seen long stretches of such unfenced road in valleys in the Highlands and other mountainous districts of this country. On the other hand, there may be danger altogether irrespective of the height of the retaining wall. There is the case of a road carried along the slope of a valley, and where the road turns at an acute angle, so that the drivers of two approaching carriages could not see each other until they met at the angle. That might be held to be a very dangerous place, and a place which ought to be fenced irrespective of the height of the road. The whole question is one of circumstances and of degree, and even the amount of traffic on a road is an element of consideration on the question of danger.

Now, there are no specialties in this case tending to shew that the jury were wrong in the conclusion which they expressed in their verdict. They thought the road reasonably safe, and I am of opinion that no cause has been shewn for interfering with their judgment on the matter.

LORD KINKAR.—I am of the same opinion. The verdict for the defenders is general, and we cannot tell whether the jury found as they did because they thought that the place where the accident occurred was not a dangerous place which the defenders were bound to fence, or because they thought that

No. 145. although there ought to have been a fence, its absence did not cause or contribute to the accident. Either ground would have been sufficient to support the verdict, because the pursuers had to shew both that the defenders were in fault and also that their fault was the cause of the injury.

May 31, 1892.
Fraser v.
Magistrates of
Rothsay.

Now, there is no question that there was evidence both ways upon the question whether the place was dangerous, and we cannot say that the verdict is wrong in so far as it negatives fault on any ground short of this, that irrespective altogether of the evidence of experts, and of the special circumstances of the case, a road with a perpendicular fall of $8\frac{1}{2}$ feet towards the sea beach is necessarily and in all cases so dangerous as to impose a duty upon the Road Trustees to fence it. I think it is impossible to come to such a conclusion, and I see no reason to interfere with the verdict, assuming what we have no means of knowing, that the jury meant to find that there was no fault on the part of the defenders.

LORD PRESIDENT.—The question upon which the verdict of the jury is said to be wrong is the question whether the part of the road upon which this accident happened was dangerous. If it was dangerous, then at common law and under the Statute of 1 and 2 Will. IV. c. 43, there would be an obligation upon the Local Authority to fence it. I say this because it is not suggested that this was a bridge or embankment, in which case there is no discretion given by the Act, for they must be fenced.

The question whether it was a dangerous part of the road was one which was most obviously an appropriate question for the jury. But in the speech which we have just heard we have had no analysis of the evidence. On the contrary, the case has been presented as if *res ipsa loquitur* upon the bare fact that there was a drop of $8\frac{1}{2}$ feet from the road to the shore.

In some places there might be particular facts as to local situation which would have aided the jury in arriving at an adverse conclusion; but they had here no case of that kind to deal with, and I think we should not be justified in granting a rule unless we came to the conclusion as matter of common sense that where there was an unprotected drop of $8\frac{1}{2}$ (or for that matter a drop or declivity of any substantial depth) from a road to a shore, there was an obligation upon the Local Authority to fence the road. To say this would be, in my opinion, to reach a preposterous and unreasonable conclusion, and one which would incidentally lead to the bankruptcy of all the Highland County Councils.

THE COURT refused the motion.

MACANDREW, WRIGHT, & MURRAY, W.S.—JOHN LATTI, S.S.C.—Agents.

No. 146.

THE NIDDRIE AND BENHAR COAL COMPANY, LIMITED.—*Dickson—Grainger Stewart.*

May 31, 1892.
Niddrie and
Benhar Coal
Co., Limited.

Public company—Reduction of capital—Process—Procedure in vacation— 49 Vict. c. 23, sec. 5.—Section 5 of the Act of 1886 amending the Companies Acts, enacts,—“Wherever the expression ‘Court of Session’ occurs in the said recited Acts” (i.e., the Companies Acts of 1862, 1867, 1877, 1879, 1880, and 1883), “or the expression ‘the Court’ occurring therein or in this Act refers to the Court of Session in Scotland, it shall mean and include either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills.”

Held that the Lord Ordinary on the Bills has, under this section, jurisdiction to entertain in vacation a petition for confirmation of reduction of capital, and that although no remit has been made to a permanent Lord Ordinary.

No. 146.

May 31, 1892.

Niddrie and
Benhar Coal
Co., Limited.

2D DIVISION.

On 25th March 1892 the Niddrie and Benhar Coal Company, Limited, presented a petition for reduction of capital, and on 30th March the Lord Ordinary on the Bills (Lord Stormonth Darling) ordered intimation, advertisement, and answers within ten days. The intimation and advertisement were duly made, and no answers were lodged.

On 25th April Lord Rutherford Clark, then Lord Ordinary on the Bills, on being informed that there were doubts as to the competency of the Lord Ordinary on the Bills in vacation to deal with such petitions, at least until a remit had been made to a Lord Ordinary, pronounced this interlocutor:—"Having resumed consideration of the petition, and heard the agent for the petitioners, remits to Mr C. B. Logan, Writer to the Signet, to inquire and to report in regard to the statements in the petition, and the regularity of the proceedings."

On 12th May Mr Logan reported thus,—". . . I have not been able to find any instance of a similar petition for reduction of capital having been presented or proceeded with before the Lord Ordinary on the Bills in time of vacation. The statutory provisions bearing upon this point are shortly these: Before the passing of the Companies Act of 1886 all petitions of the kind under the Companies Acts were presented to the Court, which, in Scotland, was defined by the Companies Act, 1862, sec. 81, to mean 'the Court of Session in either Division thereof.' By the Companies Act of 1867, which required a company reducing its capital to obtain the confirmation of such reduction by 'the Court,' the expression 'the Court' was, section 12, defined to mean 'the Court which has jurisdiction to make an order for winding up the petitioning company, and the 81st and 83d sections of the principal Act (the Act of 1862) shall be construed as if the term "winding-up" in those sections included proceedings under this Act.' The Act of 1886, sec. 5, enacts with regard to the jurisdiction of the Lord Ordinary on the Bills in vacation, that 'wherever the expression "the Court of Session" occurs in the said recited Acts, or the expression "the Court" occurring therein or in this Act refers to the Court of Session in Scotland, it shall mean and include either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills'; and section 6 provides that 'when the Court makes a winding-up or a supervision order, or at any time thereafter, it shall be lawful for the Court, in either Division thereof, if it thinks fit, to direct all subsequent proceedings in the winding-up to be taken before one of the permanent Lords Ordinary, and to remit the winding-up to him accordingly; and thereupon such Lord Ordinary shall, for the purposes of the winding-up, be deemed to be "the Court" within the meaning of the recited Act and this Act, and shall have, for the purposes of such winding-up, all the jurisdiction and powers of the Court of Session.

"These are the main provisions of the statutes expressly bearing upon this point of procedure. By virtue of the last-mentioned statute there are various petitions under the Companies Acts which are remitted to Lords Ordinary, and which proceed in time of vacation before the Lord Ordinary on the Bills, but, so far as I am aware, these have all been petitions in winding-up proceedings.

"The point of procedure in question depends upon the construction of section 5 of the Companies Act of 1886 above quoted, and it is, whether the expression 'the Court' or the 'Court of Session' occurring in the

No. 146. Companies Acts shall mean and include in time of vacation the Lord Ordinary on the Bills, in so far as regards a petition for confirmation of a reduction of capital, and if so whether the Lord Ordinary on the Bills in vacation has such jurisdiction only after a remit has been made by either Division of the Court to a permanent Lord Ordinary.

May 31, 1892.
Niddrie and
Benhar Coal
Co., Limited.

"My attention has been called to a decision by Lord Shand, as Lord Ordinary on the Bills in vacation, in a petition, *R. A. Macfie, for Liquidation of the Portobello Pier Company, Limited*, in 1886, in which, after fully considering the meaning of the 5th section of the Act of 1886, his Lordship came to be of opinion that the enacting words of section 5 must be read as amounting to a declaration that when the expression 'the Court of Session,' or 'the Court,' occurs in the Joint Stock Companies Acts referring to the Courts of Scotland, it means and includes, in time of vacation, the Lord Ordinary on the Bills.

"Upon the whole matter, and subject to your Lordships' decision on the two questions regarding the rights of creditors and the procedure in vacation above referred to, I have to report that the proceedings otherwise have been regular and in conformity with the statutes. . . ."

ON the petition and report coming before the Second Division they granted the prayer of the petition without ordering intimation, service, and answers *de novo*.

DRUMMOND & REID, W.S., Agents.

No. 147. THE ROYAL BURGH OF RENFREW AND OTHERS, Complainers (Reclaimers).
—*Vary Campbell—Greenlees.*

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

JAMES MURDOCH, Respondent.—*Johnston—G. W. Burnet.*

Burgh—Common good—Harbour rates—Loan—Assignment and personal obligation in bond—Burgh Harbours (Scotland) Act, 1853 (16 and 17 Vict. c. 93), secs. 1, 17, 18, 19, and schedule B—3 Geo. IV. c. 91, sec. 11.—The town-council of a burgh which had adopted the Burgh Harbours (Scotland) Act, 1853, borrowed in terms of the Act a sum of money for the extension and improvement of the harbour of the burgh, and granted a bond and disposition in security to the lender, in the form of schedule B of the Act. The bond bore,—"We hereby bind the burgh to pay" to the lender the sum borrowed, ". . . and we hereby assign to him the rates authorised to be levied at the said harbour" by the Act.

The harbour rates having become insufficient to pay the interest on the bond, and the town-council having declined to pay it out of the common good of the burgh, the lender charged the burgh for payment.

In a suspension of the charge the complainers pleaded that the obligation in the bond was limited to the harbour rates.

The Court *repelled* the reasons of suspension, holding that the burgh was liable for the debt.

1ST DIVISION.
Ld. Stormonth
Darling.

IN 1878, the Town-council of the royal burgh of Renfrew adopted the Burgh Harbours (Scotland) Act, 1853,* with reference to the harbour of Renfrew.

* The Burgh Harbours (Scotland) Act, 1853 (16 and 17 Vict. c. 93) bears—"Whereas the harbour and other dues leviable at the harbours belonging to many of the royal burghs in Scotland have, by reason of the change in the value of money and other causes, become inadequate for the maintenance of such harbours, and it is expedient that further provision should be made for the extension, improvement, and regulation of such harbours, and for the increase of the rates and duties leviable thereat: Be it enacted . . . as follows
"1. This Act may be adopted and applied in manner hereinafter provided in an

At a meeting of the magistrates and town-council of the burgh held on 2d August 1886, they resolved to borrow from James Murdoch £1300 for the extension and improvement of the harbour, and a bond and assignation in security was then granted in the form of schedule (B) of the Act of 1853, and was in the following terms:—"The royal burgh of Renfrew has this day borrowed the sum of £1300 from James Murdoch, . . . for the extension and improvement of the harbour of the said burgh, which sum we hereby bind the said burgh to pay to the said James Murdoch, his heirs, executors, and assignees, at the term of Whitsunday 1891, within the council chambers of the said burgh, with interest thereof at the rate of £4, 10s. per centum per annum from the date hereof . . . and we hereby assign to the said James Murdoch and his foresaids the rates authorised to be levied at the said harbour by the Act 16th and 17th Victoria, chap. 93d, entitled an Act to enable burghs in Scotland to maintain and improve their harbours, in security of the repayment of the foresaid sums, principal and interest, which are hereby declared a lien on the said rates: And we consent to the registration hereof for preservation and execution: In witness whereof these presents . . . are subscribed by Daniel Wright, provost, Thomas Anderson, treasurer, and the said William Herron, town-clerk foresaid of the said burgh, at an open meeting of the town-council thereof at Renfrew on the 2d day of August in the year 1886, before these witnesses," &c.

No. 147.
June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

The deed was recorded in the minute-book of the town-council on 3d August 1886.

After Whitsunday 1887 the revenue derived from the harbour rates

royal burgh in Scotland possessing a harbour which at the time of passing this Act is not under the regulation of any local Act of Parliament."

Section 17 enacts,—“From and after the adoption of this Act in any burgh, the whole future revenue of the harbour shall be applied and expended by the town-council in the maintenance, improvement, and extension of the harbour, and in no other way and for no other purpose whatsoever. . . .”

Section 18 (with the rubric, “Town-council may borrow money on security of rates”) enacts,—“It shall be lawful for the town-council from time to time to borrow, for the purposes of extending or improving the harbour, such sum or sums as they shall deem expedient, Provided always that intimation shall be given by the town-council of their intention to borrow money by the insertion of a notice to that effect, and stating the sum proposed to be borrowed once in a newspaper published in the burgh one month at least before the meeting of the town-council at which it is intended to authorise the borrowing of such sum: Provided also that the resolution to borrow shall be approved of by at least two-thirds of the members of the council who are present at such meeting, and that the whole sums so borrowed or advanced shall be applied and expended in the extension and improvement of the harbour, and in no other way, and for no other purpose whatsoever.”

Section 19 provides,—“The bonds and assignations to be granted for securing the repayment of the sums to be borrowed or advanced as aforesaid shall be in the form of the schedule (B) hereunto annexed, or as near as may be, and shall be signed by the provost or acting chief magistrate of the burgh, and by the treasurer and town-clerk, at an open meeting of the town-council, and two of the councillors present shall sign as witnesses thereto, and such bonds and assignations shall be recorded in the minute-books of the town-council, and until repayment of the sums so borrowed or advanced, and interest thereon, such sums, and the bonds and assignations granted therefor respectively, shall form a lien on the rates by this Act authorised to be levied preferable to all other debts and claims against the burgh, and the creditors in right of such sums shall be entitled to receive the same from the town-council and their officers out of the first and readiest of such rates.”

No. 147.

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

was not sufficient to pay the interest on the bond, and the town-council refused to pay it out of the common good.

Murdoch having charged the burgh and the provost and the other members of the town-council as members of the town-council for payment, they presented a note of suspension of the charge, and the note having been passed, a record was made up.

The complainers averred, *inter alia*, that the respondent's loan was secured over the harbour rates under sections 18 and 19 of the Act of 1853, that the forms at common law, and under Sir William Rae's Act, (3 Geo. IV. c. 91, sec. 11),* for burdening or affecting the common good, were not followed nor intended to be followed in the security granted to the respondent under the Act; that they were willing to pay him out of the first and readiest of the harbour rates, if these yielded sufficient funds, which they did not. That although the burgh was possessed of considerable common good, there was a heavy debt upon it. They further averred;—"The burgh in session 1878-79 promoted unsuccessfully a private bill for power to give the security of the common good, in addition to the harbour rates, in loans to the extent of £20,000 for the extension and improvement of the harbour."

The respondent maintained that the requirements of Sir William Rae's Act had been complied with, and that the obligation in the bond was binding upon the complainers as against the common good, which was amply sufficient to repay him.

The complainers pleaded, *inter alia*;—(1) The charger's security being limited to the harbour rates, and there being no such funds to meet his charge, the complainers are entitled to suspension. (2) The charge being given wrongfully, for the purpose of attaching the common good or other funds of the burgh, in and to which the charger has no right, the same should be suspended.

The respondent pleaded, *inter alia*;—(1) The complainers' statements are irrelevant and insufficient to warrant suspension of the charge. (2) In respect of the personal obligation of the said royal burgh, contained in the bond upon which the charge now sought to be suspended proceeds, the charge, being orderly proceeded, ought not to be suspended, and, in any event, can only be suspended upon caution or consignment of the sum due under the bond.

On 17th February 1892 the Lord Ordinary (Stormonth Darling) repelled the reasons of suspension, found the warrants and charge orderly proceeded, and decerned.†

* 3 Geo. IV. c. 91, sec. 11,—“It shall not be lawful for the magistrates or the town-council of any burgh to contract any debt, grant any obligation, make any agreement, or enter into any engagement which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made in that behalf; and any such contract, obligation, agreement, or engagement, made or entered into without such act of council, shall be void and null as against the common good of the burgh, or the succeeding magistrates or town-council thereof, without prejudice nevertheless to the personal liability and responsibility of the persons by whom the same may have been made or entered into.”

† “OPINION.— . . . The question is, does this obligation extend to the whole burgh property (except, of course, such as is specially appropriated to other purposes), or is it limited to the harbour rates?

“In support of the latter view the complainers are not able to point to any express words of limitation in the statute, but they appeal to its general scope and tenor, and especially to the dedication of the whole future revenue of the harbour to harbour purposes, and the provision that the lenders shall be entitled to get their money out of the first and readiest of the rates.

The complainers reclaimed, and argued;—The obligation contained in No. 147.
the bond did not extend to the common good of the burgh. The bond

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

"In order to test this argument it is necessary to consider what was the state of the law as regards burghs having a grant of harbour before the passing of the Act. The harbour and its dues formed a part of the common good. The right to levy dues had its counterpart in the obligation to maintain and improve the harbour, but the dues could not be increased without statutory authority, and the burgh could not be compelled to expend its general funds for harbour purposes. If, however, it chose to do so, the debt so incurred was, I apprehend, an ordinary debt of the burgh, and was recoverable out of the common good, provided the proceedings were taken in compliance with Sir William Rae's Act (3 Geo. IV. cap. 91, sec. 11).

"In that state of matters the Act was passed, on the preamble that the dues leviable at many of the burgh harbours in Scotland had, by reason of the change in the value of money and other causes, become inadequate for the maintenance of such harbours. The contemplation of the statute was not that harbours were a source of revenue to burghs but that they were either a burden, if properly maintained, or, if not, that they had fallen into a condition of disrepair. The leading purpose, therefore, was to improve the harbours, and as a means to that end to raise the rates. It would have been rather surprising if the Act had not taken care to provide that the increased rates should be entirely devoted to harbour purposes. But that seems to me to afford no ground for holding that if a burgh chose to adopt the Act (which it was not bound to do) and chose to borrow money (which it was not bound to do) the common good should be relieved of all responsibility for the money so borrowed. Presumably before the Act was passed the common good derived no benefit from the existence of the harbour. Assuredly after the adoption of the Act it could derive none. But the general prosperity of the burgh might gain largely by the harbour being put into a satisfactory state, and it might be a perfectly prudent act of administration in the true interests of the community to pledge the common good for such a purpose. That was the view of municipal policy which led to the enactment of section 7 of the Public Works Loan Act of 1882, and that was the view which the burgh of Renfrew itself took when it promoted unsuccessfully in session 1878-79 the private bill mentioned in cond. 6. I think the burgh was wrongly advised in supposing such a bill to be necessary, but the mere fact of its introduction is enough to shew that, in the estimation of the municipal authorities, the common good might well be burdened with liability for harbour loans, though it could derive no direct pecuniary benefit from harbour expenditure.

"Neither do I think that the provisions in the statute for assigning the rates in security of harbour loans necessarily or even naturally imply that no other fund is available for repayment. Where a harbour authority has no property except the works and the rates which they produce (as in the case of the *Elgin and Lossiemouth Harbour Company*, 6 R. 987, and the *Greenock Harbour Trustees*, 15 R. 343) the fund for repayment and the subject of security may be one and the same. But in such cases the document granted to the lender is simply an 'assignment,' not as here a 'bond and assignation.' The case is very different where the harbour belongs to a body like a burgh having other funds of its own. The natural meaning of binding a burgh to repay money is that the existing town-council and their successors in office are to make forthcoming the whole available property of the burgh, and there is nothing inconsistent with that in assigning a particular portion of the property of the burgh as a security to the lender. I think it would require either express words, or (to use Lord Eldon's classical phrase) 'implication plain,' to limit the effect of general words of obligation. Admittedly the statute contains no such express words, and the implication seems to me to be all the other way.

"I assent to the complainers' argument that the respondent's bond derives its whole efficacy from the statute, and that apart from the statute it would not be in a form to bind the burgh or to affect the common good. But the bond is in

No. 147.

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

was framed in terms of the Act of 1853, the scope of which, looking especially to sections 17 and 19, was to set aside a particular specific fund, viz., the harbour rates, as the security which was to be given to lenders who advanced money for the improvement of harbours. It seemed naturally to follow that there was an implied exclusion of other funds under the control of the burgh. The personal obligation in the bond was merely to make harbour rates forthcoming if there were any. But beyond that, the bond was not in the form employed at common law,¹ where the credit of the common good of a burgh was pledged, and the requirements of Sir William Rae's Act had not been complied with so as to support a claim against the corporation funds. There was no "act of council . . . previously made in that behalf," in the sense of section 11 of the Act. The charge then could not be given for the purpose of attaching the common good of the burgh, and fell to be suspended.

Argued for the respondent;—The statutory obligation in the bond was a personal one, binding the burgh to repay the sum borrowed out of the whole available property of the burgh, and that was in no way inconsistent with assigning a particular portion of the burgh property, viz., the harbour rates, as an additional security to the lender. It was to be observed that where harbour rates were alone assigned as security for a loan, *e.g.*, in cases where the property of the harbour authorities consisted in their works and rates, it was customary to grant in the document to the lender merely an "assignation" with no personal obligation.² The bond then framed as it was under schedule (B) of the Act of 1853 was in a form to bind the burgh and to affect the common good. In this view it mattered not whether the forms prescribed by Sir William Rae's Act had been followed exactly. The 1853 Act was obviously intended to abrogate the former Act. But apart from that, the minute of 2d August was a sufficient compliance with section 11 of that Act.³ There was nothing special in the words an "act of council in that behalf." They merely meant "a resolution for that purpose," and were intended to provide for obtaining (as had been done here) the consents of the representatives of the corporation authorised to bind the corporation.

LORD PRESIDENT.—The bond out of which this dispute has arisen was granted by the burgh of Renfrew in terms of the Burgh Harbours Act of 1853. That bond is acknowledged to be in conformity with the schedule prescribed in the Act of 1853. It, like the schedule, consists of two operative clauses, and two only. One is—"We"—being the Magistrates—"hereby bind the said burgh to pay to the said James Murdoch" the sum borrowed, and so on; and the second clause is—"We hereby assign to the said James Murdoch the rates authorised to be levied at the said harbour" under the statute named.

Now, it cannot be disputed that, occurring anywhere else, the plain legal effect of the words—"We hereby bind the said burgh"—these words being used by the Magistrates, the proper custodiers of the burgh estate—is to bind the whole burgh estate.

the form prescribed by the statute, and the whole question is as to the effect of a bond so conceived. In the solution of that question it is of no moment to say that it is not in the form prescribed by the earlier Act of 3 Geo. IV. c. 91.

"I am therefore of opinion that the charge was orderly proceeded, and that the note of suspension must be refused."

¹ Juridical Styles, vol. ii., p. 315.

² Haldane's Trustees v. Elgin and Lossiemouth Harbour Co., June 5, 1879, 6 R. 987; Greenock Harbour Trustees, Jan. 31, 1888, 15 R. 343.

³ Leslie v. Magistrates of Dundee, Dec. 2, 1840, 3 D. 164, 13 Scot. Jur. 59.

But then it is said that occurring as these words do in this statutory form, they must be held to have some meaning different from and short of their proper and natural legal import. I am decidedly against that contention. I assent to the reasoning of the Lord Ordinary. His Lordship has first considered how the matter stood before the Act of 1853, and then what effect the Act of 1853 has upon a bond so conceived. There is no doubt that prior to the Act of 1853—and I take leave to say since the Act of 1853 also—a bond granted in the terms I have read would unquestionably have affected the last shilling of the burgh's property, the only condition of that being (what really does not weaken the general force of the statement), that the burgh complied with the requisite formalities which entitle it to affect the common estate, including, among others, the provision of the Act of Sir William Rae.

No. 147.
June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

When the Act of 1853 was passed, it no doubt provided for certain rates being levied, and the rates being applied in a particular way, and for publication being made of the accounts of the harbour, other persons than burgesses being interested in seeing that the receipts of the harbour were properly applied, and the disbursements made in accordance with the general interests which are attended to by this Act of 1853. But the Act of 1853, when it comes to deal with the subject of borrowing money, recognises this separate fund arising from the dues, and it authorises the magistrates when they borrow money to assign those rates in security of the loans. That is given effect to in what I have called the second clause of the statutory form—the assignment of the rates. But then the statute says you are not merely to assign the rates, you are to bind the burgh in payment of the money.

Now, the contention of the reclaimers is that those words are to receive no effect whatever—that is to say, they say that the legal effect of this instrument, composed as it is of two parts—one a personal obligation and the other an assignment—is to be just the same as if it consisted of but one of them—that is to say, an assignment and no personal obligation.

The Legislature is familiar with appropriate forms of giving a creditor that limited amount of right over his debtor's estate, because in numerous Scottish and English Harbour Acts there are provisions for the document which is given to the creditor containing simply an acknowledgment that his money has been received and an assignment of the rates. That is the sort of case which occurred with reference to the Elgin and Lossiemouth Harbour, which is mentioned by the Lord Ordinary here. There the style was:—"We," the magistrates, "in consideration of the sum of advanced to us by

, do hereby sell, assign, and make over to the said aforesaid, the harbour and other works and rates," &c.

Therefore, if that is the thing to be done, and a limited right is to be conferred upon the creditor, then the Legislature does not bring in absurdly inappropriate words of obligation upon the burgh, but simply confines itself to what is the latter part of this bond.

Now, it appears to me that we should be treating *pro non scripto* the words which the Act of Parliament has ordered shall be put into this bond, if we were to give effect to the reclaimers' contention. It appears to me, it being admitted that the legal result of those words used elsewhere is to bind the common good, that no other legal effect is intended by those words when they occur in this statutory form.

I have only to add as regards Sir William Rae's Act,—and this is quite a

No. 147.

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

separate matter,—that the provisions of Sir William Rae's Act have been complied with in the present instance. It may be that the Act of 1853, by prescribing certain formalities which are to be gone through, covers the same ground as Sir William Rae's Act, and supersedes those provisions in Sir William Rae's Act; on the other hand, it may be that in prescribing those forms, which may still hold, the Legislature did not intend to abrogate or affect the provisions in Sir William Rae's Act. Whichever alternative is taken, I do not think it is of the least importance here, because Sir William Rae's Act has been complied with. There has been an act of council authorising the granting a bond to Mr James Murdoch in this form. Therefore I do not think the question arises. It would seem to be difficult to comply with the Act of 1853 without complying with the Act of 1822, but upon that I do not pronounce, because there seems to me abundant and clear ground for decision apart from that altogether.

LORD ADAM.—The 18th section of the Burgh Harbours Act empowers town-councils, for the purpose of extending and improving harbours, to borrow money, provided certain intimation be given and certain procedure gone through, and the 19th section provides the form, in the schedule appended thereto, which may be granted for the money the magistrates are authorised to borrow, and it is not disputed that the various formalities or requisites which the town-council had to go through, as specified by the Act, have been fulfilled. It is not disputed that the bond, which has been granted to the respondent for the money borrowed from him, is exactly in terms of the schedule appended to the Act, and is such as the Act authorises to be granted for the sum so borrowed. That being so, it appears to me that all we have to do is to apply our minds to the construction of this bond and disposition in security, as we would to the construction of any other bond and disposition in security granted for borrowed money, which the granters of the bond were lawfully entitled to grant. It appears to me, as plain as words can be, that the royal burgh of Renfrew bound and obliged themselves to repay at Whitsunday 1891 the sum which they borrowed from this gentleman. It is not disputed that this is a bond good in form and well executed, and the effect of the obligation is to make the common good liable for this loan. And all that is said against putting the ordinary construction on it is that, in addition to the authority to borrow and the obligation to pay, the magistrates are to give a preferable security over certain rates, and we are asked to say that where that security is given the security is to control the words of the bond, and that the creditor in the bond has no other right, or no other fund to look to than these rates so given to him in security. It would require a great deal of argument to persuade me that that is the sound construction of this bond. I think it is not the sound construction. There is here an obligation, validly entered into by the magistrates of the burgh of Renfrew to repay this sum, and the assignation of the rates is simply in security of that repayment.

LORD M'LAREN.—The royal burgh of Renfrew is a municipal corporation, constituted, I suppose, by royal charter, as its name implies. I take it to be quite settled in the law of Scotland that every municipal corporation, by going through proper forms, may come under a personal obligation to creditors, and that it is not necessary that the creditor should prove value as a condition of enforcing that obligation.

Now, when the Legislature authorised municipal corporations not only to No. 147.
pledge the harbour rates, but also to use obligatory language binding the burgh June 2, 1892.
in express terms for payment of the debt, I can give no other construction to Royal Burgh
such authority but that it meant the obligation to receive all the effect which of Renfrew v.
an obligation by corporations should have according to the law of Scotland. Murdoch.
Such an obligation would certainly not render the corporators liable to personal
diligence, but it would be the foundation of diligence against the estate of the
corporation, and it is in order that it may receive such effect, I presume, that
this charge has been given. I agree with the Lord Ordinary that no grounds
have been shewn for suspending the charge, and I agree that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR.—I am of the same opinion. I think, if the Act of Parliament had done nothing more than would appear from the rubric to section 18, and authorised the town-council to borrow money on the security of the rates, that there might have been a great deal to be said for the argument that that did not imply any authority to charge a loan upon any other fund except the rates, but, on the contrary, withheld by implication any such authority, and that therefore if the obligation upon any other fund were imposed in execution of the power given by the Act, it must be supported by some prior and wider powers, and not by the powers given by the Act itself. But then when one passes from the rubric to read the statute itself one finds, in the first place, there is a general power given to the burgh to borrow, and then in the 19th section the burgh is not only authorised but required to grant a bond for the sums so borrowed in a certain form, and when you come to the form and find that the obligation which they are required by the statute to give is an obligation not merely affecting the rates, but affecting the burgh itself, then it appears to me that the question is at an end. I agree with your Lordship that the magistrates being required by Act of Parliament to bind the burgh, that obligation must receive all the effect which any other obligation duly undertaken on behalf of the burgh will receive according to the law of Scotland.

It is said that its effect must be limited, because the word "burgh" as used in this Act of Parliament means merely the corporation *qua* harbour trustees, and therefore the obligation imposed upon the burgh by the Act is an obligation not upon the common good or upon the magistrates in their general capacity, but upon the harbour trustees. But, in the first place, we are not construing an Act of Parliament, we are construing a bond which the Act of Parliament requires to be executed; and while the burgh is taken bound to make a certain payment, there is nothing in the terms of the bond to qualify or limit the obligation. The words must, therefore, receive their ordinary signification. In the second place, the definition of the word burgh confines the operation of the statute to the case of burghs possessing a harbour which is not regulated by a local Act. But although the burgh must answer that description there is nothing to suggest that its obligations are to affect the harbour only, to the exclusion of the common good. They affect the burgh as well as the rates.

I only add that the complainers' obligation depends for its efficacy entirely on the Act of Parliament of 1853. I think it is most probable that apart from that Act it might have been supported by Sir William Rae's Act, but I think

No. 147. it is satisfactory to find that the Act of 1853 is sufficient to support the obligation.

June 2, 1892.
Royal Burgh
of Renfrew v.
Murdoch.

THE COURT adhered.

KIRK MACKIE & ELLIOT, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

No. 148.

ALEXANDER MILNE, Pursuer (Respondent).—*Rhind—Baxter.*
W. C. TOWNSEND, Defender (Appellant).—*Jameson—Dundas.*

June 3, 1892.
Milne v.
Townsend.

Reparation—Safety of the public—Machinery—Latent defect—Onus—
A carter engaged in the discharge of stones from a lorry in the premises of a marble-merchant, not his employer, was killed by the fall of a derrick crane. In an action of damages raised by the deceased's father against the marble-merchant, it was proved that the cause of the accident was the breaking through crystallisation of an iron strap, by which the stay of the crane was attached to the concrete foundation, and that the defect was latent. It was also proved that two years before the accident the upper strap of the crane had also snapped from a similar cause; that the owner of the crane had thereupon sent it to a competent engineer, who, after thorough examination, had used the lower strap in its reconstruction; that since that date the defender's foreman had periodically inspected it in the ordinary way, and that nothing had happened to suggest the necessity of any special inspection. The Court *assolized* the defender, holding that the pursuer had failed to prove fault.

Observations upon the onus of proof where an accident happens owing to a latent defect in machinery.

1ST DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

IN July 1891 Alexander Milne, carter, Aberdeen, raised an action of damages for £500 against W. C. Townsend, granite and marble-merchant there, for the loss of his son, who had been killed on 21st April owing to the fall of a crane while he was engaged as a carter in the employment of Mutter, Howey, & Company, in discharging a lorry laden with stones at the defender's yard.

The pursuer averred;—(Cond. 3) "The cause of the accident was the snapping or giving way of an iron bar which fastened one of the crane stays to the ground, and the defect could have easily been discovered upon a fit and careful examination of the crane by the defender, and it was the duty of the defender to examine this iron bar so minutely as to enable him to see a crack which was there, and so to prevent the mischief. Besides, the machine was unfit for the purpose for which it was applied, and therefore defective in its condition and construction." (Cond. 4) "*Separatim*, If it was not the duty of the defender in ordinary circumstances, it became his duty so to minutely examine the said iron bar after he knew the crane was defective. The crane broke down on four occasions, and two men were injured by it. When repairing the defects on these occasions it was the duty of the defender to have had the crane made complete in every way, and to have seen that it was put in a fit condition to work, as such a state of things called for the exercise of greater vigilance than ordinary on the part of the defender."

The defender pleaded;—The accident having occurred through a latent defect in the machinery belonging to the defender, the defender is not liable in any reparation to the pursuer.

The following was the import of the proof:—

The crane was originally erected in 1887, when the sole-plate, upon which the uprights stood, gave way, and was replaced by a thicker sole-plate. In June 1889 the top iron strap or bar gave way and the crane came down and injured a workman. The crane was then handed over to John Sangster, the engineer who had constructed and erected it. He examined it, and found that the iron of the broken strap was much

crystallised. Finding the lower strap in sound condition he used it in the reconstruction of the crane. Shortly before the accident the jib-rope gave way, and the jib came down, but that was not due to any deficiency in the crane. The exact cause of the break-down of the crane was a matter of speculation, but in the opinion of the majority of the witnesses a crack which was visible on the surface of the iron strap was due to crystallisation of the iron, by which the fibrous textures of the metal became granular and breakable.* It was doubtful whether a close inspection in 1889 could have revealed the crack, and it was probable that the process of crystallisation had not then commenced. In order to discover the defect

No. 148.

June 3, 1892.
Milne v.
Townsend.

* J. M. Henderson, a witness for the pursuer, deponed,—“I am an engineer. I have been an engineer for six-and-twenty years. The defender's crane was brought to me on the 24th of April 1891. The straps and woodwork are broken up. I have seen No. 8 of process before. When I saw it after it was newly broken, it shewed an old break. The crack was over a third of the surface. It had been there for some little time, because it was discoloured. It is possible that a common blacksmith could have detected it, but it is very difficult to detect a flaw from the exterior. If a person had been scraping it, and looking close, he might have detected it. They might have seen it if they had scraped off the dirt and the paint. I know that this crane gave way a year or a year and a-half before, because I was asked to contract for it, but I put in an offer prohibitive of its being accepted. I did so purposely. I did not wish to have anything to do with that crane. . . . If the crane had been sent to my workshop after the upper strap had broken, I should have thought it necessary to have examined the lower strap. I should have heated it, because that is the only practical way of examining it. . . . If a crane had been thoroughly overhauled in June 1889, it would be unusual for the foreman to examine it by scraping between that date and April 1891, if there was nothing to create suspicion. Had I repaired the crane in June 1889, I would not have expected it to be looked to between that time and April 1891. . . . In taking the case of a young crane, a competent foreman would go over the iron work every two years, and before painting it, he would scrape it, and examine it for cracks. That, in my opinion, would be sufficient supervision.”

John A. Sangster, a witness for the defender, deponed,—“I got the crane to repair again in June 1889. On that occasion the upper strap was broken. My instructions then were to put it in thorough working order. I went over the crane then and examined the strap. I examined the lower strap as well as all the other parts of the crane. I satisfied myself at that time that there was no defect in the lower strap. The same lower strap was used in the reconstruction of the crane. I was quite satisfied with the lower strap. The quality of the lower strap is scrap iron. That is the usual quality used by Glasgow and Edinburgh makers. I have erected twenty-four cranes of this size in Aberdeen and district. I have employed the same quality of iron in the other cranes I have erected. I have examined the strap since the breakage. . . . From an examination of the fracture I could not say that it was discoverable. Wood covered the upper surface of the strap, and part of the bolt covered the lower surface of the strap, and I don't think that the crack could be seen by examination. There was no other way to discover a defect of this sort except by heating. I don't think scraping would have made the crack visible, unless there had been some weight upon the crane so as to open the crack. After what I had done to the crane in 1889, I don't think an employer would be looking for a crack in April 1891. We often find in a bar of even the best iron that part of it is fibrous and part crystalline. You can only discover that in breaking it cold. I see that the strap has been painted. I do not think when it was painted that it would have been possible to discover this crack.”

James Cosgrove, the defender's foreman, deponed,—“I did not discover the defect before the accident. I don't think it could have been discovered. There was nothing to obstruct the view. The crack could have been seen if it was apparent. . . . I have many times examined the strap in question.”

No. 148.

June 3, 1892.
Milne v.
Townsend.

it would have been necessary to scrape off the painting upon the strap and to have heated the iron. In the opinion of the witnesses it was unnecessary, in view of the overhauling of the crane in 1889, to have had a second examination in 1891. It was also proved that the foreman examined the crane periodically after 1889.

On 14th November 1891 the Sheriff-substitute (Hamilton Grierson) pronounced this interlocutor:—"Finds (1) that the defender's crane was erected in 1887; (2) that the sole-plate provided upon which the uprights stood gave way, that the crane did not come down, and that the defect was rectified; (3) that in June 1889 the top strap gave way, and that the crane came down and injured one of the workmen; (4) that immediately thereafter the defender, through his manager and foreman, instructed Mr John A. Sangster to put the crane into thorough working order; (5) that Mr Sangster examined all the parts of the crane, that he satisfied himself that there was no defect in the lower strap, and that it was used in the reconstruction of the crane; (6) that the strap was made of scrap iron of a suitable quality, depth, breadth, and form; (7) that the crane after its re-erection was painted, and that the straps were painted; (8) that some time afterwards the jib-rope gave way and the jib came down, that that accident was not due to any deficiency in the crane other than in the jib-rope, and that a new jib-rope was put up; (9) that between June 1889 and 21st April 1891 the foreman on several occasions inspected the lower strap, and observed no defect in it; (10) that while the upper surface of the strap was covered by the guy, and part of the lower surface by the nut of the bolt which passed through the hole where the breakage eventually occurred, the sides of the strap and part of the lower surface were open to inspection; (11) that on the 21st April 1891 the lower strap gave way and the crane came down, killing the pursuer's son; (12) that at the time of the accident there was no stone or other weight attached to the lifting apparatus of the crane; (13) that between the date of the re-erection of the crane and the date of the accident there was nothing in the appearance of the crane, or any part of it, or in the manner in which it worked, to suggest any suspicion to those using it or superintending it that it was defective in any respect in any part of its construction, except as stated in the eighth finding of this interlocutor; and (14) that part of the material of the strap, at the part where the breakage occurred, had become crystalline, and that this could not be discovered by inspection of the external surfaces: Finds in law that the defender is not liable to the pursuer in damages in respect of the death of the said pursuer's son: Therefore assoilzies the said defender from the conclusions in the prayer of the petition," &c.

On appeal, the Sheriff (Guthrie Smith) recalled his Substitute's interlocutor, and pronounced this interlocutor:—"Finds it proved that on 21st April 1891 a crane in the defender's yard fell in consequence of its being defective and insufficient, and killed the pursuer's son, who was lawfully on the premises at the time, and that said insufficiency was due to the fault of the defender: Finds the defender liable in damages: assesses the same at the sum of £150," &c.*

* "NOTE.—The crane which caused this accident has had an unfortunate history. Erected in 1887, the sole-plate gave way, and had to be replaced with a thicker plate. In June 1889 the upper strap gave way, the crane came down and broke a man's leg. Next, the jib-rope gave way, the jib came down, and some men narrowly escaped. Lastly, in April 1891 the lower strap gave way, the crane came down, and killed the pursuer's son, who happened to be then delivering a load of stones on behalf of his employers, Mutter, Howey, & Company. These facts (in the absence of explanation) are, in my opinion, sufficient

The defender appealed, and argued ;—The Sheriff's judgment proceeded upon the previous history of the crane, and upon the fact that the defender had not discarded the lower strap when the upper one was found to have become crystalline. The best answer to this was that he had, after

No. 148.

June 3, 1892.

Milne v.

Townsend.

to condemn the crane as originally defective. It appears that when the crane fell in June 1889 the cause was found to be weakness and insufficiency in the upper strap. In the opinion of some of the witnesses, the strap was too light, but a much more serious flaw was found by Mr Sangster, the original maker, to whom it was sent for repair. On examining the broken strap he found it very much crystallised—that is to say, the fibrous textures of the metal, in about thirty months after it was put up, had become granular, a condition which naturally ended in rupture. A man of skill would see at once the great importance of this fact as affecting the sufficiency of the remaining strap, for if the upper strap betrayed traces of crystallisation, it was reasonable to infer that the same process, incipient or developed, was likewise in operation in the lower strap. Whether the crystallisation was due to strain, vibration, weather, or temperature, or all combined—a point on which metallurgists, I believe, are not agreed—is of no consequence. The causes, whatever they were, had both straps equally under their influence ; the iron came from the same workshop—possibly the same piece ; and the condition of both straps would be the same. It is now ascertained that this was the actual fact. According to Mr Garvie, a witness for the defender, who examined the lower strap after the break of 1891, the right-hand side at the breakage was fibrous, and the left-hand side crystalline, and there was a crack distinctly visible which had existed for a length of time. Assuming then that the pursuer's witnesses are wrong in thinking that the strap was too light for the work it had to do, I see no answer to the argument that Mr Sangster, when he had the defender's instructions to give the crane a complete overhaul, should have discarded both the old straps, and not run the risk of again employing the one which had not given way, but which has led to a second accident exactly the same as the first.

"It was said that no man can be held responsible for a latent flaw, and if by 'latent' is meant something which is neither preventible in the original process of manufacture nor discoverable when in use, I agree. The case of *Redhead v. Millard Railway Company*, 2 Q. B. 412, is an example of a flaw of this kind. But no person reading the evidence in this case can say that there were not strong grounds for rejecting this particular piece of iron, on which was to depend the stability of the whole structure, when the crane came to be re-erected in 1889. The maker had either knowledge, or the means of knowledge, of the risk he was running and the risk he was exposing others to, and the neglect to act on this knowledge was negligence.

"Such being my conclusions on the facts, I think the defender must be held responsible for the insufficiency of the crane. . . . We must apply the principle which was applied in a case from this Court (*Walker v. Olsen*, 9 R. 946), namely, *res ipsa loquitur*. A crane does not come down when lifting anything without some cause. It is not for the injured person to explain what the cause was. It is for the owner to shew that the crane was not defective when first put up, and that there had been no want of supervision to detect any supervening flaw. I acquit the defender of any failure on the latter head. I think his foreman did examine it periodically without detecting any signs of weakness ; but I think he has failed to prove that in the selection of material for its construction adequate care was taken to insure its strength and guard against the possibility of accident when it was re-erected in 1889.

"The only other question is whether, when such a failure has been proved, is it enough for the owner to say that he put it into the hands of a competent tradesman to be put into thorough repair? The case of *Cleghorn v. Taylor*, 18 D. 564, read along with *Tarry v. Ashton*, 1 Q. B. D. 314, decides that the person injured has no concern with the tradesman. The owner is the person with whom he has to deal, and I have accordingly been obliged to find the defender liable in damages."

No. 148.
 June 3, 1892.
 Milne v.
 Townsend.

the accident in 1889, sent the crane to the original maker to be overhauled. The latter found the strap in question quite sound, and used it in the reconstruction of the crane, and from that time onward the defender's foreman periodically examined the crane. The accident was due to a latent defect, which it was proved could only have been revealed by scraping and heating the iron—a precautionary operation quite unnecessary in view of the recent examination. The Sheriff was wrong in applying the maxim *res ipsa loquitur* so as to relieve the pursuer of the *onus* of proving his case. The law had settled that where an accident occurred through latent defect, it was for the pursuer to shew that the defect was known to the maker or user of the machine, or that it was discoverable by careful inspection.¹ Although it was perhaps hard to reconcile *Walker v. Olsen*² and *Fraser v. Fraser*³ with that doctrine, these cases had been explained in *Macfarlane v. Thomson*.⁴ The *onus* then being upon the pursuer he had failed to discharge it.

Argued for the pursuer;—It had been held, even where the exact cause of an accident was unexplained, that fault might be inferred from the accident itself as attaching to the owner of the defective apparatus.⁵ Here, however, the accident was clearly proved to have been caused by the iron of the strap becoming crystalline. When in 1889 the upper strap was found to be in this condition, the lower strap should have been discarded, and the defender was in fault in continuing to use it. The accident was one which in the circumstances might have been anticipated,⁶ and it was no defence to say that the defender had employed a competent tradesman to repair the crane in 1889.⁷

LORD PRESIDENT.—The Sheriff has found it proved that this crane fell “in consequence of its being defective and insufficient, and that said insufficiency was due to the fault of the defender,” and he has fully explained the grounds of his judgment. I desire specially to refer to the passage in his note where he says—“*Res ipsa loquitur*. A crane does not come down when lifting nothing without some cause. It is not for the injured person to explain what the cause was. It is for the owner to shew that the crane was not defective when first put up, and that there had been no want of supervision to detect any supervening flaw. I acquit the defender of any failure on the latter head. I think his foreman did examine it periodically without detecting any signs of weakness; but I think he has failed to prove that in the selection of material for its construction adequate care was taken to insure its strength and guard against the possibility of accident when it was re-erected in 1889.”

Now, as that passage is somewhat absolutely expressed, it is perhaps well to say that I do not read it as intended to lay down a general doctrine of law, and

¹ Gavin v. Rogers, Nov. 30, 1889, 17 R. 206; Harpers v. Great North of Scotland Railway Co., &c., July 9, 1886, 13 R. 1139.

² Walker v. Olsen, June 15, 1882, 9 R. 946.

³ Fraser v. Fraser, June 6, 1882, 9 R. 896.

⁴ Macfarlane v. Thomson, Dec. 6, 1884, 12 R. 232.

⁵ Walker v. Olsen and Fraser v. Fraser; Kearney v. London, Brighton, and South Coast Railway Co., 1870, L. R., 5 Q. B. 411, *affd.* 1871, 6 Q. B. 759.

⁶ Beveridge v. Kinnear & Co., Dec. 21, 1883, 11 R. 387; Findlay v. Angus, Jan. 14, 1887, 14 R. 312; Cormack v. School Board of Wick and Pulteneytown, June 21, 1889, 16 R. 812.

⁷ Cleghorn v. Taylor and Others, Feb. 27, 1856, 18 D. 664, 28 Scot. Jur. 287; Campbell v. Kennedy, Nov. 25, 1864, 3 Macph. 121; Tarry v. Ashton, Jan. 24, 1876, L. R., 1 Q. B. D. 314; Francis v. Cockrell, Feb. 21, 1870, L. R., 5 Q. B. 184.

certainly as such it could not be supported. It is certainly not as a general **No. 148.**

rule for the owner to shew that his appliances are not defective when an accident occurs,—the burden of proof is on the person coming to the Court and **June 3, 1892.**
alleging fault. Accordingly, I read this somewhat general statement along with **Milne v. Townsend.**

the more specific passage on the preceding page, where the learned Sheriff says —“According to Mr Garvie, a witness for the defender, who examined the lower strap after the break of 1891, the right-hand side at the breakage was fibrous, and the left-hand side crystalline, and there was a crack distinctly visible which had existed for a length of time. Assuming, then, that the pursuer's witnesses are wrong in thinking that the strap was too light for the work it had to do, I see no answer to the argument that Mr Sangster, when he had the defender's instructions to give the crane a complete overhauling, should have discarded both the old straps, and not run the risk of again employing the one which had not given way, but which has led to a second accident exactly the same as the first.”

Now, the first question to be determined is, what was in fact the cause of the collapse of the crane? The Sheriffs are at one on this matter, for the Sheriff takes the same view as that expressed by the Sheriff-substitute in his fourteenth finding in fact, which is to the effect that the strap broke through the iron becoming crystalline. I am willing to take that view of what is more or less a speculative question. It appears that the iron did become crystalline, and it seems to have been the general opinion of the witnesses that that would account for the accident. I say this because the case on the record does not specify that as the cause of the accident. Indeed, there is exceeding vagueness in the theory of the pursuer as stated on record. It is very much the view suggested in the more general passage in the note of the Sheriff, *res ipsa loquitur*. Condescendence 3 says, “The cause of the accident was the snapping or giving way of an iron band which fastened one of the crane stays to the ground, and the defect”—it is not stated what the defect was—“could have easily been discovered upon a fit and careful examination of the crane by the defender.”

Taking the case, then, as I have said, on the assumption of both the Sheriffs, that the strap broke through the crystallisation of the iron, where was the fault on the part of the defender? The reasoning of the Sheriff rests on the fact that another strap in a different part of the crane had given way previously, and the cause of its failure had been found to be the crystallisation of the iron. He says, inasmuch as one strap had given way through the iron becoming crystalline, there was fault on the part of the defender in not removing the other strap, which would in all likelihood crystallise also.

I cannot assent to this reasoning. *Prima facie*, the two pieces of iron have no connection with each other, except in so far as they both are artificially made parts of one structure. That does not raise the inference that because one piece is bad, the other must have a similar infirmity. There is no evidence in support of that conclusion, which, apart from evidence, seems a somewhat crude and superstitious apprehension, rather than a scientific deduction. The defender, I think, took a more practical view of the case when he handed the crane over to Sangster, a very competent engineer, to be overhauled; he says that he examined the strap now in question, passed it as sound, and used it in the reconstruction of the crane. In doing so, the Sheriff finds the defender was in fault. A curious feature of the case is, that a very close inspection in 1889 could at most only have detected a crack, and that crystallisation probably did not exist in

No. 148. 1889, but existed for a very much shorter period. The pursuer's case therefore fails unless the defender was bound to discard all the iron on the crane because one piece was found to be in a somewhat uncommon condition. The defect was latent, and the facts do not sustain the view of the Sheriff, that in reconstructing the crane in 1889 there was any negligence on the part of the defender, or on the part of Sangster in retaining this strap as part of the renewed crane.

June 3, 1892.
Milne v.
Townsend.

The defect being latent, it was for the pursuer to establish either that it was in the original structure and that the defender was bound to examine and test for such defects on the crane coming into his possession, or else (on the theory that it was a supervening defect) he was bound to make out that there was a duty of periodical inspection which would have revealed its existence, and that the defender failed to provide such periodical inspection. On the first point the pursuer has failed. There was very little argument upon the second, the witnesses agreeing that if there was a thorough inspection made in 1889 there was no need to have another inspection before 1891, when the accident happened.

I am of opinion that we should recall the interlocutor of the Sheriff and revert to that of the Sheriff-substitute.

LORD ADAM.—In this case the question of *onus* is not important, because we know the facts and we must decide the case according to the facts ascertained.

A person who meets with an injury and claims reparation must shew that there was fault on the part of the defender. It has been held in some cases as the Sheriff says, that *res ipsa loquitur*, but the *res* can only speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained. That does not arise in the least here, because the cause of the accident has been ascertained to have been the state of the iron of the strap which was defective in two respects. Its substance had crystallised, and there was an external crack. It is, however, material to note that these two states have no connection with each other. As regards the crystalline nature of the iron, that was beyond doubt a latent defect which nothing less than heating would have disclosed, and it was probably that state of the iron which led to the accident and not the crack, which apparently was merely a surface crack. If there is no doubt that the crystalline nature of the iron caused the accident, the question of the crack is immaterial. But suppose the question of the crack were important, it is said examination would have disclosed it, and for not so examining it the defender must be held responsible. That that examination would have revealed it is more than doubtful. The foreman was in the habit of examining it, and the evidence for the pursuer as well as for the defender shews that if the crane came back from a competent engineer in 1889, as it did, there was no need before 1891 for such an examination as would alone have disclosed the crack, viz., an examination by scraping off the paint. I think therefore there was no fault on the defender's part on that ground.

The fault found by the Sheriff was not insufficient examination, or that examination would have disclosed defects in the crane, but he finds fault in the defender's treatment of the crane in 1889. At that time one of the straps was found to be in a similar state to that in which this strap was at the date of the accident, and he says a man of skill ought to have drawn the inference that it

other strap was in a similar condition, and ought *de plano* to have discarded them all. Whether he would carry his argument so far as to say he ought to have discarded all the iron about the crane, and not merely all the straps, I do not know. I cannot follow that reasoning, and I cannot affirm the Sheriff's view that there was fault on the defender's part in not rejecting all the straps in 1889. I think we must believe Sangster when he says that he then examined all the straps, including this one, and that there was no fault in the defender after that continuing to use them. I am of opinion we should revert to the judgment of the Sheriff-substitute.

No. 148.
June 3, 1892.
Milne v. Townsend.

LORD M'LAREN.—Everyone will agree that when a pursuer comes into Court with a claim for damages for personal injuries he must prove the negligence which he avers. I do not think that the Sheriff meant to lay down any law to the contrary, but there are expressions in his note to the effect that it is enough for a pursuer to prove that there was a fault in the machinery—it may be a latent defect—and then it is for the defender to exonerate himself of responsibility for the fault. That is an inversion of the true rule, and although here the question of *onus* is not material since we know the facts, it may be material in other cases.

Where the defect is latent the pursuer must prove that it was known to the maker or user, or that it was discoverable by careful inspection. The crane here was a comparatively new one. It was erected in 1887, four years before this accident happened, and in consequence of one of the guy-straps having given way in 1889, the crane was taken to pieces and re-erected. At that time it was given back to the defenders as substantially a new crane, and two years thereafter the accident in question occurred. One of the pursuer's witnesses, Henderson, says that "in the case of a young crane a competent foreman would go over the iron work every two years." Now, as only two years had elapsed since the crane had been overhauled, it is evident from the pursuer's own case that there was no omission of necessary supervision or inspection. The cause of the breakdown was, as far as we can see, the general disintegration of the iron of the strap when passing into a crystalline state. But whatever the cause was, the injury appears to have been the result of a pure misadventure, for which no one is responsible.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff: Hold the findings in fact contained in the interlocutor of the Sheriff-substitute, dated 14th November 1891, as here repeated: And further, find as matter of fact that the pursuer has failed to prove fault on the part of the defender: Affirm the said interlocutor of the Sheriff-substitute, and of new assolzie the defender . . ."

WILLIAM OFFICER, S.S.C.—HENRY & SCOTT, W.S.—Agents.

SAMUEL CHAPMAN, Petitioner.—*Young—Macaulay Smith.*
SULPHITE PULP COMPANY, LIMITED, Respondents.—*Shaw—Craigie.*

No. 149.

Company—Application for shares—Acceptance—Letter of allotment—Proof.
—In January 1891 a person applied for shares in a public company, and in August withdrew his application.
In a petition presented by him for removal of his name from the register of reholders he alleged that he had received no letter of allotment. There was

June 7, 1892.
Chapman v. Sulphite Pulp Co., Limited.

No. 149. no conclusive evidence that he had received such a letter, but it was proved that the shares had been allotted to him in January, and that in February he had received a circular to attend the first general meeting of the company, and that in March he had been orally informed by the secretary of the company that the shares had been allotted. *Held* that the petitioner had received sufficient notice that his application had been granted to preclude him from withdrawing his application, and that his name was properly on the register.

June 7, 1892.
Chapman v.
Sulphite Pulp
Co., Limited.

1st DIVISION. THE SULPHITE PULP COMPANY, LIMITED, was incorporated in 1890, with a nominal capital of £50,000, in 5000 shares of £10 each. On 26th November following Samuel Chapman applied for twelve shares and deposited a sum of £60, being £5 per share on application. On 12th January 1891 he made a further application for twelve additional shares and made the necessary deposit. The applications contained a request that the applicant's name should be placed on the register of members for the shares which might be allotted.

Not having received—as he alleged—any intimation that the shares in question, or any of them, had been allotted, he, on 7th August 1891, wrote through his agents “withdrawing unconditionally” his applications for the shares.

Ultimately the answer made by the secretary was that notices of allotment had been sent to Mr Chapman in regard to both applications, and that his name appeared on the register.

Chapman then presented a petition under the 35th section of the Companies Act, 1862, to have his name deleted from the register.

Proof was led. The evidence regarding the receipt of the allotment letters was not conclusive. In each case the application for shares was taken to the manager's office by the petitioner's wife—(the petitioner himself being frequently absent from home on business)—along with the cheques for the amounts payable on application, and the banker's receipts for these payments were received by the petitioner. The petitioner deponed that he had called on Mr Dempster, the secretary, in March 1891, after he had received (as he admitted) a circular calling the first ordinary general meeting of the company, and stated that he was getting anxious about his shares, and that the reason given for the non-sending of the allotment letter was that one of the directors was abroad, and that the necessary document could not be issued until his return. Mrs Chapman, deponed that no allotment letters for the shares in question having reached her, she had called upon Mr Dempster about the end of March 1891, and he deponed that, at that meeting, he had told her that Mr Chapman's name was on the register for twenty-four shares, and that it could not be taken off except by transfer. Mrs Chapman had no recollection of what passed. Mr Dempster deponed that Mrs Chapman had on that occasion left the second letter of allotment with him in order that the shares might be disposed of, and this letter was produced.

Argued for the petitioner;—There was no completed contract to take the shares. The allotment was not proved to have been communicated to the petitioner, and the *onus* of proving that it had been so communicated was on the company.¹ The principle upon which it had been held that the posting of a letter accepting an offer constituted a binding contract was that the post-office was the common agent of both parties when offer and acceptance both went through the post.² Accordingly, if an

¹ Reidpath's case, Dec. 1870, L. R., 11 Eq. 86.

² Household Fire Insurance Co. v. Grant, 1879, L. R., 4 Exch. Div. 216; Dunlop v. Higgins, 1848, 1 Clark & Finnelly, 381; Harris' case, 1872, L. R., 7 Chanc. Apps. 587; Thomson v. James, Nov. 13 1855, 18 D. 1, 27 Scot. Jur. 632.

offer were made by letter which authorised the sending of an answer by post, the posting of a letter was sufficient. Besides, in *Harris'* and *Dunlop's* cases the letter of acceptance was received. But here the offer was not made through the post, but on each occasion the petitioner's wife herself delivered it to the company. There was nothing in the other circumstances of the case which could be held to bind the petitioner.

No. 149.
June 7, 1892.
Chapman v. Sulphite Pulp Co., Limited.

Argued for the respondents ;—The petitioner was duly informed that the shares were allotted to him. There was no obligation on a public company to see that letters which were properly posted were actually delivered. The contract was completed as soon as the letter of allotment was posted.¹ But there was really no necessity for a letter of allotment.² It would be impossible for a company in all cases to prove that an applicant had received special notice of allotment. If the company were bound to send such notice, great inconvenience and hardship would result. It was enough that the applicant was proved to have knowledge of the fact of the allotment. That was the case here. His wife's knowledge was his own, and it was proved that at her interview with Mr Dempster he had told her that the petitioner's name was on the register. Further, the petitioner admitted that he had received a circular of a general meeting of the company, from which he must have known that he was a shareholder.

LORD PRESIDENT.—It is not disputed that the petitioner applied for twenty-four shares of this company ; it is certain that they were allotted to him, and that he was put on the register as holder of those shares. Most of the evidence which has been taken relates to the questions whether or not he was at the time informed by the company of the allotments, and whether allotment letters were sent to him and received by him.

The respondents' counsel stated that they did not impugn the credibility of the petitioner and of his wife, and I should have found difficulty in arriving at a conclusion on the questions which I have stated, but a much simpler ground of judgment is presented somewhat incidentally in the evidence. On two occasions in spring 1891, after he had been put on the register, Mr Chapman was in communication with the officials of the company regarding those shares, and I think the result of the evidence is that, apart altogether from the disputed letters, he was then sufficiently apprised that the company had accepted him as a shareholder in terms of his applications. On one of those occasions the petitioner's wife went, as arranged with the petitioner, to see the secretary of the company, and unquestionably was in law his agent. Now, Mr Dempster says he told her that Mr Chapman was on the register. His words are,—“ I said I was very sorry, but that I could not help it, because his name was now on the register, and the shares could only be taken over by transfer.” Mrs Chapman is asked about this, and to the question “ Did Mr Dempster explain to you that he could do nothing now, as Mr Chapman's name was on the register for the twenty-four shares, and that they could not be taken off except by transfer ? ” she replied—“ I don't remember that at all.” It is not unnatural that Mrs Chapman should not remember this, for apparently she did not know the importance of registration. On the other hand, it is certain that Mr Dempster

¹ *Harris' case*, 1872, L. R., 7 Chanc. App. 587.

² *Gunn's case*, 1867, L. R., 3 Chanc. App. 40 ; *Levita's case*, 1867, L. R., 3 Chanc. App. 36.

No. 149. knew that Mr Chapman had had shares allotted to him, and was on the register, and it is therefore highly probable that he made this statement. I hold, therefore, that on this occasion Mr Chapman's agent was informed that his name was on the register.

June 7, 1892.
Chapman v.
Sulphite Pulp
Co., Limited.

The other fact to which I refer is that, he being on the register, the company sent to the petitioner a circular calling him to a meeting of shareholders. This was, unless explained away, an intimation that the company treated him as a shareholder. Now, Mr Chapman says that after receiving that circular he saw Mr Dempster, and taking his own account of the conversation, it certainly did not result in any disclaimer of him as a shareholder by Mr Dempster, and his evidence rather reads as if he understood that only some formal evidence of his membership yet remained to be given to him.

In my opinion, therefore, it is proved that in March 1891 the company had adequately informed the petitioner that he had been accepted as a member, and from that time, therefore, he was not entitled to resile.

LORD ADAM, LORD M'LAREN, and LORD KINNENAR concurred.

THE COURT refused the petition, with expenses.

ENSLIE & GUTHRIE, S.S.C.—MENZIES, BRUCE LOW, & THOMSON, W.S.—Agents.

No. 150.

June 7, 1892.*
Hughes v.
Assessor for
Stirling.

PETER HUGHES, Appellant.—*Asher—Johnston.*
ASSESSOR FOR STIRLING, Respondent.—*James Clark.*

Valuation Acts—"Consideration other than rent"—Goodwill—Public-house—Obligation by proprietor not to commence rival business—Valuation of Lands Act, 1854 (17 and 18 Vict. cap. 91), sec. 6.—Where a sum of money is paid in name of goodwill to the proprietor and occupant of an inn by a purchaser or lessee of the premises, the Valuation Committee are not entitled without inquiry to take the whole of that sum as applicable to the premises themselves.

Observations upon the elements which may be assumed to enter into the goodwill of a publican's business formerly carried on by the proprietor of the premises, and sold by him to his tenant under a lease.

The proprietor of a public-house, who had carried on business there, let the premises to a tenant on a ten years' lease, the tenant paying a sum for goodwill, and the proprietor undertaking not to commence business as a spirit-dealer in the same town during the currency of the lease. The Assessor, in valuing the premises, took the rent stipulated in the lease, and added thereto the sum paid for goodwill divided by the number of years of the lease. The tenant appealed to the Valuation Committee, and stated that he was willing that the goodwill should be valued at half the sum taken by the Assessor, and offered to prove that the valuation so arrived at was greater than the lettable annual value of the subjects, with all their advantages. The Committee refused to hear evidence, and adopted the Assessor's valuation.

Held that their determination was wrong, in respect (1) that they had failed to ascertain duly what proportion of the sum effeired to the premises, and (2) that the obligation by the proprietor not to carry on a rival business was a valuable consideration in favour of the tenant, not effeiring to the premises, which should have been deducted from the value of the goodwill before any addition was made in respect thereof to the rent in the lease.

Observations on Assessor for Lanark v. Selkirk, March 9, 1887, 14 R. 579.

At a meeting of the Valuation Committee of the County Council of No. 150. Stirlingshire for the Stirling division of the county, held upon 14th September 1891, at Stirling, for the purposes of hearing and determining appeals and complaints under the Lands Valuation Acts, Peter Hughes, tenant of the Commercial Inn, Broad Street, Denny, appealed against those premises being entered in the Valuation-roll by the Assessor at £46 (afterwards restricted to £44, 14s.) He maintained that the entry should be reduced to £31, 17s.

June 7, 1892.
Hughes v.
Assessor for
Stirling.

Lands Valuation
Appeal
Court.

Ld. Kyllachy.
Ld. Wellwood.

For several years prior to Martinmas 1890 Mrs Smith, the proprietor of the Commercial Inn, carried on business in it as a publican. At that term the appellant acquired the business from Mrs Smith on terms contained in the missives of sale, which were these:—The offerer was to pay £350 for goodwill, fixtures, bar fittings, and all working utensils; a transfer of licence to be got at the first statutory Court; a lease for ten years to be given at a rental of £19; and Mrs Smith to undertake not to begin business in Denny on her own account in the spirit line during the currency of the lease.

Case 133.

The Assessor had fixed the yearly value of the premises at £46 (afterwards restricted to £44, 14s., in respect it appeared that the lease was for ten and a-half years), made up on the footing of taking the rent of £19 named in the lease, deducting from the £350 paid for goodwill, &c. £80 as applicable to fittings, and adding to the £19 the quotient of the sum of £270 left for goodwill divided by the years of the lease.

The appellant was willing that the value should be taken at £31, 17s., which was arrived at by taking the value of the goodwill effeiring to the premises at £135 (half the sum taken by the Assessor) and dividing it according to the number of years of the lease. He offered to prove that £31, 17s. was greater than the lettable annual value of the subjects, even taking the licence into account.

The Assessor objected to the leading of evidence on the ground that the premises were let and the documents contained everything material. The Committee adopted this view, and after argument unanimously affirmed the valuation, viz., £44, 14s. The appellant appealed to the Valuation Judges.

Argued for the appellant;—No part of the sum paid for goodwill should be treated as additional rent. Goodwill, in the case of a public-house, was referable almost entirely to the personal exertions of the publican, and was therefore in no sense heritable. Where the tenant during the currency of the lease assigned the lease and received a sum in name of goodwill, no part of that sum was treated as additional rent, and that even in the case where the outgoing tenant was also joint proprietor of the subjects.¹ In any view, not the whole sum paid for goodwill, but only that part of it which on inquiry should be found to be heritable in its character, should be treated as rent.² English cases had no application here, for the licensing law of England was different from that of Scotland.

Argued for the Assessor;—Any sum paid to the landlord for the goodwill of a public-house was a "consideration other than the rent," and fell to be treated as additional rent. The cases in which a sum was paid in name of goodwill to a tenant did not apply, for in them there was no consideration other than the rent paid to the landlord. It was quite settled that when the sum paid in name of goodwill went to a proprietor it was

¹ Assessor for Kilmarnock v. Allan, March 9, 1887, 14 R. 581; Nicolson and Others v. Assessor for Port-Glasgow, March 12, 1886, 23 S. L. R. 603.

² Drummond, &c. v. Assessor for Leith, Feb. 5, 1886, 13 R. 540.

No. 150.

June 7, 1892.
Hughes v.
Assessor for
Stirling.

to be treated as additional rent. The goodwill of a public-house was heritable in its nature. In the case of *Drummond*¹ the assessor had taken one-half of the sum to be dealt with, but there was no principle for so proceeding. Had he chosen he might have taken the whole sum.²

At advising,—

LORD WELLWOOD.—I am of opinion that the determination is wrong on two distinct grounds. The first is that the Valuation Committee have not taken into consideration Mrs Smith's undertaking not to carry on business in Denny in the spirit line during the currency of the lease. That is an important obligation in favour of the tenant, and should have been valued by the Committee and deducted from the goodwill.—*The Assessor for Lanark v. Selkirk*, 14 R. 579.

The second ground is that they have, without allowing any evidence to be led, taken the whole of the sum paid for goodwill as effeiring to and increasing the value of the premises. In this I think they are wrong. They were not bound or entitled to come to that conclusion without considering the whole circumstances of the case.

Goodwill is an elastic term of which it is not easy, if it is possible, to give an exhaustive definition. *Prima facie*, however, what is called the goodwill of a publican's business, which has been carried on by the proprietor of the subjects, is of a composite character; partly, perhaps chiefly, attaching to and increasing the value of the premises for valuation purposes, but also partly personal. Apart from the value of the capital employed, and the personal qualifications of the occupant, a public-house usually possesses certain distinct advantages which it retains, notwithstanding a change of tenants. Its local situation is of the first importance. But further, if a successful business has been carried on in the house for a considerable number of years, its success, although in great measure due to the personal exertions of the occupant, necessarily enures to the house itself, and affects its letting value. Customers who have been in the habit of coming to the house will, in all probability, continue to come to it, notwithstanding a change of management.

On the other hand there is also, *prima facie*, a personal element in the goodwill. The former occupier agrees that the licence, which stands in his name, shall be transferred to the tenant; and although, in the absence of express stipulation, he is not barred from competing, he, by selling the goodwill, gives up his claim to the old business, and impliedly agrees not to represent himself as carrying it on.

I therefore think that the Valuation Committee were bound to keep in view the composite character of the so-called goodwill, and that, as they have not done so, their determination cannot stand. I observe that the appellant was at one time willing that one-half of £270 should be treated as representing goodwill affecting the premises; and that the annual value should be ascertained by adding to the rent £12, 17s., the quotient of that sum divided by 10½ years. If both parties agree to this there need be no further inquiry, and we may simply remit to the Committee to enter the valuation at £31, 17s.

But if parties do not agree the case must go back for further inquiry, and

¹ *Drummond, &c. v. Assessor for Leith*, 13 R. 540.

² *Assessor for Lanark v. Selkirk*, March 9, 1887, 14 R. 579; *Assessor for Kilmarnock v. M'Nally*, March 9, 1887, 14 R. 582; *Ex parte Punnett in re Kitchen*, 1880, L. R., 16 Ch. Div. 226.

the Committee must, after inquiry, determine what proportion of the sum paid for goodwill is to be regarded as enuring to the premises and affecting their value. I do not think that any definite rules can be laid down as to the way in which this proportion should be ascertained. It is a fair jury question. The Committee will take into consideration the various elements which affect the letting value of the premises, and I shall not attempt to lay down rules for their guidance beyond this. I think that the rent named in the lease must be taken as the minimum value; and while they may and ought to inquire, *inter alia*, whether the rent named in the lease is or is not a fair average rent for licensed premises of the kind in the neighbourhood, they must also consider how long Mrs Smith carried on business there, and how much the business connection made by her, and the existence of the licence, increased the letting value of the house.

No. 150.

June 7, 1892.

Hughes v.

Assessor for

Stirling.

In holding that the whole of a sum paid in name of goodwill to a person who both was proprietor of the premises and carried on business as a publican in them must not be taken without inquiry as so much additional rent, and added to the valuation, I do not think that we shall be going back upon any settled practice or series of decisions, although it cannot be disputed that the case of the *Assessor for Lanark v. Selkirk*, 14 R. 579, supports the Assessor's contention. I find more than one case reported in which valuation committees have taken one-half of the sum paid for goodwill as representing the proportion affecting the premises for purposes of valuation. In particular I find that in the case of *Wilson*, 20th May 1884, No. 51, new series, the Valuation Court ordered the annual value to be entered at £89, at which it had stood in previous years, that sum having been arrived at by taking one-half of the sum paid for goodwill as applicable to the heritable subjects. It is true that the question before the Valuation Court was whether the rent should stand at £89 or be reduced to £39, the rent named in the lease. At the same time the Court recognised without observation the course which had been adopted by the Valuation Committee.

Again, in the case of *Drummond, &c. v. The Assessor for Leith*, 5th February 1886, 13 R. 540, the magistrates took one-half of the goodwill as effeiring to the premises, and this determination was upheld by the Valuation Court. It is true that the assessor had himself taken one-half of the goodwill, and did not demand that the whole of it should be taken into consideration, but the case is of importance, especially coming after the case of *Wilson*, as shewing that the existence of a practice both on the part of assessors and valuation committees of dealing with sums paid in name of goodwill in such circumstances as not entirely paid in connection with the heritable subjects was brought under the notice of the Court.

The opinions of the Judges in the case of the *Assessor for Lanark v. Selkirk*, are, unfortunately, short. Lord Fraser in his judgment says expressly that the whole sum paid for goodwill, as ascertained after making the deduction there mentioned, must be taken into consideration, and that, indeed, was the result of the judgment. Lord Lee does not say anything expressly on the subject, and confines his remarks to dealing with a question which, perhaps, was the principal question debated, viz., whether a deduction should be made on account of the lessor undertaking not to start business in the neighbourhood. But undoubtedly the decision is adverse to the course which I propose we should follow. With the greatest respect to the opinions of the learned Judges who

No. 150.
June 7, 1892.
Hughes v.
Assessor for
Stirling.

decided the case of *Selkirk*, I think that in the circumstances of such a case as the present, there is a personal element, however small it may be, in what is called goodwill, and that in respect thereof some deduction must be made before fixing the fair annual value of the premises.

While I am so far with the appellant, I am not prepared to accept the conclusion to which his case was forced in the course of the argument, viz., that the sum paid for goodwill must be regarded as wholly personal in its character. Without saying that there could be no circumstances in which a sum stipulated for in name of goodwill could be held to be exclusively personal, I think that this would require to be proved to demonstration, and there is nothing in the circumstances of this case to indicate the possibility of such a result. There is no practice, and no decision, so far as I am aware, to support it. The counsel for the appellant relied, in support of their argument, on the cases of *Nicolson, &c. v. The Assessor for Port-Glasgow*, 12th March 1886, 23 S. L. R. 603; *Assessor for Kilmarnock v. Allan*, 9th March 1887, 14 R. 581, in which it was held that when a tenant during the currency of a lease assigns the lease and receives a sum in name of goodwill, the valuation of the premises is not affected, but remains until the expiry of the lease at the rent named in the lease. It was contended that this shewed that the sum paid for goodwill for such a business is wholly personal. This reasoning is, I think, fallacious. The reason why in such cases the sum paid to the outgoing tenant is not taken into consideration is because no part of it goes to the landlord, and during the currency of the lease the rent named in it, if originally *bona fide*, must be held to be the fair yearly rent or value. It may be, and indeed must be assumed that the sum paid in name of goodwill to the outgoing tenant in the cases referred to only represented his personal interest in the business. But however that may be, the valuation cannot exceed the sum paid in name of rent or otherwise to the landlord.

LORD KYLLACHY.—This case belongs to a class in which there has always been a good deal of difficulty. The general question may be stated thus: The owner of premises which, considered simply as a lettable subject, have a certain annual value, obtains a licence for the sale within the premises of excisable liquors. He thereupon sets up the business of a hotel-keeper, publican, or licensed grocer, as the case may be, and conducts that business within the premises for a number of years, obtaining at the Licensing Court in each year a renewal of the licence. The business prospers, partly perhaps from the convenience of the situation, partly from the excellence of the management, and partly also, it may be, from the refusal of other licences in the neighbourhood. After a time the owner desires to retire from business, and he lets the premises to a tenant, making over to the latter what he describes generally as the goodwill of the business. He perhaps also binds himself not to set up a similar business in the same locality. But whether he does so or not, he in effect parts with the power of doing so, because having made over to the tenant his interest in the licensed business, there would be little likelihood of his obtaining another licence to be used for the purposes of competition. For these considerations the tenant binds himself by lease or missive to pay a certain rent, but also binds himself to pay in addition a certain sum down for goodwill. The rent stipulated may be the original valuation rent, which perhaps has not been revised during the owner's occupancy; or it may be a valuation rent fixed at

some recent Valuation Court, or it may be the rent fixed as between the parties, No. 150. on what principle does not appear.

The question to be solved is how, in these circumstances, is the annual value of the premises to be estimated? Is the rent named in the lease to be taken as conclusive? Or, is the payment for goodwill to be treated as additional rent? Or, is the payment for goodwill to be divided, so as to be viewed partly as additional rent, but partly also as a consideration for certain rights and advantages which the lessor is in a position to transfer, but which would not pass or be enjoyed under a mere lease of the premises? Further, if it appears that the goodwill does in part consist of what is properly rent, how is that part to be estimated? If the lease expresses a division, is that to be held conclusive? Or, is the Valuation Court to make the division as best it can? Or, is the result this,—that the lease being found to stipulate for a consideration other than the rent, it is displaced as the criterion of valuation, so that the assessor is thrown back on the inquiry, What would the premises let for if put into the market on a yearly tenancy with all the advantages attaching to them as the seat of an established business, and as possessing a licence which any occupant would have at least a considerable prospect of having renewed in his favour?

June 7, 1892.
Hughes v.
Assessor for
Stirling.

It appears to me that before attempting to answer this question, it is necessary to have a clear view of the elements which enter, or may be assumed to enter, into the goodwill of a public-house—I mean, of course, in cases where such goodwill is sold by the owner of the premises to a purchaser or tenant, to whom at the same time the premises are sold or let. Generally speaking, I think the following elements must all, more or less, be included :—

1. The tenant or purchaser (I shall call him the new occupant) obtains, to begin with, as assignee to the goodwill, what is, in practice, one great advantage. He obtains the seller's consent to an immediate transfer of the licence, by means whereof he is enabled at once to apply for and obtain such transfer, and so to carry on the business continuously to the ensuing Licensing Court. This in the case of an entry at Martinmas or between terms is a great advantage, and one which the new occupant could not have under a mere lease of the premises.

2. The new occupant further obtains this advantage—also in connection with the licence, viz., that the former holder of the licence does not compete with him at the next Licensing Court, but, on the contrary, is held to recommend him, and to transfer to him such claims as he (the former holder) personally has to a renewal of the licence. This also is something which the new occupant could not have merely as occupant of the premises. He might have a claim to the licence as such occupant (I shall refer to that presently), but the important advantage which he secures is the combination of the two claims, occupancy of the premises, and successorship to the personal claims of the existing licensee.

3. The new occupant further obtains a right to use the name by which the inn or public-house has been known, and this may sometimes be a valuable right. He has always also the benefit of an introduction to the customers of the business, and also this advantage, that the previous occupant cannot set up a competing business, at least in the same place, and under the same name.

All these are elements which in the case of licensed premises can hardly fail to enter more or less into any payment for goodwill. On the other hand, they are all elements which have no relation to rent, and can in no way affect the annual value of the premises.

But then there are other elements which at least may enter into the compu-

No. 150.

June 7, 1892.
Hughes v.
Assessor for
Stirling.

tation of goodwill—elements which ought properly to go to increase rent, but which in practice go to increase goodwill. In other words, there are certain advantages attaching to the occupancy of licensed premises, and impossible to dissociate from such occupancy, which may, and it is well known are, paid for, not under the name of rent, but under the name of goodwill.

For example :—

1. The benefit of the existing licence to a large extent attaches to the premises. No doubt it is the person who is licensed, not the premises; but the licence is confined to the particular premises, and the occupant of the premises has often (perhaps generally) a better claim to the renewal of the licence than the former holder who has ceased to occupy. In many cases, indeed, the licence may be said practically to go with the premises. It does so always, we are told, in England, and it must often do so in Scotland—in the case, for example, of country inns. And in such cases the only personal element in the goodwill—so far as connected with the licence—is the advantage which the new occupant obtains by getting the previous holder's consent to a transfer of the licence between the Courts.

2. But further—and apart from the licence altogether—it cannot be doubted that a large measure of what is called goodwill adheres to the premises simply as the seat of an established business. Some customers may follow the shop-keeper; others, and probably the majority, adhere to the shop. It is clearly going too far to say, as the late Master of the Rolls is reported to have said in a case cited to us, that the goodwill of a public-house consists simply in the habit of the customers to resort thither. But the goodwill of such a business certainly includes that element, and does so to a large extent.

All this being so, it is not, in my opinion, possible to lay down any fixed or general rule as to how far payments for what is called goodwill are to be treated as additional rent. Cases may be figured in which the personal element is so inconsiderable that the whole payment may rightly be treated as additional rent. Certain inns in country districts suggest examples of this. On the other hand, extreme cases may be figured where the circumstances exclude every element which is not strictly personal, and where therefore the rent stipulated may fairly be taken as the sole consideration paid for the premises. But in the general run of cases it may be safely asserted that where, in addition to the rent, there is stipulated a payment for goodwill, part at least of that payment truly represents an additional rent. It may also be assumed that, at least in general, the lease, or other document constituting the bargain, contains no materials for making a satisfactory apportionment. The apportionment must almost always involve an examination of the circumstances of each case, and must vary indefinitely as between different cases.

Now, what is the result of all this? In my opinion the result is, that wherever it appears in any lease that there is a consideration other than the rent, and materials do not exist within the lease for correcting the rent, the valuation authority is thrown back on the general rule of the statute, viz., that the annual value is to be estimated at the sum for which the premises might be reasonably expected to let from year to year. The Assessor must, in short, perform in each case the same operation which he performs when he has to value some established inn or public-house which has always been occupied by the owner, and has never been let so as to yield a rent. In so doing regard must of course be had to the advantages adhering to the premises as the seat of an established

business, and as premises to which a licence has for a longer or shorter time been attached. Regard must also be had to the rents paid for similar premises in the neighbourhood possessing the same or similar advantages. Nor is the lease with its rent and goodwill to be disregarded; for the rent stipulated must at least be considered as a minimum; the question being, what sum, if any, upon the whole facts in evidence, requires to be added to it? No. 150.
June 7, 1892.
Hughes v.
Assessor for
Stirling.

This being the principle, I am of opinion that in this case of *Hughes*, the magistrates have gone wrong. They have assumed without inquiry that the whole sum paid for goodwill is of the nature of additional rent, and have refused to allow evidence to be led by which the appellant offered to prove that the sum proposed by the appellant exceeded the fair rent of the subjects with all their advantages. Unless, therefore, the parties agree that the offer by the appellant should be accepted as a basis of valuation, I see nothing for it but to remit for further inquiry.

THE COURT pronounced this interlocutor:—"We are of opinion that the determination of the Valuation Committee is wrong, and in respect that the appellant is willing that the annual value should be entered at £31, 17s., we direct that sum to be entered."

JAMES PURVES, S.S.C.—ASSESSOR FOR STIRLING—Agents.

THE STEEL COMPANY OF SCOTLAND, LIMITED, Appellants.—*D.-F. Balfour* No. 151.
—*Ure*.

THE ASSESSOR OF LANARKSHIRE, Respondent.—*Dundas*—*Sym.*

June 7, 1892.*
Steel Co. of
Scotland,
Limited, v.
Assessor of
Lanarkshire.

Valuation Acts—Process—Statement of case—Findings in fact—Valuation (Scotland) Amendment Act, 1879 (42 and 43 Vict. cap. 42), sec. 7.—In a case stated for the opinion of the Valuation Appeal Court, the Valuation Committee set forth the contentions of the parties, that the appellants had led evidence (which was set forth at length, as taken down in shorthand), and the following determination,—“The Committee sustained the appeal to the effect of reducing the valuation” to a certain sum.

Held that the case had been improperly stated, as it neither set forth the facts proved, nor stated whether the determination of the Committee proceeded on the principle contended for by the Assessor, or on that contended for by the appellants, and case dismissed.

At a meeting of the County Valuation Committee for the Middle Lands Valuation Appeal Court, held at Hamilton on 12th September 1891, for hearing and disposing of appeals under valuations made by the Assessor for the year 1891-92, under the Lands Valuation Acts, the Steel Company of Scotland (Limited) appealed against the valuation of their Hallside works, situated in the parish of Cambuslang, being entered in the Valuation-roll at £12,000, and craved to have it reduced to £5469, 10s. 4d. Case 137.

The Committee sustained the appeal to the effect of reducing the valuation to £11,000.

The appellants craved a case.

In the case the Valuation Committee set forth the contentions of the appellants on the one side and of the Assessor on the other, and stated that “Proof was led for the appellants, which is appended and referred to, in which they sought to establish” certain points.

The case did not state the facts which the Committee found proved, nor whether their determination reducing the valuation had proceeded on the footing of the contentions of the Assessor or of those of the appellants.

No. 151. At the hearing before the Judges the Assessor objected to the competency of the appeal in respect the case did not set forth the facts which the Committee found proved in terms of section 7 of the Act of 1879.* It was true that sections 8 and 9 of the Act† conferred a power upon the Court to remit an imperfectly stated case for fuller statement, but remits were only made where there was some slight deficiency in the stated case, never, as here, where the case was hopelessly defective.¹ It was for appellants to see that the case craved was properly stated.

June 7, 1892.
Steel Co. of
Scotland,
Limited, v.
Assessor of
Lanarkshire.

Argued for the appellants;—Value was itself a fact. It was unnecessary therefore to require that facts should be found upon which the Court must judge of value. That must be done on a review of the whole evidence. Where a question of law was raised it was different. There the Court must state the facts to raise the question.

LORD WELLWOOD.—The Valuation Act of 1879 requires the commissioners or magistrates to state and sign a case setting forth the facts proved, together with the determination thereupon. I am of opinion that this case is not properly stated. The Valuation Committee have given us at great length the contentions of parties as they were bound to do under the 9th section of that statute. They also inform us that proof was led for the appellants in which they sought to establish certain points. But they do not tell us whether in their opinion those points were or were not established, and they do not state any facts which they hold to be proved. Moreover, they do not even tell us whether their determination proceeds on the footing contended for by the Assessor, or on that contended for by the appellants, although perhaps we may infer from the amount of the valuation that the Committee have practically adopted the Assessor's views.

This being so, I think the case is not properly stated. I am not disposed to criticise such cases too strictly, or to insist upon a full statement of facts; because I am aware it is not an easy matter sometimes to state a case well, or to select for statement those facts upon which the question of law or principle really depends. But here we have no facts found at all.

The question is, what is to be done with the case? That is a matter in the discretion of the Court. We may remit it to the Committee with instructions. But there is another course which we may adopt, viz., to dismiss the appeal on the ground that the case is not properly stated. An appellant is bound to see

* The Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 7, enacts that the commissioners or magistrates in stating a case for the opinion of Valuation Appeal Judges shall "set forth the facts proved, together with the determination thereupon."

† The Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 8, provides,—". . . that either party to any appeal or complaint to the commissioners of supply of any county or the magistrates of any burgh under the Valuation of Lands (Scotland) Acts, may at the hearing of such appeal or complaint require the evidence to be taken in shorthand at his expense, and in that event such evidence shall be taken accordingly." Section 9 provides that the grounds of appeal and the replies shall be set forth, and that "a certified copy of any evidence taken as aforesaid shall be submitted along with the case to the said Judges, who may, if they think fit to do so, remit the case to the commissioners or magistrates by whom it was stated, with such instructions as the said Judges may consider necessary for having the case more fully stated."

¹ Rule v. Lord Abinger, Jan. 25, 1883, 10 R. 502.

that the case he asks for is properly stated, and it is in the discretion of the Court to dismiss the appeal if this is not done—*Bank of Scotland*, June 9, 1873, 11 Macph. 991; *Rule v. Lord Abinger*, Jan. 25, 1883, 10 R. 502, per Lord Fraser. I may also refer to the practice in regard to appeals under the Registration Statutes, in particular the Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), sec. 22; *Pringle*, 3 Macph. 420; *Cameron*, 5 Macph. 73; *Maitland v. M'Credie*, Dec. 19, 1868, 7 Macph. 288; and *Adamson v. Smith*, Nov. 1879, 17 S. L. R. 158.

I think the better course to follow will be to dismiss the appeal, because if we were to remit the case again to the Valuation Committee, it would be necessary before it was ripe for decision, not only that the case should be re-stated, but that the evidence should be corrected and supplemented in various respects. The valuation by the Committee is £1000 less than that of last year, and I do not think that we shall be subjecting the appellants to much hardship if we allow the valuation of £11,000 to stand for this year.

LORD KYLLACHY concurred.

THE COURT dismissed the case.

TODD, MURRAY, & JAMIESON, W.S.—BRUCE & KERR, W.S.—Agents.

JAMES HENDERSON ROBERTSON, Pursuer (Respondent).—*Dickson—G. W. Burnet.*

No. 152.

MRS JANE ROSS OR ROBERTSON AND OTHERS (Robertson's Trustees),
Defenders (Reclaimers).—*Shaw—Guy.*

June 7, 1892.
Robertson v.
Robertson's
Trustees.

Trust—Delivery—Power to revoke.—A truster by trust-disposition, on the narrative that he was then in solvent circumstances, and that he regarded himself as morally and legally liable to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children, disposed certain heritable subjects, and also assigned certain policies of insurance upon his own life to trustees, and bound himself to the trustees to keep the policies in force. He then directed the trustees to hold and apply the trust-estate for payment of a variety of provisions to his wife and children, some of which were to come into immediate operation, and also for payment of £500 to a nephew, payment of the last mentioned provision being directed to be made as soon as the trustees had received payment of the proceeds of the policies of insurance. The residue of the trust-estate was directed to be divided, on the death of his wife, among his lawful children. It was further declared that none of the provisions should become vested interests until the period of payment. The deed contained no express power to revoke, and was delivered to the trustees, who were infeft in the heritable subjects and intimated the assignation of the policies in their favour to the insurance companies. Subsequently the truster executed a deed revoking the provision of £500 to the nephew. *Held*, after the death of the truster, that the provision in favour of the nephew was irrevocable.

On 8th October 1891 James Henderson Robertson, residing in Allison Street, Crosshill, Glasgow, brought an action against the trustees of his uncle, the late John Robertson, sometime warehouseman in Glasgow, for payment of the sum of £500.

The claim was founded on a trust-disposition and assignation executed by John Robertson on 23d November 1881, by which, *inter alia*, he directed his trustees to pay to his nephew, the pursuer, the sum of £500. On 7th September 1887 Mr Robertson executed a partial revocation of the trust-disposition and assignation, and, *inter alia*, of the provision

No. 152. therein contained of £500 to his nephew. The question in the case was whether that was a valid revocation.

June 7, 1892.
Robertson v.
Robertson's
Trustees.

The trust-disposition and assignation proceeded on the narrative that the granter was then in solvent circumstances, and that he regarded himself as "morally and legally liable" to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children. He therefore, with consent of his wife, assigned and disposed to trustees, for the purposes thereafter written, the dwelling-house and grounds called Elmwood Villa, three heritable bonds secured over property in Glasgow, £1000 A debenture stock of the Somerset and Devon Railway Company, and four policies of insurance on his life for £200, £300, £500, and £500 respectively. He further bound himself to make timely payment to his trustees of the future yearly contributions required to keep the foresaid policies of insurance in force, and he declared that he had therewith delivered up to the trustees the policies of insurance to be used by them as their own proper writs and evidents. He then directed his trustees to hold and apply the trust-estate, and the annual interest or produce thereof, first, in payment of the expenses of the trust; second, in payment to his daughter Georgina Robertson of £500; third, in payment to his nephew, the pursuer, of £500; and fourth, in payment to Henrietta Ross of £500, which payments to Georgina Robertson, the pursuer, and Henrietta Ross he directed his trustees to make so soon as they received payment of the proceeds of the insurance policies.

By the sixth purpose the truster directed his trustees to pay to a Mrs Ross an annuity during her widowhood at the rate of £45 per annum, beginning the first term's payment at Whitsunday then next. By the seventh purpose he directed his trustees, on Mrs Ross's death, to divide among her children on their respectively attaining twenty-one years of age, a sum of £1000, with power to advance the interest for their maintenance and support. By the eighth purpose he directed his trustees to grant the use of Elmwood Villa to his wife during her life, so long as it should remain unsold. By the ninth purpose he directed his trustees, after satisfying the other purposes of the trust, to apply the free annual proceeds of the trust-estate for the maintenance of his wife and children, but exclusive of his *jus mariti* and right of administration. And lastly, he directed his trustees on the death of his wife to divide the residue of the trust-estate among his lawful children, payable to sons on majority and to daughters on majority or marriage, whom failing to their issue.

The truster further declared that none of the provisions made in favour of any person should become vested interests in such persons until the terms of payment thereof.

The deed contained no power of revocation, the only reservation in the truster's favour being that the trustees should exercise a general power given to them of paying the interest of the sums prospectively falling to the children, or of making advances therefrom, only with his consent during his lifetime.

The deed contained a clause consenting to registration for preservation and execution.

The trust-disposition and assignation was duly delivered to the trustees, who accepted office. They were infeft in the heritable subjects thereby conveyed to them, and the assignation of the policies of insurance therein contained in their favour was duly intimated to the insurance companies in the months of November and December 1881.

By the deed of revocation, dated 7th September 1887, the truster, with consent of his wife, on the narrative of the foresaid trust-disposition and

assignation, and, *inter alia*, that the provisions therein in favour of the pursuer and certain other beneficiaries were purely gratuitous on his part, and were made solely because of favour and affection for them, and that the same had not become vested interests in them, revoked the direction to his trustees to pay to his nephew, the pursuer, the sum of £500, and declared that he should not be entitled to participate in any part of his means and estate falling under the trust-disposition and assignation. He also revoked the annuity to Mrs Ross and certain other provisions.

No. 152.

June 7, 1892.
Robertson v.
Robertson's
Trustees.

Mr Robertson, the truster, died on 22d June 1891.

The pursuer pleaded;—(2) The trust-disposition and assignation founded on by the pursuer was irrevocable in respect of the terms thereof, and that the same was delivered.

The defenders pleaded;—(2) The provision in favour of the pursuer condescended on being revocable by the truster during his lifetime, and the truster having validly revoked the same during his lifetime, the defenders ought to be assoilzied. (3) The trust-estate being insufficient to satisfy the purposes of the trust, the provision in favour of the pursuer, if held to be irrevocable and unrevoked, is subject to abatement along with the other provisions of the settlement *pro rata*, and that after payment of the expenses of administration.

On 6th January 1892 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Sustains the second plea in law stated for the pursuer, and repels the second plea in law stated for the defenders; and with reference to the defenders' third plea in law, appoints the case to be put to the roll for further procedure: . . . Grants leave to reclaim."*

The defenders reclaimed, and argued;—The trust-disposition and assignation here was testamentary, or at least revocable, *quoad* the provision in favour of the pursuer, towards whom the deceased was under no obligation, legal or moral. It was not of course disputed that a man might make a wholly gratuitous gift to another, but in order to the efficacy of such a gift the granter must be completely divested by delivery of the subject either to the donee himself or to trustees for behoof of the donee. On the other hand, when a deed of conveyance to trustees

* "OPINION.—The question in this case is whether a certain trust-assignation of certain policies of assurance and heritable subjects, executed by the late John Robertson, was revocable, so as to have been effectually revoked by a subsequent deed of revocation which he executed.

"I have considered the argument which I heard on this question, and have referred to the authorities cited, and also to the more recent case of *Mackie's Trustees*, 10 R. p. 746, and 11 R. p. 10, in which some of these authorities were considered. In result I have come to the conclusion that no sufficient grounds exist for holding the deed revocable. It is not, it will be observed, a conveyance of the truster's whole estate or of the whole estate belonging to him at the time of his death. On the contrary, it is a conveyance of specific subjects, including, no doubt, policies of assurance payable at death, but including also various heritable properties, and with respect even to the policies, conferring upon the trustees certain rights enforceable against the truster during his life. It cannot, therefore, I think, be held to be a testamentary deed; and that being so, I am unable to hold that it was revocable merely because of the declaration that there should be no vesting in any of the beneficiaries until payment. Such a declaration may be important for purposes of construction when the question is whether a deed is or is not testamentary. Even on that question, however, it is not conclusive, and where a deed not testamentary but plainly intended to operate *inter vivos* is executed and delivered to trustees, it cannot, I think, make such a deed revocable that the interests of the beneficiaries (for whom the trustees hold) are in whole or in part contingent upon survival of the certain period, or upon some other circumstance or event. . . ."

No. 152.

June 7, 1892.
Robertson v.
Robertson's
Trustees.

was in itself testamentary and revocable, delivery of the deed to the trustees and the completion of their title to the subjects conveyed would not deprive it of its revocable character. In such a case the granter was divested of the legal title to the subjects only, the radical right remained in him, and the trust might be recalled by him at any time, and was no obstacle to the diligence of his creditors.¹ That was the character of the pursuer's provision here. It was a provision of a sum of money to the pursuer to be paid to him after the death of the granter, vesting being by express terms postponed till payment. To hold that the provision was irrevocable was nothing else than to disregard the clause regarding vesting. For if the provision was irrevocable, the effect was to give the pursuer a vested right from the date of the delivery to the trustees, although no doubt such vesting was subject to defeasance in the event of the pursuer's death before payment.

The argument for the pursuer sufficiently appears from the opinions of the Lord Ordinary and the Court.²

At advising,—

LORD ADAM (after narrating the substance of the deeds as above).—From the narrative I have given of the contents of the trust-disposition and assignation, it will be apparent that it is not of the nature of a revocable or testamentary deed. It conveys only certain specific heritable and moveable subjects, and has no reference to the truster's property as at his death. It reserves no power of revocation, and as far as the pursuer is concerned it proceeds on the narrative that the truster was legally and morally liable for the sum provided to him. Most of the provisions come into immediate operation, and none of them are contingent on the truster's death, except only the provisions of £500 each to the pursuer, Miss Robertson, and Miss Ross, and that only in this way, that the fund out of which they are to be paid, being the proceeds of the policies on his life, only become available to the trustees for payment of the provisions after his death. But the truster bound himself to make payment to the trustees of the funds necessary to keep the policies in force—an obligation which no doubt could have been enforced against him during his life—and, as it appears to me, altogether adverse to the notion that the truster intended that the provisions in question should be revocable.

To say that these provisions were gratuitous, and were made solely out of favour and affection, will not of course make them revocable, the deed having been a delivered deed. On a sound construction therefore of the trust-disposition and assignation, it was not revocable either in whole or in part by the granter.

I think accordingly that this case is ruled by the cases of *Turnbull*, 1 W. & S. 80, and *Smitton*, 2 D. 225, and that the effect of the deed, and of the intimations and intimated assignations following thereon in favour of the trustees was absolutely to divest the truster of the trust property, and to invest the

¹ *Dunlop v. Johnston*, April 2, 1867, 5 Macph. (H. L.) 22, 39 Scot. Jur. 382, L. R. 1 Sc. and Div. App. 109; *Dickson v. Somerville's Trustees*, May 16, 1867, 5 Macph. (H. L.) 69, 39 Scot. Jur. 421; *Mackenzie v. Mackenzie's Trustees*, July 10, 1878, 5 R. 1027; *Wightman v. Costine*, March 20, 1879, 6 R. (H. L.) 13; *Jarvie v. Jarvie's Trustees*, Jan. 28, 1887, 14 R. 411.

² *Authorities*.—*Turnbull v. Tawse*, April 15, 1825, 2 W. & S. 80; *Smitton v. Tod*, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241; *Tennent v. Tennent's Trustees*, July 2, 1869, 7 Macph. 936, 41 Scot. Jur. 530; *Spalding v. Spalding's Trustees*, Dec. 18, 1874, 2 R. 237; *Mackie v. Gloag*, March 6, 1884, 11 (H. L.) 10.

trustees therewith, who were bound to hold and administer it for the purposes of the trust. One of the trust purposes was the payment of £500 to the pursuer out of the proceeds of the policies, if he should survive the period of payment. The pursuer has survived that period; the trustees have received the proceeds of the policies, and I think they are bound to fulfil that purpose.

No. 152.
June 7, 1892.
Robertson v. Robertson's Trustees.

It was maintained, however, that because of the clause in the deed which declares that none of the provisions made in favour of anybody should become vested interests in such person until the terms of payment thereof, the truster had power to revoke the provisions in favour of the pursuer at any time before the date of payment, in respect he had no vested interest therein. It is true that the pursuer had no vested right, but he had a contingent right to the provision, which is a right known to and recognised by the law. But if I am right in thinking that the truster was absolutely divested of the estate, and that the trustees were bound to hold and administer it for the trust purposes, then I think they were bound to hold the estate until it should be seen whether the contingency would be purified, and whether the pursuer would become absolutely entitled thereto. Had the pursuer predeceased the term of payment, the result would have been not that the truster would have right to the £500, but that the £500 would have fallen into residue, and have been administered under the 9th and last purposes of the trust. I do not see that the truster had power to revoke or deal with it to any effect.

I accordingly think that the Lord Ordinary's interlocutor is right, and should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

JAMES CLERK RATTRAY, Appellant.—*Craigie*.
JOHN YEAMAN (Leslie's Trustee), Respondent.—*Law*.

No. 153.

June 11, 1892.
Rattray v. Leslie's Trustee.

Proof—Valuation-roll—Lease—Reduction of rent.—Opinion that a return by a landlord to an assessor under the Valuation Act of the rent of a farm is not conclusive evidence as between landlord and tenant of an agreement to reduce the rent fixed in a written lease.

JAMES LESLIE was tenant of the farm of Thorn under lease from Lieut.-Gen. James Clerk Rattray of Craighall, C.B., for nineteen years from Martinmas 1871, at an annual rent of £650.

In December 1889 the landlord obtained sequestration of the stock and crop of the farm and decree for payment of the rent stated in the lease for crop 1889. Subsequently the tenant was sequestrated under the Bankruptcy Acts, and John Yeaman, solicitor, was appointed trustee.

The landlord lodged a preferable claim for rent outstanding under the decree amounting to £116, 12s. He also lodged an ordinary claim for the rent in the lease for crop 1888.

On 15th April 1892 the trustee rejected the preferable claim to the extent of £100, "in respect that an abatement of £100 per annum was from 1886 allowed on the rent mentioned in the lease, and that the reduced rent of £550 was returned to the Valuation-roll on behalf of the landlord and by his authority, as the rent of the farm." He made a corresponding deduction from the ordinary claim.*

* The following letter from the assessor of Perthshire to the trustee was pro-

No. 153.

June 11, 1892.
Rattray v.
Leslie's Trustee.

On appeal the Sheriff-substitute of Perthshire (Grahame), on 6th May following, adhered to the trustee's deliverance.*

General Clerk Rattray appealed to the Court of Session.

Argued for him;—(1) In regard to the preferable claim, the trustee's objection was barred by the decree. (2) The assessor's letter to the trustee was not evidence of a new agreement. The trustee ought to have proved by the landlord's writ or oath that the terms of the written lease had been varied. The return to the assessor did not shew that the landlord was bound to give an abatement from the rent under the lease.¹

Argued for the trustee;—The agreement to modify the rent might be proved by evidence that the parties had transacted with third parties on this footing.² The proof led was sufficient to prove the new agreement.

LORD PRESIDENT.—This case divides itself into two parts in consequence of the decree of the Sheriff-substitute of 6th December 1889. That decree was granted in a petition in the ordinary form for sequestration and payment, and it appears to me that when it was produced the Sheriff-substitute ought to have given effect to it as representing the judicially ascertained rights of parties.

But there remains the question as to the other years. I am of opinion that the Sheriff's judgment cannot stand. He has held that the stipulated rent was reduced by agreement between the landlord and tenant,—at least that is the only way of stating the legal result at which he has arrived. When we look at the nature of the evidence upon which this result is rested, it appears that there is nothing but a letter from the assessor to the trustee saying that "the rent

duced:—"Perth, 21st February 1891.—Dear Sir,—In reply to your letter of the 19th inst., I beg to inform you that the rent of Thorn farm was returned reduced in May 1887 for year 1887-88, and the reduced rent was continued for 1888-89 and 1889-90. . . . Except the return I can trace no writing, but I can trace that I made personal inquiry at Mr Anderson [General Clerk Rattray's agent], and was satisfied that the rent was really reduced for 1887-88, when the reduced rent was first returned."

Letters from the landlord's agents to Leslie were produced, dated in 1886, intimating a reduction of £100 for the year 1885-86.

* "NOTE.— . . . The only question here really at issue is, whether the appellant in his claims for arrears of rents due to him by his bankrupt tenant is entitled to claim upon the original rent of £650 per annum, as provided for under his tenant's lease, or whether he is entitled to claim upon the rent of £550 per annum, which the appellant agreed to accept for crops 1885 and 1886, in terms of the correspondence between the appellant's agents and the bankrupt, and which reduced rent was returned to the Valuation-roll on behalf of the landlord and by his authority as the rent of the bankrupt's farm, and was so continued on the Valuation-roll till the date of the bankrupt's sequestration on 9th December 1889.

"The rent of the farm, as thus entered on the Valuation-roll, must, I think, be held to be the rent according to which the appellant's claims to rank for arrears of rent are to be determined. The correspondence produced no doubt makes reference only to the rents for the years 1885 and 1886, but, in the face of the fact that the reduced rent was by the appellant's authority entered on the Valuation-roll and allowed to remain unaltered till the date of the sequestration, I cannot hold that the original rent under the lease can be taken as the rent on the arrears of which the appellant is now entitled to be ranked as a creditor on his sequestrated tenant's estate."

¹ Menzies v. Assessor for County of Perth, June 19, 1889, 16 R. 805.

² Baillie v. Fraser, June 15, 1853, 15 D. 747, 25 Scot. Jur. 449; Emslie v. Duff, June 2, 1865, 3 Macph. 854, 37 Scot. Jur. 457.

was returned reduced." Now, it is plain that this is not legal evidence, and therefore the decision could not be supported; but we may further ask whether—because, in the words of the assessor, "the rent was returned reduced"—that is to be held as conclusive against the landlord that the stipulations of the lease have been departed from.

No. 153.
June 11, 1892.
Rattray v. Leslie's Trustee.

I think it is impossible to take that view. The case of *Emalie v. Duff* does not import that a mere return to an assessor for the purposes of the roll is conclusive of any or every fact to which the various columns of the schedule relate. The question there was whether or not there had been an agreement for a lease of a farm for nineteen years, and a letter from the landlord to the Surveyor of Taxes was produced in which the latter explained in a clear and emphatic manner that all the farms on the estate were let for nineteen years. That letter was held to be writ of the landlord, because in previous cases relating to the constitution of leases writings in which the parties had no direct interest were founded on as tending to instruct a lease. But that case must not be held to lay down, as general law, that a return to the assessor under the Valuation Act is conclusive evidence, as between landlord and tenant, to the effect of instructing an agreement to vary or rescind a lease.

Nothing short of such law will avail the respondent in this appeal, and I think the case has been wrongly decided, even assuming the Sheriff to have had legally proved the statement of the assessor, that the rent had been returned reduced. That bare fact is all the respondent has to go upon, and, in my judgment, it is insufficient.

LORD ADAM concurred.

LORD M'LAREN.—If the respondent had stated that he desired to have the facts investigated, or to refer this matter to the landlord's oath, I should have been disposed to entertain his application. But I take it that both parties are agreed that we have all the evidence before us of which the case admits. This being so, I agree that the bare fact of an entry in the Valuation-roll, even if inserted on the authority of the landlord, is insufficient to displace the contract of lease, or to prove a different contract from that which appears upon the face of the lease. Accordingly, I think the landlord is entitled to rank on the tenant's sequestrated estate for his arrears, on the footing that the rent is as stipulated in the lease.

LORD KINNAR concurred.

THE COURT pronounced this interlocutor:—"Recall the judgment of the Sheriff-substitute, dated 6th May 1892: Remit to the trustee in the sequestration to rank the appellant preferably for the sum of £116, 12s., and to give him an ordinary ranking for the sum of £444, 18s. 8d., and decern."

J. & F. ANDERSON, W.S.—JOHN RHIND, S.S.C.—Agents.

ROBERT BROATCH, Pursuer (Appellant).—*M'Lennan—Maclaren.*
JONATHAN M. DODDS, Defender (Respondent).—*Guy.*

No. 154.

June 11, 1892.
Broatch v. Dodds.

Proof—Reference to oath—Construction of deposition—Admissibility of letters.
—In an action by a law-agent for payment of a prescribed account for professional services, the pursuer referred the cause to the defender's oath. In his oath the defender admitted that the pursuer had rendered him the services

No. 154. referred to in the account, but deponed that he had only promised to pay what he was able, and that he understood the pursuer was carrying on the litigation as a speculation.
 June 11, 1892.
 Broatch v.
 Dodds.

Held that the words of the oath imported an obligation by the defender to remunerate the pursuer, limited only by his means, and that the oath was affirmative of the reference.

Observations upon the question how, in an examination under a reference to oath, documents may be made available.

1st DIVISION.
 Sheriff of the
 Lothians and
 Peebles.

ON 4th January 1892 Robert Broatch, solicitor, Edinburgh, brought an action in the Debts Recovery Court against Jonathan M. Dodds, Morning-side Road, Edinburgh, for the sum of £27, 2s., the balance of a business account for professional services which the pursuer alleged he had rendered to the defender in connection with two actions in 1884 to 1886.

The account having prescribed, the pursuer referred the cause to the defender's oath.

In answer to the pursuer the defender, *inter alia*, deponed as follows:—“(Q.) You employed me in these actions? (A.) Yes, I called upon you about them and got your advice. . . . You knew well enough when I started the case the means I had and what I told you I would do. I understood you were carrying it on as a speculation. (Q.) I wrote a letter at your request dated 6th March, pointing out exactly how the matter stood. Did you receive that letter? (A.) I think I did. (Q.) Did that shew you that I was carrying on the case as a speculation when I had such little hope of getting anything for you? (A.) But it was at the commencement of the case the arrangement was made with you. (Q.) Were you to pay no money at all? (A.) I said I would give you what I actually could, and I told you when I gave you the last 10s.—so far as I recollect I gave you three times 10s., never £1—I told you I was afraid I was drifting into litigation, and I would have to abandon it. I gave you altogether £1, 12s. 6d. . . . After paying the last sum of 10s. I said I could go no further. My letters shew how unwilling I was.”

A number of letters which had passed between the parties from 1884 to 1891 with reference to the litigation were produced, and were docquetted and subscribed as relative to the defender's deposition by the Sheriff-substitute (Hamilton) and the defender.

On 19th February the Sheriff-substitute pronounced this interlocutor:—“. . . Finds the oath negative of the reference : Assoillizes the defender from the conclusions of the libel.”

On appeal the Sheriff (Blair), on 17th March, adhered to his Substitute's interlocutor.

The pursuer appealed, and argued;—The oath was affirmative of the reference. The defender admitted that the pursuer conducted the legal business referred to in the account, and although the defender said that he told the pursuer that he was afraid he would have to abandon the litigation, he never did so formally in point of fact. There was no qualification of the bargain. The defender's promise to pay shewed that he did not regard the litigation as a speculation on the part of the pursuer. His understanding as to what he would be required to pay was a mere matter of conjecture, and did not import a bargain limiting the extent of his obligation.¹ This applied also to the defender's promise to pay what he actually could.²

¹ Contrast *M'Larens v. M'Dougall*, March 16, 1881, 8 R. 626.

² *Hamilton's Executors v. Struthers*, Dec. 2, 1858, 21 D. 51, 31 Scot. Jur. 42.

³ *Fair v. Hunter*, Nov. 5, 1861, 24 D. 1, per Lord Justice-Clerk (Englis) 9, 34 Scot. Jur. 3; *Forbes v. Forbes*, Nov. 4, 1869, 8 Macph. 85, 42 Scot. Jur. 41; *Christie's Trustees v. Muirhead*, Feb. 1, 1870, 8 Macph. 461, 42 Scot. Jur. 215.

Argued for the defender;—The oath and the correspondence were negative of the reference. Any admission of the constitution of the debt must be taken as a conditional admission. The defender was only to pay what he actually could, as the pursuer was conducting the litigation purely as a speculation. Further, the defender had clearly given the pursuer to understand that he had abandoned his interest in the litigation. No. 154.
June 11, 1892.
Broatch v
Dodda.

At advising.—

LORD PRESIDENT.—This case having been referred to the oath of the defender, the question is, what is the true meaning of the defender's deposition? Now, the defender admits that the pursuer acted as law-agent for him in two actions, and did the business shewn in the account sued for. He says that at the commencement an arrangement was made between him and the pursuer. "(Q.) Were you to pay no money at all? (A.) I said I would give you what I actually could."

The main question is, what is the legal result of that arrangement? I do not agree in the view of the Sheriffs. The words of the deposition import that the pursuer was to be remunerated by the defender, and the remaining question is, what is the effect of the qualification that the amount is measured by the ability of the defender. Now, the cases cited by the pursuer seem in point, and they settle that such words do not set up any limit to the liability other than the whole means of the person undertaking.

This, then, being the legal meaning of the words which I have quoted, I do not think their effect is abated by the words, "I understood you were carrying it" (*i.e.*, the case) "on as a speculation." This is not, like the words I have commented on, a statement of the bargain made, but a conjecture of the defender as to the pursuer's estimate of the comparative value of the liability of the defender and the liability of his opponent in the litigation in the event of success. Nor can I adopt the suggestion of the defender that the deposition imports that he terminated the employment of the pursuer. The words founded on are too vague to support this contention, the proposition being the substantive one, that there was a cesser of an employment sworn to as having commenced. I am therefore of opinion that the oath is affirmative, and that the pursuer must have decrea.

LORD ADAM.—I concur with your Lordship. I have only to add with reference to the documents which have been printed, and to which we were referred in the course of the debate, that I think they cannot be looked at. The oath must be construed by itself, and without any reference to these documents.

LORD M'LAREN.—I concur. I wish only to add a word with regard to a point noticed by Lord Adam,—the competency of referring to the correspondence which is printed in this case. There is a good deal of law in previous cases upon the question how far writings may be made available for the construction of an oath of reference, but it seems to me that consistently with all that has been laid down in the decisions the rule is, and ought to be, exactly the same as the rule which regulates the use which may be made of one document which is referred to, in another document for purposes of construction. The rule is, that you can only make use of the writing referred to for the purpose for which it is referred to in the principal writing. Accordingly, where a deponent under a reference to his oath has referred to his letters as containing his answer to an interrogatory,

- No. 154. you are entitled to look to the whole correspondence as part of the evidence in answer to the particular question, but you are not entitled to look at it as contradicting or illustrative of his evidence upon any other point regarding which he has made no reference to the correspondence.
- June 11, 1892.
Broatch v.
Dodda.

LORD KINNEAR.—I am of the same opinion. I entirely agree with your Lordship. With reference to the point to which Lord Adam and Lord McLaren have referred, I think the law is very clearly laid down by the late Lord President in *Gordon v. Pratt*, February 24, 1860, 22 D. 903, where he says, p. 907,—“It is not difficult to make writings available in an examination on reference if what is necessary is done—that is, placing the writings in the hands of the deponer and interrogating him in reference to them, his answers to which interrogatories are part of the evidence. But all that is evidence is what the deponer says on his oath.”

THE COURT pronounced this interlocutor:—“Sustain the appeal, recall the interlocutors of the Sheriff-substitute and of the Sheriff, . . . Find the oath affirmative of the reference, and ordain the defender to make payment to the pursuer of the sum of £27, 2s. concluded for, . . . Remit to the Sheriff to decern in terms of the above findings.”

ROBERT BROATCH, L.A.—WISHART & MACNAUGHTON, W.S.—Agents.

- No. 155. WILLIAM LOGAN WEIR, Pursuer (Respondent).—*Sym.*
MARY TUDHOPE, Defender (Appellant).—*Lees—Craigie.*
- June 14, 1892.
Weir v. Tudhope.
- Process—Appeal—Sheriff—A. S. 10th March 1870, sec. 3.*—The Act of Sederunt, 10th March 1870, sec. 3, enacts that where an appellant shall not, after marking his appeal, take certain steps with regard to printing and boxing papers, “he shall be held to have abandoned his appeal,” and that the “judgment or judgments complained of shall become final and shall be treated in all respects as if no appeal had been taken against the same.” *Held* that the provision as to finality is applicable only to an interlocutor which can competently be brought up on appeal, and therefore that it did not apply where a party had appealed incompetently and “abandoned his appeal,” so as to exclude his having the interlocutor reviewed in a competent appeal subsequently taken.
- Process—Appeal—Sheriff—Extract—Court of Session Act, 1868 (31 and 32 Vict. c. 100), secs. 68 and 69—Sheriff Court Act, 1876 (39 and 40 Vict. c. 70).*—The Court of Session Act, 1868, sec. 68, enacts that a “party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent, but on the expiration of the foresaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract.” Sec. 69 enacts with regard to appeals that they “shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant but also at the instance of every other party appearing in the appeal to the effect of enabling the Court to do complete justice without hindrance from any interlocutor in the cause. . . .” The Sheriff Court Act, 1876, enacts (sec. 32),—“Notwithstanding anything contained in section 68 of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order, pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against.”
- In an action in a Sheriff Court the Sheriff pronounced certain interlocutors which could not be appealed against as they did not exhaust the cause. The pursuer extracted them. Thereafter the Sheriff pronounced an interlocutor

finding it unnecessary to pronounce further on the merits, and awarding expenses to the pursuer. The defender then appealed to the Court of Session. The pursuer maintained that the appeal could not bring up any interlocutor which had been extracted. The Court held that whether the interlocutors were validly extracted or not, under sec. 69 of the Court of Session Act the appeal was "effectual to submit to review the whole interlocutors in the cause to the effect of enabling the Court to do complete justice."

No. 155.

June 14, 1892.
Weir v. Tudhope.

WILLIAM LOGAN WEIR, manufacturer, Lesmahagow, owner of a house and ground there, presented a petition in the Sheriff Court at Lanark against Mary Tudhope, owner of the house and piece of ground next to his on the east, praying the Sheriff to interdict the defender from encroaching upon a lane on the east side of his property, or continuing building operations thereon, and to ordain her to remove certain building materials therefrom, and to restore a hedge bounding the lane.

2D DIVISION.
Sheriff of
Lanarkshire.

The defender claimed the property of the lane and the right to build on it. The pursuer maintained that the lane was his, or at least that part of it was his, or was property common to him and the defender.

After a proof the Sheriff-substitute (Birnie), on 24th July 1891, pronounced this interlocutor:—"Finds that the respondent has inverted the possession had of the lane referred to, and that she was not entitled to do so; interdicts her as craved until the rights of parties are settled by declarator or otherwise, and with these findings continues the case until the first Court day in the winter session, and decerns."

The defender, on 7th August, appealed to the First Division of the Court of Session, but did not proceed to print, and on 24th September 1891 the process was "retransmitted in respect of the abandonment of the appeal" by the Clerk of Court. On 24th October 1891 the Sheriff-substitute (Davidson), in respect of the abandonment by the defender of her appeal to the Court of Session, on the craving of the pursuer, decerned against the defender for £3, 3s. of expenses in terms of the Act of Sederunt relating to such abandonments.*

On 24th October 1891 the Sheriff-substitute also pronounced this interlocutor:—"Having considered the process, decerns and ordains the

* The A. S. 10th March 1870, made in pursuance of the Court of Session Act, 1868, and concerning probation and appeals from inferior Courts, enacts with reference to appeals, sec. 3, subsec. (2),—"The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the Clerk a print of the note of appeal, record, interlocutors, and proof, if any, . . . and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court as aforesaid a print of the papers required . . . or to box . . . the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided. . . . Subsec. (5) On the expiry of the period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent shall not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the Clerk of Court shall forthwith retransmit the process to the Clerk of the inferior Court; provided always that before retransmitting the process the Clerk of Court or his assistant shall engross upon the interlocutor sheet and sign a certificate in these or similar terms:—'[Date.] Retransmitted in respect of the abandonment of the appeal.' And in respect of said certificate the Sheriff, or other Judge of the inferior Court, shall, upon a motion being made before him to that effect, grant decree for payment to the respondent in the appeal of the sum of £3, 3s. of expenses."

No. 155. defender to remove and to restore all as craved at the sight of William Clarkson, builder, Lesmahagow, within fourteen days from this date, under certification, and decerns ; reserving to pronounce further.”
 June 14, 1892.
 Weir v. Tudhope.

The defender appealed to the Sheriff.

On 8th December 1891 the Sheriff (Berry) pronounced this interlocutor:—“Under reference to the annexed note, Dismisses the appeal: Allows the fourteen days mentioned in the Sheriff-substitute’s interlocutor to run from this date, and remits to him for further procedure, and decerns.”*

On 24th December 1891 the Sheriff-substitute pronounced this further interlocutor:—“On pursuer’s motion, in respect the defender has failed to obtemper the interlocutors of dates 24th October last and 8th December current, grants warrant and authority to Mr William Clarkson, builder, Lesmahagow, to execute the removal and restoration which the defender was ordained to execute by the said interlocutors, reserving to pronounce further, and decerns.”

The pursuer obtained extract of these interlocutors of 24th July, 24th October, and 8th and 24th December 1891.†

* “NOTE.— . . . The appeal cannot be said to be incompetent in as far as the interlocutor of 24th October is concerned. It was stated, however, at the bar for the appellant, that the object of the appeal is to bring under review the interlocutor of 24th July, in terms of the provision of the Sheriff Court Act of 1876, section 29, which enacts, that an appeal to the Sheriff ‘shall be effectual to submit to the review of the Sheriff the whole interlocutors and judgments pronounced in the cause.’ I am of opinion that that provision cannot be held to operate so as to bring up for review by the Sheriff an interlocutor against which an appeal had previously been taken to the Court of Session, and which had been abandoned. When an appeal has been taken to the Court of Session and abandoned, the judgment appealed against becomes, as I take it, final both in that Court and in the inferior Court. Indeed, that seems to be the import of the Act of Sederunt of 10th March 1870, section 3 (5), which provides that after an appeal has been abandoned, ‘the judgment or judgments complained of shall become final.’ That provision has been applied by the Court of Session in more than one case. In *Watt Brothers v. Foyne*, Nov. 1, 1879, 7 R. 126, for example, where an interlocutor had become final by default, it was held incompetent to bring it under review by note of suspension, or other form of appeal, and the Lord President said, that what was meant by the section was, that when an appeal falls by default, the judgment of the inferior Court becomes final, not only there, but absolutely, as if it had been reviewed on the merits. Lord Shand pointed out in the same case that were the rule different, the consequences might be serious, by affording to a party desiring delay, the means of procuring it to his opponent’s disadvantage at a trifling cost.

“It was not contended that, if the interlocutor of 24th July was to be regarded as final, the subsequent one did not properly follow as a consequence of it. The appeal, therefore, must be dismissed.”

† Section 32 of the Sheriff Courts Act, 1876 (39 and 40 Vict. c. 70),—“Notwithstanding anything contained in section 68 of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the Sheriff or Sheriff-substitute who pronounced the same shall allow the extract to be sooner issued.”

Section 68 of the Court of Session Act, 1868 (31 and 32 Vict. c. 100), enacts, as to the “*Time at which interlocutors of inferior Courts may be extracted.*” “A party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent, but on the expiration of the fore-

The reporter having reported that the removal and restoration had been carried out, the Sheriff-substitute, on 18th February 1892, pronounced this interlocutor:—"Finds it unnecessary to pronounce further on the merits: Decerns against the defender in favour of the pursuer for the sum of £3, 4s. 4s. sterling, being the amount incurred by the pursuer in obtempering the order of date 24th December last: Finds the defender liable to the pursuer in expenses: Remits the account to the Auditor to tax and report, and decerns," &c.

No. 155.

June 14, 1892.
Weir v. Tudhope.

The defender appealed to the Second Division of the Court of Session.

The pursuer objected to the competency of the appeal, and argued;—"It must be admitted that in point of form the defender could appeal against the interlocutor of 18th February, decerning for the expense of obtempering the report and awarding expenses. But the defender had no interest to appeal that interlocutor, for two reasons,—1st, the important interlocutor was that of 24th July 1891. But that was final, because the defender had appealed against it and then abandoned the appeal. The express words of the A. S. 10th March 1870 (quoted *supra*, p. 859, note), were that the effect of the abandonment was that judgment became "final, and shall be treated in all respects as if no appeal had been taken against the same." It made no difference that the appeal had been incompetent. *Sibi imputet* if the defender had produced finality in that way. On any other view a party could get abundance of delay for paying £3, 3s. by taking a variety of incompetent appeals. The case of *Watt*, quoted by the Sheriff, was in point. But, secondly, the whole interlocutors prior to that of 18th February were final, because they were extracted. After extract there was no appeal, just as after implement there was none (and for that matter, the interlocutors here were both extracted and implemented). It might be possible to review even an extracted judgment in a suspension, or to reduce it; but it was a thing absolutely unknown and incompetent to appeal against it. According to section 68 of the Act of 1868 extract could not be taken within twenty days, but these being expired the extract might be issued, "if no appeal shall have been taken." Then came the 32d section of the Act of 1876. Under it extract might be issued of "any" interlocutor on the expiration of fourteen days, "unless the same shall, if competent, have been sooner appealed against." But "any interlocutor" being so extracted it could not be appealed. No instance could be given of an appeal against an extracted judgment.¹

Argued for the appellant;—"The appeal was certainly competent against the interlocutor of 18th February. The question was what it submitted to review. It submitted the previous interlocutors in the cause. It was said to be barred to all practical effect, because the appeal against the most important interlocutor on the merits had been abandoned. But the Act in declaring a judgment "final" when an appeal had been taken and then abandoned, implied that the party had brought up an appeal which could be entertained. A mere error in process which put the other party to no inconvenience could not be held to exclude an appeal. The remedy for a series of incompetent and abandoned appeals was in the

said period, if no appeal shall have been taken, the Clerk of Court may give out the extract; it being competent, however, to take such appeal at any time within the period of six months from the date of final judgment in the cause, unless the judgment has previously been extracted or implemented."

¹ *Authorities cited*.—*Malcolm v. M'Intyre*, Oct. 19, 1877, 5 R. 22; *Tennent v. Romanes* (Lord President's opinion), June 22, 1881, 8 R. 824; *Thompson v. King*, Jan. 18, 1883, 10 R. 469; *Macfarlane v. Thompson*, Dec. 6, 1884, 12 R. 232.

No. 155. hands of the Court in dealing with expenses. It was said that extract generally barred appeal. But the proper construction of the Act of 1868 and of the Act of 1876 together was not to take away a right of appeal. It led to this only, that where a party could have appealed competently and did not, and extract was taken, then that appeal was barred. But here the defender could not have brought her appeal to the Court of Session sooner, because it had been decided that till the expenses had been awarded (though not actually taxed and decerned for), there was not a final judgment.¹ The respondent's contention involved that while a person might be unable to appeal an interlocutor, his adversary could extract it before an appealable judgment was pronounced, and so make the appeal useless. Or the Sheriff, by shortening the period of extract, or delaying to pronounce an interlocutor which could be appealed, might deprive a litigant of his constitutional right of appeal. All this was in the teeth of section 69 of the Court of Session Act, 1868.* Again the respondent's argument that "any interlocutor" could be extracted led to absurdity. The Act could not mean that, for instance, an interlocutor closing the record could be extracted.

At advising,—

LORD JUSTICE-CLERK.—This case raises a somewhat important question of competency of appeal from the Sheriff Court. What the appellant desires is to obtain redress against an interlocutor pronounced by the Sheriff-substitute on 24th July 1891. That interlocutor stands in this position, that an appeal was taken against it to the Court of Session, and was afterwards abandoned. It was abandoned because it was at that stage an incompetent appeal. That it was incompetent does not admit of any dispute. But although it was an incompetent appeal, the Sheriff has held that he is barred from reviewing the interlocutor upon an appeal taken on a subsequent interlocutor of the Sheriff-substitute, on the ground that where an appeal is taken and abandoned the interlocutor becomes final under the Act of Sederunt of 10th March 1870. It appears to me that the Sheriff has erred in taking this view. If an appeal to the Court of Session against the interlocutor of 24th July was competent, then undoubtedly its abandonment would under the Act of Sederunt have given finality to the interlocutor. But if there was no right of appeal against that interlocutor at that stage, then it cannot be held a default not to proceed with the appeal. To proceed with it could only result in its being dismissed as incompetent, and if dismissed as incompetent, then the interlocutor to which it related could still be submitted to review as soon as an interlocutor against which an appeal was competent should come to be pronounced. For in that case the appeal against the appealable interlocutor, whether taken to the Sheriff or to the Court of Session, has the effect of submitting all previous interlocutors to review, unless such interlocutors, being appealable, have not been appealed against within a certain time, and have on the lapse of that time been

¹ Russell v. Allan, Oct. 18, 1877, 5 R. 22.

* The Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 69, enacts, with regard to appeals, that they "shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from any interlocutor in the cause"

extracted. I am of opinion that if a party erroneously takes an appeal against an interlocutor against which it is incompetent to appeal, and on discovering its incompetency drops it, he does not thereby lose the right to have review of that interlocutor when an appeal has become competent by the pronouncing of a subsequent interlocutor. No. 155.
June 14, 1892.
Weir v. Tudhope.

It is not doubtful that the present appeal is competent in this sense, that it is against the first interlocutor in the case against which it was competent to take an appeal to the Court of Session, subsequent to the interlocutor allowing a proof, which was acquiesced in. But another objection is stated to the effect that the respondent has obtained extract of certain interlocutors in the cause, and that accordingly they cannot now be submitted to review. This is at first sight a somewhat formidable objection. For undoubtedly the theory of the effect of extract of an interlocutor is that it takes out of the process the matter to which the interlocutor relates. And if the respondent has validly taken out extract of these interlocutors, and if the ordinary effect of extract is allowed, then the appellant is shut out from review of these interlocutors. This would be a most anomalous result. For it would in every case put it in the power of one of the litigants absolutely to exclude his opponent from obtaining any review of interlocutors which might go to the very essence of the case. For the scheme of the statutes in regard to appeals, both within the Sheriff Court itself and from the Sheriff Court to the Court of Session, is to bar appeals except at certain stages of the cause, and when any of these stages has been reached, to empower the Court to review all previous interlocutors which were not appealable by themselves. But if while a party aggrieved is thus restrained from obtaining review of an interlocutor his opponent can extract it, and by so doing can finally exclude review of that part of the process, then it is in the power of a litigant to render nugatory the 69th section of the Court of Session Act of 1868 and the 29th section of the Sheriff Courts Act of 1876, by which it is declared that an appeal against an appealable interlocutor shall "be effectual to submit to review the whole interlocutors and judgments in the cause," not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling "the Court or Sheriff) to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter-appeal."

The clause under which extract has been obtained here of interlocutors which were not appealable is clause 32 of the Sheriff Courts Act of 1876, and it is as follows:—"Notwithstanding anything contained in section 68 of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the Sheriff or Sheriff-substitute who pronounced the same shall allow the extract to be sooner issued." The obvious purpose of this clause is to abbreviate the time within which extract is barred. It does nothing more by enacting words. If it does nothing more it is by implication only. It is contended that as the words "if competent" are used in regard to the appeal, it is implied that every interlocutor or judgment as to which appeal is incompetent may be extracted after fourteen days. I do not so read the section. It appears to me that to read it

No. 155. so would be to give it a strained interpretation, and that it cannot be held to make interlocutors extractable which were not extractable before it was passed. To hold that it did would be to alter the law of extract by mere implication. I hold that the words of section 32, where they refer to extract, do so with reference to the existing law and practice as to what interlocutors are extractable, and do not extend the power of extract so as to bar review of interlocutors against which an appeal cannot be taken, and which can only be reviewed by an appeal taken at a subsequent stage of the cause.

June 14, 1892.
Weir v. Tud-
hope.

But even if it were to be held that under section 32, if it stood alone, such interlocutors could be extracted, and with the ordinary effect of extract, I am further of opinion that the very broad and distinct terms of section 69 of the Court of Session Act lay it upon us as a duty to take up an appeal against any appealable interlocutor as submitting to the review of this Court all previous non-appealable interlocutors, regardless of anything done which, according to ordinary practice, or according to any previous statute, would remove them beyond our power. No words could be broader or more clear. The appeal is declared "effectual" to submit them to review "to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause." I cannot hold that the power and effect of that clause can be defeated by anything done in the inferior Court. Our duty is prescribed to us, and we must have the power to carry out that duty. I certainly cannot hold by mere implication that a party has the power to prevent us from doing that complete justice which the Legislature has declared that it enables us, and therefore directs us, to do. I therefore hold that the objection to the competency of our dealing with the interlocutors in this case should be repelled. Whether the taking out of the extracts was competent may be a question, although I should be inclined to hold, on the grounds which I have already stated, that it was not. But even if competent it cannot restrain us from the duty imposed upon us by the emphatic terms of the section under which we sit to hear this appeal. Standing that direction to the Court, no such effect can be given to any extract as to bar its operation.

I am therefore of opinion that the objection taken to the competency of this appeal should be repelled, and the respondent found liable in the expenses of the discussion.

LORD YOUNG.—I am of the same opinion. I must confess for myself that I never thought either of the points raised attended with reasonable doubt. The whole question is admittedly one of mere form. Two objections have been taken to the competency of this appeal. Now, an appeal is one form of review. There are other forms—two in particular, suspension and reduction.

Here appeal as a mode of reviewing the judgment of the Sheriff is objected to on two grounds. In the first place, it is objected to on the ground that an interlocutor leading up to another was the subject of an admittedly incompetent appeal, and that appeal was abandoned. The proposition submitted to us is this, that the abandonment of the incompetent appeal, which, if not abandoned, would have been dismissed, has the effect of rendering a subsequent interlocutor appealed against final. Such a proposition is extravagant on the face of it. I am not prepared on any rule of law to hold that the reasonable abandonment of an incompetent appeal will make another interlocutor which can be appealed against and has never been reviewed final. I speak of reason.

able abandonment because there is no doubt power on the part of the Court to check a system of incompetent appeal taken for delay and afterwards abandoned. I am therefore against the extravagant argument that the reasonable abandonment of an appeal, which, if it had not been abandoned, would have been dismissed as incompetent, makes an interlocutor final.

No. 155.

June 14, 1892.
Weir v. Tudhope.

The second objection was that the appeal was incompetent because the interlocutors against which the defender has a true interest to appeal have been extracted. We had the argument advanced that extract has a marvellous effect upon an interlocutor; that the interlocutor thereby becomes almost sacred; something which appeal cannot touch. I do not think that an extract is more than a certificate that the decree extracted has been pronounced. All the extractor does is to certify that a judgment has been pronounced, and a certificate that a judgment has been pronounced does not gain anything by being called an extract. There, again, I think the respondent's argument extravagant for the reasons which your Lordship has pointed out. It is the merest and shallowest question of form. Your Lordship pointed out that it is required by the Court of Session Act, 1868, in the interests of public convenience as to the form of review, that an appeal against the interlocutor submits to the review of the Court all previous interlocutors. Here the suggestion is that some other process of review must be resorted to, such as a suspension or a reduction. That is simply nonsense, and abhorrent to all my ideas of public interest and views of public expediency.

I repeat that in the technical arguments advanced by the respondent I have not from the first entertained any doubts as to the competency of this appeal, and I am clearly of opinion that the objections to its competency should be repelled.

LORD RUTHERFURD CLARK.—On the first point I have no doubt, and agree with your Lordships.

On the second point I have entertained considerable doubts, and these have not been altogether removed. But I think on the whole that the judgment which your Lordship proposes is probably the safest.

LORD TRAYNER.—The matter to be determined at present is whether this appeal is competent, and, if competent, what interlocutors can thereby be brought under review. There can be no doubt that the appeal is competent, so far as concerns the interlocutor directly appealed from. That interlocutor, dated 8th February 1892, is a final judgment of the cause, and therefore appealable, and the appeal has been noted within the time allowed by statute for appealing. This appeal, however, will be of no practical use to the defender unless under the law he can submit to review certain interlocutors previously pronounced, and of which the interlocutor of 18th February last was the logical result. The appellant submits that her appeal brings up for review "the whole interlocutors and judgments pronounced in the cause," in respect it is so provided by the 69th section of the Court of Session Act, 1868. This is objected to by the respondent on two grounds,—first, that as regards one of the interlocutors (that, namely, of 24th July 1891) an appeal had been noted which was thereafter abandoned, and that such abandonment makes that particular interlocutor final,—a view which the Sheriff has adopted; and second, that as regards all the interlocutors (except that of 18th February last) review is excluded by reason of the interlocutors having been extracted before the present appeal was taken.

No. 155. The former of these grounds of objection appears to me to be untenable in the circumstances of the present case. If a party notes an appeal against an appealable interlocutor or judgment, and abandons that appeal, such abandonment will have the effect ascribed to it by the Sheriff, no doubt. That interlocutor or judgment is thenceforward final against the party appealing and not insisting in the appeal, and so it was decided in *Watt's* case. But the distinction between *Watt's* case and the present is very clear; for there the appeal taken and not insisted in was from an appealable interlocutor, while here the interlocutor against which the appeal was noted was not appealable. The appeal noted in this case against the interlocutor of 24th July 1891 was incompetent—it could not have been insisted in—and being incompetent, must be treated *pro non scripto*. The appellant cannot be said to have abandoned an appeal which under the statute he could not take.

June 14, 1892.
Weir v. Tudhope.

The second ground of objection stated by the respondent is attended with more difficulty, and in dealing with it regard must be had to the terms of the 68th section of the Court of Session Act, 1868, and the 32d section of the Sheriff Court Act, 1876. By the former of these sections it is provided that “a party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent, but on the expiration of the foreshaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract.” Now, it is plain that that provision only contemplates the issuing of an extract of a judgment against which an appeal is, at its date, competent, but against which no appeal has been taken. If an extract is issued in such circumstances appeal is no longer open to the party complaining, although he may have review of the judgment under a different form of process. The question then comes to be, how far this provision has been altered by the 32d section of the Act of 1876. It provides that “notwithstanding anything contained in section 68 of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court, may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against.” It is maintained for the respondent that this provision last read allows extract to be issued of any judgment pronounced by the Sheriff fourteen days after its date, whether it is a judgment against which appeal can then competently be taken or not. If this is so, then a judgment of which extract has competently been issued would not, according to our practice, be reviewable on appeal, whatever other form of review remained available to the party complaining of the judgment.

I cannot say that the mode in which the 32d section of the Sheriff Court Act is expressed absolutely excludes the view presented by the respondent. On the contrary, the respondent's view presents what is a possible reading of that clause. But I cannot adopt that reading for several reasons. In the first place, in my opinion, the only purpose of the provision in the Sheriff Court Act was to modify the provision in the Court of Session Act as to the time within which an extract of a judgment might be issued. It made extract competent within fourteen instead of twenty days after the date of the judgment to be extracted, and as a necessary consequence changed the time for appealing from twenty to fourteen days. I think that was the only change which the provision in the Sheriff Court Act was intended to make on the previous provision of the Court of Session Act. In the second place, the clause relied on by the respondent does

not deal, at least does not deal directly, with the existing rights of appeal, as No. 155. these stand under the provisions of the Court of Session Act. These must, ^{June 14, 1892.} therefore, be taken still as regulated by that Act, under which appeal is only ^{Weir v. Tud-} excluded in respect of extract where that extract has been issued of a judgment ^{hope.} against which it was competent at the date of that judgment to appeal. In the third place, if the clause in the Sheriff Court Act is read as having the effect contended for by the respondent, then it is put within the power of one party to an action by extracting any interlocutor or judgment—by statute not appealable at its date—to preclude his opponent from the appeal which would at a later stage of the cause be competent to him, which is, in effect, to allow a party to a suit to deprive his opponent of a right of appeal conferred on him by statute. And, lastly, the respondent's view cannot be sustained unless it is held that the right of appeal expressly given by the Court of Session Act has, by implication, been recalled by the provision in the Sheriff Court Act, whereas it is with us a constitutional rule that a right of appeal expressly given cannot be recalled by implication.

The present appeal has been duly brought against the first, and indeed the only interlocutor pronounced in the cause against which an appeal to this Court was competent. I am therefore of opinion that the appellant is entitled under this appeal to submit to review the whole interlocutors pronounced previous to the one directly appealed against in terms of the 69th section of the Court of Session Act, 1868.

It was stated in the course of the argument in this case, that under the 32d section of the Sheriff Court Act, 1876, it was now competent to extract any interlocutor or order pronounced by the Sheriff, and that an interlocutor, for example, closing the record, could be so extracted. I do not think the clause in question authorises anything of the kind. If it is competent to extract an interlocutor closing the record, it must be equally competent to extract an interlocutor continuing the cause, or making avizandum, which is absurd. The clause must be read in the light of existing law and practice; and what, in my opinion, it authorises is this, that extract of any decree, judgment, interlocutor, or order may be issued within fourteen days, provided that, according to law and practice, the interlocutor or judgment is extractable.

THE COURT repelled the objection to competency, and put the cause to the roll.

D. LISTER SHAND, W.S.—JOHN B. YOUNG, S.S.C.—Agents.

WILLIAM YOUNG AND GEORGE THOMAS BEILBY, Petitioners.—Ure.
HERMAND OIL COMPANY, LIMITED, Respondents.—Dundas.

No. 156.

Interest—Expenses—Appeal to House of Lords.—A party who obtains repayment of expenses paid by him to his opponent, in consequence of the judgment of the Court of Session being reversed in the House of Lords, is not entitled to recover the interest which had accrued in the interval on the sum so paid. ^{June 15, 1892. Young v. Hermand Oil Co., Limited.}

THE Second Division of the Court of Session, by interlocutor dated 20th March 1891, assoilzied the defenders, the Hermand Oil Company, in an action at the instance of William Young and Thomas Beilby, and found the defenders entitled to expenses.

The pursuers appealed to the House of Lords, but on a petition presented by the defenders the Court of Session allowed execution to

No. 156. proceed for payment of the expenses, amounting to £968, 14s. 5d. The pursuers paid this sum on 1st July 1891, the defenders finding caution to repeat that sum in the event of the judgment being reversed. The sum was lodged on deposit-receipt. The judgment was reversed in the House of Lords, and the defenders were ordered to pay to the pursuers their expenses of process in the Courts below.

June 15, 1892.
Young v. Her-
mand Oil Co.,
Limited.

The pursuers presented a petition to apply this judgment, and asked for decree for repayment of the £968, 14s. 5d., with five per cent interest on it from 1st July 1891. Counsel at the bar intimated that he did not press for more than the interest actually accrued on the deposit-receipt. The motion was resisted as regarded interest on the authority of the case of *Fleeming v. Howden* (Nov. 6, 1868, 7 Macph. 79, 41 Scot. Jur. 45).

THE COURT refused the petition *quoad* the interest.

SMITH & MASON, S.S.C.—DRUMMOND & REID, W.S.—Agents.

No. 157. MAJOR & COULSON, Pursuers (Respondents).—*Comrie Thomson—Salvesen.*

June 16, 1892.
Mavor &
Coulson v.
Grierson.

HENRY GRIERSON, Defender (Reclaimer).—*Jameson—G. G. Grierson.*

Expenses—Tender—Extrajudicial tender.—An action was raised for payment of £169 as the amount remaining due to the pursuers on a contract to perform certain work. After service of the summons, but before it was called, the defender extrajudicially offered £155, but no expenses. This being declined, and the summons called, he offered in his defences £50, but made no offer of expenses. After proof, the pursuer was found entitled to £44. The Court, holding that the defender's conduct had been reasonable, and the action unnecessary, found the defender entitled to expenses.

2D DIVISION.
Lord Low.

On 22d May 1891 Mavor & Coulson, electric light engineers and contractors, Glasgow, raised an action against Henry Grierson, Craigend Park, Liberton, for payment of £169, as the balance due on an account for goods supplied to and work executed for the defender to the amount of £1471, 14s. 2d. to account of which the defender had paid £1302, 14s. 2d.

On 24th June 1891 the defender's agents wrote to the pursuers' agents a letter offering £155 in full payment, but refusing to pay any expenses.

This offer was refused by the pursuers. By letter dated 15th July 1891 the defender's agents intimated that there were objections to the account, but that the defender was willing to pay "the amount concluded for without expenses, if your clients will be so good as satisfy him that there are 150 lights in the house, as charged for in the account. In order to do so they will require to furnish a list of the 130 lights originally contracted for, shewing where each of them is, and a list of the 20 additional lights charged for, shewing where each of these is. And of course you are not to lodge the summons for calling until Mr Grierson is furnished with such lists, otherwise he will maintain all his objections to the account."

A list of lights was sent by the pursuers. The defender's agents then wrote on 6th August stating that the defender had been informed by an expert that there were 18 more lights charged for than were supplied, and asking an explanation. The pursuers' agents on 11th August in reply gave no explanation, but stated that they had been instructed to call the summons on the first box-day. The summons was then called on 20th August 1891.

The defender stated that the work was defective and was still unfinished, and that it was overcharged. He also stated that he was entitled,

inter alia, to deductions amounting to £125, 10s. "Deducting this sum from the sum sued for, leaves £40, 10s. 7d., but in order to avoid litigation the defender tenders to the pursuers the sum of £50 in full of their claims in this action. On the 24th of June 1891, the defender, through his agents, made an offer of £155, in full payment of the pursuers' claim, which was not accepted."

No. 157.
June 16, 1892.
Mavor &
Coulson v.
Grierson.

The defender pleaded, *inter alia*;—(3) The defender having, prior to the raising of this action, tendered to the pursuers a sum larger than that justly due to them, this action was unnecessary, and ought to be dismissed, with expenses.

After a proof the Lord Ordinary (Low) gave decree for £128, 4s. 2d., and found the defender liable in expenses, "subject to modification to be hereafter determined."

The defender reclaimed. The Court gave effect to certain of the deductions he claimed, and gave decree for £44, 13s. 1d.

The defender then moved for expenses, and argued;—There was, doubtless, no tender except that of £50 which was contained in the defences, which contained no offer of expenses. But the question was one of discretion. It was legitimate to refer to the reasonable attitude of the defender, and to the extrajudicial offer of £155 before the summons was called in Court.¹ In the case of *Gunn* the defender had offered first extrajudicially, and then in his defences (but without expenses), the sum which the pursuer ultimately accepted, and the defender, on the ground of his reasonable attitude, was found entitled to expenses.

The pursuers argued;—There was no tender. The offer on record did not offer expenses to its date. The defender certainly could not claim expenses as matter of right. That it was within the discretion of the Court to give him expenses followed, no doubt, from *Gunn's* case. But here that discretion should not be so exercised. The pursuers had not obtained all they asked, but had obtained a considerable sum, and that success, according to ordinary practice, carried expenses. Their conduct was reasonable. The defender had maintained that they had not fulfilled their contract and had overcharged the work done. At the best for the defender, no expenses should be found due by or to either party.

LORD JUSTICE-CLERK.—I think it is unnecessary to go into difficult questions as to whether this matter can be decided according to a strict rule about expenses. I think it is a matter for our discretion according to what we consider the reasonableness of the manner in which the parties have acted. The defender in this action has ultimately been successful in reducing the pursuers' claim to a large extent. We are entitled to consider the fact that before the case proceeded—that is before the summons was called—the defender intimated that he was willing to pay more than even the Lord Ordinary found to be due. In the action itself he made an offer less than that, but greater than we have held to be the amount of his liability. In these circumstances I think that the litigation was unnecessary, and that being so, I think the defender should not be a sufferer for it. I think he ought to be found entitled to his expenses.

LORD YOUNG.—I am of the same opinion. It weighs with me that on all the questions, with one exception, which were the subject of dispute, we have found that the defender is entitled to succeed. I agree that he should have his expenses.

¹ *Little v. Burns*, Nov. 16, 1881, 9 R. 118; *Critchley v. Campbell*, Feb. 1, 1884, 11 R. 475; *Gunn v. Hunter*, Feb. 17, 1886, 13 R. 573.

No. 157.

June 16, 1892.
Mavor &
Coulson v.
Grierson.

LORD RUTHERFURD CLARK.—I think that this was an unnecessary litigation, and therefore on grounds somewhat similar to those which were adopted in *Gunn's* case, I think the defender should be found entitled to expenses.

LORD TRAYNER.—I also think that the defender is entitled to his expenses. I do not so decide because of his tender, but for reasons similar to those stated by the Lord President in the case of *Gunn*. I think his conduct was so reasonable that he ought to have our decree for his expenses.

THE COURT recalled the interlocutor of the Lord Ordinary, gave decree for £44, 13s. 1d. with interest from the date of citation, and found the defender entitled to expenses.

MORTON, SMART, & MACDONALD, W.S.—SCOTT & GLOVER, W.S.—Agents.

No. 158.

June 17, 1892.
Sweeney v.
Duncan & Co.,
Limited.

PATRICK SWEENEY, Pursuer (Appellant).—*J. G. Smith—Rhind.*
ROBERT DUNCAN & COMPANY, LIMITED, Defenders (Respondents).—*Jameson—McClure.*

Reparation—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1—Contract of employment.—A firm of shipbuilders were in the practice of entering into contracts for the execution of certain pieces of work within their yard with squads of fitters. Each of these men employed labourers to assist in his part of the work, who were exclusively under his control and direction, and who were paid 7d. an hour by the squad. When the piece of work was finished the squad divided the profit among themselves. The shipbuilders' foreman inspected the work as it proceeded to see that the result was satisfactory, but did not interfere with the work.

In an action of damages raised against the shipbuilders by a labourer who had been injured through the fault of the fitter who employed him, the pursuer founded on the Employers Liability Act, 1880. Held that the Act did not apply to the case as the pursuer had not been employed by the defenders.

2D DIVISION.
Sheriff of Ren-
frewshire.

PATRICK SWEENEY, fitter's helper, Port-Glasgow, raised an action in the Sheriff Court at Greenock against Robert Duncan & Company, Limited, shipbuilders, Port-Glasgow, to recover damages for injuries sustained on 27th October 1891 through the fault, as he averred, of the defenders.

He averred that on that day he was in the defenders' employment, and that, while engaged with other labourers in raising a heavy iron plate, he was injured by the breaking of a cut link with which the plate was attached to the chain of a crane. (Cond. 6) "The work was done under the direction and superintendence of Bernard Flannigan, fitter in the employment of the defenders, whose directions and orders the pursuer and the other labourers at the job were bound to obey. The said Bernard Flannigan was a foreman gaffer in defenders' employment in connection with the said work being executed." (Cond. 9) "The accident was caused through the fault and negligence of the defenders and of their manager and foreman, or of the said Bernard Flannigan, for each of whom they are responsible. The cut link supplied for the work by defenders, or those for whom they are so responsible, was defective." (Cond. 10) " . . . A cut link is not a safe and proper thing to use, especially with heavy weights. The proper tool to use is an 'S' hook, which is made in one piece, and much stronger and safer than a cut link."

The defenders denied that the pursuer was in their employment on 27th October, and averred that he was then in the employment of James McDonald & Company, fitters, who had contracted with the defenders to do certain work in their yard. They also denied fault.

The defenders pleaded, *inter alia* ;—(1) The relationship of master and servant not having existed between the pursuer and the defenders, the pursuer is not entitled to reparation under the Employers Liability Act, 1880.

No. 158.

June 17, 1892.
Sweeney v.
Duncan & Co.,
Limited.

Proof was led. It appeared from the proof that it was the practice of the defenders to enter into contracts with squads of fitters to execute pieces of work in the defenders' yard, the defenders supplying tools and materials. The nature of the employment was thus described in the evidence of James M'Donald, a witness for the defenders:—"I am the James M'Donald of the James M'Donald & Company mentioned in this case. I and other fitters take contracts for the framing of vessels, and we are paid so much per frame. There are five of us in the squad, and each of us requires helpers, and each starts his own crowd of men—as many as he requires. The helpers are paid out of the funds from the job; we get the funds from the shipbuilders; we draw for what work we have done, and we pay our helpers and divide the balance amongst ourselves, and we share the profit. We pay our helpers 7d. an hour. Neither defenders nor their foreman exercise any control over us in the methods which we adopt in carrying on our work. We do the work to the best advantage for ourselves, and we get through it as quickly as possible. Defenders' foreman, Gallacher, inspects the work. Gallacher's duty as regards us is to see that the work is satisfactory, and if it is satisfactory he does not interfere with us or our helpers. Gallacher inspects our work as we go along with it."

The pursuer deposed,—"On 27th October last I was in the employment of defenders as a fitter's helper, and at the time of the accident . . . I was engaged for the job in question by Bernard Flannigan, . . . Flannigan was over me, he was the man that I had to work to, and I had to obey his orders. (Q.) He was your gaffer? (A.) Yes. I was solely employed by Flannigan. I knew about James M'Donald & Company. James M'Donald was on the job, too, but I was not working with him, and I had no connection with him. Flannigan and James M'Donald were, I believe, in company. I did not contract with James M'Donald & Company for my wages. I contracted directly with Flannigan. The latter came out into the street and asked me to work to him, and I was solely connected with him. (Q.) So far as you were concerned Flannigan was your gaffer, and you had to do whatever he told you? (A.) Yes. It was Flannigan who put me to the work at which I was hurt. I had nothing to do with the selecting or putting in of the cut link, he did that himself."

It appeared that the accident was caused by Flannigan improperly using a cut link of a chain in place of an "S" hook, and that "S" hooks were supplied in the yard.

The Sheriff-substitute (Begg), on 4th March 1892, pronounced this interlocutor:—"Finds, in fact, that, on 27th October 1891, the pursuer, while working as a fitter's helper in defenders' shipbuilding yard at Port-Glasgow, was injured in his left foot by the fall of a heavy iron plate, through the breaking of a cut link, which was being used for the purpose of connecting the chain of a crane with the sling attached to the plate; that the said cut link was an ordinary chain-link, out of one side of which a piece had been cut by some person without the authority or knowledge of the defenders; that the said link had not been supplied by the defenders in its cut condition to or for the use of any person working in their yard; that the use to which it was put as above mentioned in its cut condition was improper and unsafe, and caused the breaking of the link; but that the pursuer has failed to prove that the said use, or the accident

No. 158: resulting therefrom, was due to the fault or negligence of the defenders, or of any person for whom they are responsible: Therefore assolvies the defenders from the prayer of the petition.”

June 17, 1892.
Sweeney v.
Duncan & Co.,
Limited.

On appeal the Sheriff (Cheyne) adhered.

The pursuer appealed, and argued;—The pursuer had ground for damages under the Employers Liability Act, 1880. He was injured by Flannigan's fault. Flannigan had authority over him. The only remaining questions were whether Flannigan and he were in the defenders' employment, and whether he was injured through “conforming” to an order of Flannigan to which he was bound to conform.¹ Now, the supposed contract was unsubstantial. It was just a case of a bit of piece-work by some fitters over whom the defenders exercised a general charge. They received a sum for the job, and out of that paid the pursuer; but that was just a way of paying the defenders' men. The defenders' foreman was over them all and superintended their work. The case was like that of the “butty colliers” who were decided in an English case to be in the coalmasters' employment.² Secondly, the order need not be a direct order. It was common sense and according to decision³ that it might be implied from the circumstances. The circumstances here were that the pursuer was doing the part Flannigan assigned to him, and while so acting Flannigan's fault injured him.

Argued for the defenders;—To entitle the pursuer to succeed under the Act there must have been a relation of employment with the defenders.⁴ But the proof shewed that the employment was with the squad of fitters. The proper test was control. But Flannigan had control over the pursuer in the work. All the defenders did was, without interfering with the fitter's helpers, to insist on being satisfied with the fitter's work. The fitters were contractors. In *Morrison v. Baird* the judgment was put upon control and payment of wages, and it was decided only that there was a relevant averment that the defender had control. In *Brown v. Butterley Coal Company* it was only decided that there was evidence of employment to support a verdict. Assuming the employment there was no negligence which made the master liable. It was negligence in Flannigan to use the “cut link.” But there was no evidence of injury from an order to which the pursuer was bound to conform, and did conform, and in the fact that he was doing the work he was set to do by Flannigan. The 3d subsection of section 1 of the Act implied a direct order to do a particular thing.

LORD JUSTICE-CLERK.—In the view I take it is not necessary to go into some difficult questions which were discussed. The facts are these. The defenders' practice is to give out to men in whom they have confidence certain parts of their work. These men receive a fixed and agreed-on sum for each part of the work. To do it they require the help of other men. They engaged them at 7d. per hour. The result is that these men whom the defenders engage at a fixed sum obtain a profit or suffer loss according as things turn out, and that, so far as we see, there is no contract of employment between the defenders and the men whom these men engage.

¹ Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1.

² *Brown v. Butterley Coal Co.*, 1885, 53 L. T. Rep. 954; *Morrison v. Baird*, Dec. 2, 1882, 10 R. 271; *Charles v. Taylor*, 1878, 3 L. R., C. P. D. 492.

³ *Millward v. Midland Railway Co.*, 1884, L. R., 14 Q. B. D. 68.

⁴ *Robertson v. Russell*, Feb. 6, 1885, 12 R. 634; *Nicolson v. M'Andrew*, July 7, 1888, 15 R. 854; *Stephen v. Thurso Police Commissioners*, March 3, 1876, 3 R. 535; *Flynn v. M'Gaw*, Feb. 21, 1891, 18 R. 555; *M'Coll v. Black and Eadie*, Feb. 6, 1891, 18 R. 507.

That this accident occurred through Flannigan's fault there is no doubt. No. 158.
 But did Flannigan and the pursuer stand in such a relation to the defenders
 that they are responsible to him for Flannigan's fault? I answer that question June 17, 1892.
 in the negative. I hold that the pursuer was not the defenders' servant, and Sweeney v.
 further that Flannigan was in the position of a contractor, and that the defend- Duncan & Co.,
 ers are not responsible for what he did. It is true that the defenders had a Limited.
 right to oversee his work, and find fault, if need be, with it. But that was only
 the right which any man getting work done for him has to object to the work
 done. They did not exercise control upon the mode in which it was done.
 Flannigan and his men were entitled to take the mode they chose, and the
 defenders were entitled to find fault, not with the mode of working, but with
 the work.

LORD YOUNG.—I have been looking at the judgment of Mr Justice Brett in the
 case of *Charles*, and have been struck with the passage,—“It is not for us sitting
 as Judges to criticise the law, but we must sometimes look out for the prin-
 ciples upon which it is founded. . . . I shall now enunciate one principle relat-
 ing to the question. I do not say there may not be more. It is this,—when the
 two servants are servants of the same master, and where the service of each will
 bring them so far to work in the same place and at the same time that the negli-
 gence of one in what he is doing as part of the work which he is bound to do
 may injure the other whilst doing the work which he is bound to do, the master
 is not liable to the one servant for the negligence of the other.” The case was
 put by Mr Rhind upon the Act. Its application requires the relation of
 employer and employed. The workman is in certain cases to have “the same
 right” as if he had not been a workman in the service of the employer. It was
 passed to alleviate certain hardships in the law. We had applied to these cases
 the maxim *respondet superior*. But the House of Lords decided that that
 maxim did not apply to such cases—that (while the masters could always con-
 tract as they pleased) the implied contract was that the master should not be
 liable for such risks of the act of a fellow-servant, and that the servant took the
 risk himself. The Act was to remedy that rule. The particular part of it that
 here is to be considered is subsection (3) of section 1. It applies to the case of a
 master putting one servant in authority so that another is bound to obey him.
 In that case the master is made responsible if the servant's injury has resulted
 from his obeying a negligent order. The pursuer puts it thus in his evidence,—
 “Flannigan was the gaffer of the squad. I was one of the squad and bound to
 obey him, and he brought and suffered the squad to use the link which gave
 way.” The pursuer further says Flannigan was his employer “solely.” That
 Flannigan was in fault, there is no doubt. He is responsible, but I suppose to
 proceed against him would be of no use. Why are the defenders responsible?
 The pursuer says,—Because they put Flannigan over him as foreman, and he,
 the pursuer, was bound to obey him. But I think the defenders did not so
 put Flannigan over him. That failing, all fails. The pursuer may have been
 bound to obey him by his own contract, but if he was not bound to obey him
 by a contract with the defenders, the action fails.

As to the question whether subsection (3) contemplates a particular order, it
 is unnecessary to give any decision. I have seen nothing to induce me to alter
 the view I expressed in the two cases of *Flynn* and *McColl*.

LORD RUTHERFURD CLARK.—It is clear that Flannigan was in fault. But I

No. 158. think that there is no evidence that Flannigan was put over the pursuer with the authority of the defenders.

June 17, 1892.

Sweeney v.
Duncan & Co.,
Limited.

LORD TRAYNER.—I agree. I am ready to assume that both Flannigan and the pursuer were in defenders' employment. But it is not proved that Flannigan was put by the defenders in the position of one having the authority of the defenders to give orders which the pursuer was bound to obey. Therefore there is no responsibility.

THIS interlocutor was pronounced:—"Find in fact and in law in terms of the findings in fact and in law of the Sheriff-substitute in his interlocutor of 4th March 1892: Dismiss the appeal: Affirm the judgment of the Sheriff and the Sheriff-substitute appealed against."

W. OFFICER, S.S.C.—DRUMMOND & REID, W.S.—Agents.

No. 159. LORD PROVOST AND MAGISTRATES OF GLASGOW, Pursuers (Respondents).—
Lees—Craigie.

June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

CALEDONIAN RAILWAY COMPANY, Defenders (Appellants).—
D.-F. Balfour—C. J. Guthrie.

Arbitration—Reference of all differences as to provisions of certain sections of private Act—Jurisdiction—Glasgow Central Railway Act, 1888 (51 and 52 Vict. cap. cxciv.), secs. 39, 41.—By the Glasgow Central Railway Act, 1888 (sec. 39), a railway company were empowered temporarily to stop up certain streets for the purpose of the construction of the railway, and during such construction to "use and appropriate" any of the streets so stopped up, provided, *inter alia*, that they should not "at any one time be entitled to enclose, for the construction of the said railways and works and operations, a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide, with intervals of not less than 200 yards between each such enclosure, within which intervals no enclosure shall be placed (except with consent of the corporation . . .)."

Such consent was subsequently given to the effect of reducing the intervals between the enclosures to 100 yards.

The Act further enacted (sec. 41) "that if the corporation and the company shall differ upon or with reference to any of the provisions of this and the two next preceding sections of this Act, every such difference shall, on the application of the company or of the corporation, be referred to the determination of an arbitrator."

In the course of the work the company claimed to be entitled to occupy portions of Argyle Street with their materials in addition to the parts occupied by their enclosures. The corporation maintained that this was outwith the Act, and also contrary to a local Police Act, which required all places so occupied to be enclosed.

Held (dub. Lord Justice-Clerk) that a difference had arisen which must be referred to the arbitrator, and that an application to the Courts of law for interdict against the company so occupying portions of the street beyond the 50 feet enclosures at 100 yards intervals was incompetent.

2d DIVISION.
Sheriff of
Invernesshire.

By the Glasgow Central Railway Act, 1888 (51 and 52 Vict. cap. cxciv.), the company thereby incorporated (which had a relative agreement with the Caledonian Railway Company, whereby that company were to work and manage the line), were empowered, *inter alia*, to construct certain railways, which were to pass in tunnel and otherwise beneath the streets of Glasgow, and, *inter alia*, beneath Argyle Street. Certain powers of temporarily breaking open or stopping up streets were given to the company.*

* Section 39 of the Act enacted,—“Subject to the provisions of this Act, the

"For the further protection" of the corporation, as a municipal corporation and as trustees and commissioners under various Acts, certain provisions were, by section 41 of the Act, to be binding upon the company, including the provisions as to opening up Argyle Street, and as to the appointment of an arbitrator.*

No. 159.

June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

In the course of the work the corporation, as Commissioners of Police, consented, on the application of the company, to the intervals between the enclosures on Argyle Street being reduced from 200 yards, as mentioned in section 39, to 100 yards.

Enclosures were made in Argyle Street for the purposes of the work. The company also occupied, without enclosing, certain portions of Argyle Street beyond these 50 feet enclosures.

In March 1892 the Lord Provost and Magistrates, as Commissioners of Police of the city, raised in the Sheriff Court at Glasgow a petition against the Caledonian Railway Company, praying the Court to interdict the defenders "from appropriating, using, enclosing, or occupying for the construction of railways and works and operations under the powers contained in the Glasgow Central Railway Act, 1888, a greater extent of the surface

company may, for the purpose of constructing the railways (whether the same be shewn on the deposited plans as to be constructed in tunnel or otherwise), temporarily cross, alter, break open, stop up, or divert any streets, . . . shewn on the deposited plans and described in the deposited book of reference, and may during such construction use and appropriate any of the streets . . . so stopped up or diverted, and may also, from time to time, break or open any such streets . . . when necessary for the protection or repair of any sewers, drains, or pipes under the same; provided . . . that except as in this Act otherwise provided, the company shall not at any one time be entitled to enclose, for the construction of the said railways and works and operations, a greater extent of the surface of Canning Street, Trongate, and Argyle Street, than 50 feet long by 17 feet wide, with intervals of not less than 200 yards between each such enclosure, within which intervals no enclosure shall be placed (except with the consent of the Corporation of Glasgow as hereinafter defined)."

Section 40 of the Act provides for the restoration of streets stopped up within a certain time.

* Section 41, subsec. B, enacted,—“The company shall not, except as after-mentioned, without the consent of the corporation, open or in any way interfere with the surface of . . . Argyle Street, or the pavements or footways thereof, for the purpose of the construction of the railways by this Act authorised, unless and until they shall to the reasonable satisfaction of the corporation provide for the free passage of the traffic thereon by a temporary carriageway and footpath equal in extent to the portion of the surface so interfered with; but for the purpose of providing such temporary carriageway they may open the surface of such streets and footpaths between the hours of 9 P.M. and 7 A.M. of the next lawful day. . . .”

Subsec. P enacted,—“If the corporation . . . and the company shall differ upon or with reference to any plans, elevations, sections, or other particulars, which under the provisions hereinbefore contained are to be delivered by the company to the corporation . . . or as to the mode of carrying out the same, or as to any other matter or thing arising out of the said plans, elevations, sections, or particulars, or any of the provisions of this and the two next preceding sections of this Act, every such difference shall, on the application of the company, or of the corporation . . . be referred to the determination of an arbitrator, to be mutually agreed upon by the corporation . . . and the company, before the construction of the railway and works, hereby authorised, is commenced, and failing such agreement, as may be appointed on the requisition of either of them by the Board of Trade, and such arbitrator shall have power to determine the matter in difference, and the costs of and incidental to the reference shall be paid by the company.”

No. 159. of Argyle Street, Glasgow, than 50 feet long by 17 feet wide, with intervals of not less than 100 yards between each enclosure, within which intervals no enclosures are by said Act to be placed except with the consent of the pursuers, unless in so far as any such appropriation, use, enclosure, or occupation is made in accordance with the provisions, and subject to the conditions set forth in section 38, and subsection B of section 41 of said Act, and is for the purpose of providing a temporary carriageway or in connection with sewers or drains; (2) to grant interim interdict; (3) to ordain the defenders, or anyone acting on their instructions or directions, instantly to cease from appropriating, using, occupying or enclosing for the construction of said railway and works and operations the extent of Argyle Street, Glasgow, they are at present occupying or enclosing beyond the 50 feet allowed by their Act."

June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

The pursuers stated, and the defenders admitted, that the defenders were occupying the surface of Argyle Street at various places to a greater extent than the 50 feet enclosures at intervals of 100 yards, and in particular that this had taken place at a certain part of the street on 8th March 1892, and had interfered with traffic.

The pursuers stated that they had given no authority for such occupation of the surface beyond the enclosures, and that the same was contrary to the Glasgow Police Act, 1866.*

The defenders averred;—"Explained that under section 39 of the Act of 1888 the defenders are not disabled from occupying any part of the said street beyond the extent of 50 feet by 17 feet, which they are under said section empowered to enclose. The provision referred to applies only to enclosures placed by the defenders in said street, and by section 41, subsection B, the defenders are empowered, for the purpose of executing the railways, to occupy any portion of said street equal in extent to the portion thereof not so occupied, but left free for the traffic; and for the purpose of providing temporary carriageway for the traffic on such portion of the street, the defenders are, by the said subsection, further empowered to open the surface of Argyle Street, between 9 P.M. and 7 A.M. of the next lawful day."

They stated that a certain amount of interference with traffic was unavoidable if they were to work at all by day, and that interdict in terms of the prayer would make it impossible to construct the railway. If the pursuers had any ground of complaint against the mode in which the defenders were carrying on their operations, the defenders contended that they were entitled and bound to bring such a question before the arbitrator, in accordance with the provisions of section 41, subsection P. of the said Act.

The pursuers pleaded;—(1) The defenders having illegally, and in

* By section 149, subsection 35, of the Glasgow Police Act, 1866, it is provided that "every person who makes any hole or opening, or who throws or lays down, or causes to be thrown or laid down, any building materials, or who slacks, sifts, or screens, or who causes to be slacked, sifted, or screened, any lime in any road, street, or court, except under the powers of any local Act of Parliament, or by the authority of the Dean of Guild, or with the written consent of the Master of Works, or in compliance with a notice given by him in the manner hereinafter provided, or who does not hoard or fence and light such hole or materials in the same way as the portion of a street used by the authority of the Dean of Guild during the erection or alteration of any building is directed by this Act to be hoarded, fenced, and lighted, or who suffers such hole or materials to remain a longer period than is necessary," shall, in respect thereof, be liable to a penalty.

violation of the provisions of their Act, appropriated, used, enclosed, or occupied Argyle Street, to a greater extent than by enclosures of 50 feet, should be interdicted from doing so, or continuing to do so. No. 159.

The defenders pleaded, *inter alia* :—(4) The question as to what extent of occupation of the streets affected by the defenders' operations is to be allowed to the defenders being a difference between the corporation and the defenders at present referred to, and depending before the arbitrator appointed in terms of said Act, the present action is incompetent. (5) All differences between the parties as to the proper mode of carrying out the defenders' operations having been committed to the said arbitrator, under the provisions of the said Act of Parliament, the present application is incompetent. June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

Interim interdict was granted.

Thereafter on 18th May 1892 the Sheriff-substitute (Spens) pronounced this interlocutor :—"Recalls the interim interdict formerly granted : Repels the whole defences of new ; and in lieu of the interim interdict formerly granted, grants interdict against the defenders, or anyone acting under their authority or directions, during any days of the week—Sundays excepted—between the hours of 7 A.M. and 9 P.M., appropriating or using any greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide at any one point of occupation, said points of occupation to be separated by intervals at least of 100 yards, excepting in so far as operations are authorised by section 38 of the Glasgow Central Railway Act, 1888, and are executed in terms of said section, for underpinning, as also such proper and necessary temporary carriageway and footpath as is contemplated and provided for in subsection B of section 41 of said Act. . . ."

The defenders appealed to the Court of Session, and argued ;—The question ought to be decided by the statutory arbitrator. It was the question whether the defenders could only occupy for any work what was enclosed in the 50 feet enclosures. The arbitrator had been appealed to, but had given no decision as yet. It was not disputed that the Sheriff as Judge ordinary could give the interim interdict till the arbitrator could hear parties on it. But for the purposes of the present question the Courts of law were excluded. It was a serious question for consideration by the arbitrator, and the case was quite distinguishable from those quoted by the pursuers. In these cases the Court took the view that where there was really no matter for consideration of the arbiter, one party could not say that the Courts of law were ousted by a professed appeal to the arbitrator. Such were the cases of *Mungle* and *Coghill*.¹

Argued for the pursuers ;—What the defenders wished was to induce the Court to send the case to the arbitrator in the hope of a decision that a thing plainly illegal might be permitted. There was really no question for the arbitrator. There was no ambiguity about section 39. The defenders were to have 50 feet of enclosure and could not occupy more, even if they did not enclose it. Besides the Police Act required all such places as the defenders wished to occupy with unenclosed heaps of material and works to be fenced. It was not the construction of section 39 of the Act 1888 that was referred to the arbitrator, but questions arising out of the section.¹

¹ *Authorities cited*.—*Mungle v. Young*, June 28, 1872, 10 Macph. 901, 44 Scot. Jur. 499 ; *Mackay v. Parochial Board of Barry*, June 22, 1883, 10 R. 1046 ; *Caledonian Railway Co., v. Greenock and Wemyss Bay Railway Co.*, June 28, 1872, 10 Macph. 892, 44 Scot. Jur. 503, affd. March 30, 1874, 1 R. (H. L.) 8 ; *Parochial Board of Greenock v. Coghill*, March 5, 1878, 5 R. 732 ; *Lockerby v. City of Glasgow Improvement Trustees*, July 16, 1872, 10 Macph. 971.

No. 159. At advising,—

June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

LORD YOUNG.—The parties are both public bodies. The one, the railway company, is engaged in the construction of a railway beneath the streets of Glasgow, which the Legislature has pronounced to be for the local and public advantage. The Commissioners of Police, on the other hand, maintain that the railway company are by their operations interfering with the traffic on the streets of Glasgow to the injury of the public interests with which they are charged.

The question therefore between the parties is one regarding the operations with which the company are proceeding as exhibited on the plans and details which they have given in under their statute. The question arises upon these and upon the Glasgow Central Railway Act, 1888. In the petition the Sheriff is prayed to interdict the defenders “from appropriating, using, enclosing, or occupying for the construction of railways and works and operations under the powers contained in the Glasgow Central Railway Act, 1888, a greater extent of the surface of Argyle Street, Glasgow, than 50 feet long by 17 feet wide, with intervals of not less than 100 yards between each enclosure, within which intervals no enclosures are by said Act to be placed except with the consent of the pursuers, unless in so far as any such appropriation, use, enclosure, or occupation is made in accordance with the provisions, and subject to the conditions set forth in section 38 and subsection B of section 41 of said Act, and is for the purpose of providing a temporary carriageway or in connection with sewers or drains.” The material pleas stated in the Sheriff Court were the 4th and 5th pleas for the appellants, which are as follow:—“(4) The question as to what extent of occupation of the streets affected by the defenders’ operations is to be allowed to the defenders, being a difference between the corporation and the defenders at present referred to, and depending before the arbitrator appointed in terms of said Act, the present action is incompetent. (5) All differences between the parties as to the proper mode of carrying out the defenders’ operations having been committed to the said arbitrator, under the provisions of the said Act of Parliament, the present application is incompetent. . . .” We are now to dispose of these pleas. I understand and appreciate the position of the Police Commissioners upon the question on the merits, and I may also observe that it is obvious that the operations in question would be illegal both at common law and according to the local Police Act. Now, section 39 of the Glasgow Central Railway Act enacts,—“Subject to the provisions of this Act, the company may, for the purpose of constructing the railways (whether the same be shewn on the deposited plans as to be constructed in tunnel or otherwise), temporarily cross, alter, break open, stop up, or divert any streets . . . shewn on the deposited plans and described in the deposited book of reference, and may during such construction use and appropriate any of the streets . . . so stopped up or diverted, and may also, from time to time, break or open any such streets . . . when necessary for the protection or repair of any sewers, drains, or pipes under the same.” It is said by the Sheriff, and conceded by the respondents, that if the proviso stopped there there would be no question as to the statutory right to do what is proposed, subject only to the statutory check of the arbiter to the extent to which he might think it necessary to apply it. But there is a proviso with reference to Argyle Street as follows:—“That except as in this Act otherwise provided,

the company shall not at any one time be entitled to enclose, for the construction of the said railways and works and operations, a greater extent of the surface of Canning Street, Trongate, and Argyle Street, than 50 feet long by 17 feet wide, with intervals of not less than 200 yards between each such enclosure, within which intervals no enclosure shall be placed (except with the consent of the Corporation of Glasgow as hereinafter defined)." The dispute between the parties is whether this proviso containing a limitation as to Argyle Street is confined to enclosing part of the street or extends to any use and occupation of the street. The railway company say that it is confined to enclosing beyond a certain extent, but that using and occupying otherwise is not prohibited by it, and that their works could not be executed on any other footing, while the Police Commissioners say that according to good sense, and according to the Glasgow Police Act, there can be no occupation without enclosing the street for the public safety, and that, therefore, the limitation really applies to any occupation for the purpose of making the railway, and that the occupation is only the more objectionable if the rules requiring interferences with the street to be fenced for the public interest be not observed. That is the dispute.

No. 159.
June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

Then on the application being made to the Sheriff for interdict, the railway company say that this matter arises out of their proposed works and out of the provisions of the Act under which they are alone permitted to execute them, and that the Legislature has provided a special tribunal for the decision of such a controversy. We are to decide whether it has done so or not.

Now, the provisions of the Act upon which that depends are to be found in section 41, subsection P. That clause enacts—[His Lordship read the section quoted, *supra*, p. 875, note.]

Now, the railway company point to this tribunal—an arbitrator to be so appointed—as the proper tribunal to decide the question between them and the pursuers, and say that if this is so, this application for interdict is incompetent. Has a difference then arisen upon the matters referred to in the section? Is it possible to represent the dispute which has arisen as not of the character to which the words of the clause apply? If not, then the statute law of the matter is that the Sheriff had no jurisdiction and we have no jurisdiction, and the arbitrator alone has it.

But, then, it is said that the meaning of the statute is too clear for argument. That is a familiar expression in such discussions. "The meaning of the statute is so and so, and no tribunal in its senses can say anything else." What is the conclusion from that? It is that the Sheriff Court and not the statutory arbitrator is the proper tribunal. I cannot accept that conclusion. The expediency of the statutory arbitration is certainly manifest. It is impossible to construct a railway through the busy streets of a great city without disturbance and serious obstruction to the traffic, and without the public suffering from that. But the Legislature consider that before giving the statutory authority, and it is when the public interest justifies that inconvenience for some important public end that the authority is given. Here the Legislature was satisfied that local and public interests required this Act to be passed. But then the Legislature imposed a check, in order that the power conferred by the statute should not be abused. The statutory powers are not to be employed beyond the extent to which they are necessary to be used. I think that if it had been proposed to the Legislature that this check was to rest with the Sheriff-substitute, the Sheriff, the Court of Session, and the House of Lords, the Legislature would

No. 159. have rejected the proposal as inapplicable. What, then, is the meaning of the language of the statute? The language used is necessarily general. I think it is intended that if the provisions of the statute are being violated, the arbitrator appointed under it is to restrain the violation, if they are being used excessively to limit the use. He is to see that in the making of the railway the company keeps within—and it may be far within, if there is no need for exercising the powers in full—these powers, so that this railway may be constructed with least public detriment.

June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

I desire, for my part, to avoid indicating an opinion upon the meaning of the statute. I do so, because the Legislature has deprived us of jurisdiction in that matter, and given it to another tribunal.

The Sheriff said that he was of opinion, and he understood the parties to admit, that at all events he had jurisdiction to maintain the *status quo*. Now, I think he is quite right there. I am not to determine the matter now, but I think it quite likely that in many cases the Sheriff may have jurisdiction to maintain the *status quo*, and even to grant an absolute and permanent interdict, and that this Court could do so respecting either the operations of the railway company, or any interference with these operations. For example, if the arbitrator condemned what they were doing, or proposing to do, as outwith their statutory powers, or as an unnecessary interference with the public use of the streets, and if notwithstanding they insisted in proceeding with them after that, I think it probably is the true view that the Sheriff or this Court might have to be applied to for an interdict to stop them. On the other hand, if the arbitrator determined that certain operations were within their power, or proper in the construction of the railways, and any parties, even public bodies, obstructed them in carrying out these operations, I think the railway company might apply to the Sheriff or to this Court to interdict such interference or obstruction. But I think it is only in such circumstances that a resort can be had to any other than the statutory tribunal. Now, it is not suggested here that the railway company have done or propose to do anything which the arbitrator is of opinion is outwith their statutory powers, or an unnecessary exercise of their statutory powers for the construction of their line; and as they have done nothing which we can pronounce illegal, I do not see that there was any legitimate occasion for the interdict. The Legislature certainly never contemplated that the railway should be constructed under an interdict by the Sheriff of Glasgow against doing anything until the arbitrator had approved.

I am prepared to sustain the 4th and 5th pleas in law for the railway company, and dismiss the application.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The main question raised in this case depends upon the construction to be put on section 39 of the Act of Parliament under which the appellants are carrying on the operations complained of. That question is one *prima facie* for the determination of a Court of law, if the Act of Parliament I have referred to does not otherwise provide for its determination. In my opinion the Act does otherwise provide. It appears to me that the question now raised is one of the questions or differences which by section 41 (subsection P) are referred to the determination of the arbiter mutually chosen by the parties or appointed by the Board of Trade, for it is a difference with regard to the

carrying out of certain plans proposed by the appellants which, on the one hand, are said to be, and on the other hand, are said not to be within the power conferred on the appellants by section 39 of their Act. Whether the difference between the parties is one relating to the carrying out of certain plans, or is one relating to the extent of the powers conferred by section 39, or is a question into which both of these elements may enter, I am of opinion that it falls within the provisions of the Act relative to arbitration, and that it must be determined, not by the Court, but by the arbiter chosen by the parties. With regard to the point Lord Young last dealt with, I think no interdict should be granted until the arbiter has decided that the railway company are wrong.

No. 159.
June 17, 1892.
Magistrates of
Glasgow v.
Caledonian
Railway Co.

LORD JUSTICE-CLERK.—I have felt great doubt upon this question, and but that your Lordships regard it as clear I should have felt it necessary to dissent. I quite concur in the general observations of Lord Young on the great importance of having a convenient Court to deal with the difficulties which must arise in the construction of a railway which is to pass beneath the streets of a great city. I agree also in thinking that the words of the statute creating that Court are very broad. But my difficulty is that the mere fact that they are very wide words, including differences “upon or with reference to any plans, elevations, sections, or other particulars,” to be delivered by the company to the Corporation, “or as to the mode of carrying out the same, or as to any other matter or thing arising out of the said plans, elevations, sections, or particulars, or any of the provisions of this or the two next preceding sections of this Act,” cannot make them cover anything that the railway company may propose to do. The intention clearly is to refer only such matters as may reasonably be capable of being maintained to be within the Act. Now, as to this case, the Act gives the company power to enclose part of the surface of Argyle Street, but not to a greater extent than 50 feet by 17, and with intervals of not less than 200 yards, except with consent of the Corporation. That consent was obtained on the representation, it is said, that the works could not be carried on without it, and now the spaces which are being enclosed are only 100 yards apart. But the obstruction to the public does not depend on the enclosure. It is the same if, owing to the operations of the company, the roadway cannot be used by reason of its being occupied though not enclosed. The Corporation point out that according to the police law of the city of Glasgow there can be no occupation of the street unless upon the condition that the space occupied is enclosed. There is nothing in this private Act to indicate that that law is altered. If, obeying that police law of Glasgow, the company were to enclose spaces of more than 50 feet by 17, they would at once be acting contrary to their statute. They avoid that by saying “we do not enclose, we only occupy.” But, as I have pointed out, the injury is not the enclosing but the occupying, so that the public use is prevented. I am inclined to think that this answer is a mockery, and I confess I do not see the defence of the company for their conduct in not enclosing what they occupy. There is nothing in their Act about occupying without enclosing.

Therefore, while I acknowledge that there is great reason in the public interest that where the streets of a city are to be broken up there should be a rapid and practical way of getting rid of difficulties, I think there is another side to that. If this occupation is outside the Act altogether the Corporation may be left without redress. It seems to me very unlikely that their consent to enclos-

No. 159. ing being done in spaces of less than 200 yards apart would have been given if it had been known that a right to occupy other portions of the surface was to be claimed as well.

June 17, 1892. Magistrates of Glasgow v. Caledonian Railway Co.

These are my difficulties about the judgment proposed, but I shall not formally dissent.

LORD YOUNG.—I wish to add that I desire to avoid any expression of opinion on the dispute between the parties. The dispute goes to the arbiter because the Legislature has appointed that as the proper tribunal. I desire to give no opinion, because we have no jurisdiction, the Legislature having given it to him.

LORD JUSTICE-CLERK.—May I also add that my difficulty was whether the question was not outside the Act. I go into the facts only to indicate my difficulty about that.

THIS interlocutor was pronounced:—"Sustain the appeal and recall the interlocutors appealed against: Sustain the fourth and fifth pleas in law for the appellants (respondents in the Sheriff Court): Dismiss the action."

CAMPBELL & SMITH, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

No. 160.

ANDREW FERRIER, Complainer.—*D.-F. Balfour—Rankine.*
ASSESSOR FOR EDINBURGH, Respondent.—*Cheyne—Boyd.*

June 17, 1892.*
 Ferrier v.
 Assessor for
 Edinburgh.

Valuation Acts—Complaint by third party—Stated case—Competency—Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), secs. 8, 9, and 13—Valuation of Lands (Scotland) Act Amendment Act, 1857 (20 and 21 Vict. c. 56), sec. 2—Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), secs. 6, 7, 8, and 9.—The Lands Valuation Acts entitle persons dissatisfied with an assessor's valuation of subjects held by themselves "to appeal," and persons dissatisfied with an assessor's valuation of subjects held by others "to complain" to the commissioners or magistrates "sitting as an appeal Court," and give right to persons "entitled to appeal" to the commissioners or magistrates to require them to state a case for the opinion of her Majesty's Judges. *Held* that the right to require a case to be stated is given to third parties complaining as well as to those objecting to the valuation of their own property.

Lands Valuation Appeal Court.
 Ld. Wellwood.
 Ld. Kyllachy.

Case 138.

At a meeting of the Magistrates of Edinburgh in September 1891 for the purpose of hearing and disposing of appeals and complaints against the valuations made by the Assessor for 1891-1892 under the Valuation of Lands (Scotland) Acts, Andrew Ferrier, inspector of St Cuthbert's Combination, complained that the valuations put by the Assessor on certain public parks belonging to the Magistrates and Town-Council of the city of Edinburgh, situated within the parish of St Cuthbert's, were inadequate.

The magistrates having issued their determination, Ferrier craved case. The Assessor objected to a case being granted, on the ground that the decision of the magistrates was final under the Lands Valuation Acts.

The magistrates granted the case craved, and, with the acquiescence of the complainer, reserved to the Assessor the right to state his objection as a preliminary plea before her Majesty's Judges.

The question depended upon a construction of the enactments quoted *infra*.^{*} No. 160.

June 17, 1892.

Ferrier v.
Assessor for
Edinburgh.

* The Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. c. 91), sec. 8, enacts,—“The Commissioners of Supply of every county, and the magistrates of every burgh, shall annually . . . hold a Court for hearing appeals against valuations made by such assessors as aforesaid under this Act . . . and at such Court . . . all such appeals and complaints under this Act shall be disposed of; and such Courts or adjourned Courts of appeal shall be held in such and as many places within such county and burgh respectively as such commissioners and magistrates respectively shall appoint; and the deliverances of such commissioners and magistrates respectively upon such appeals and complaints shall be final and conclusive, and not subject to review.”

Section 9.—“All persons whose names shall have been entered by the assessors in the Valuation-roll . . . shall be entitled to appeal to the said commissioners or magistrates . . . with reference to such entry. . . .”

Section 13.—“If any complaint shall be made to the Commissioners of Supply . . . or to the magistrates . . . sitting as an appeal Court as above provided, to the effect that the yearly rent or value of any lands or heritages within such county or burgh respectively has been stated by the assessor in the Valuation-roll . . . at other than the just and true amount thereof, such Commissioners of Supply and magistrates respectively may, if they think fit, make inquiry into such complaint . . . and may thereupon alter the amount of the yearly rent or value of such lands and heritages in the Valuation-roll of such county or burgh, . . . and the Commissioners of Supply and magistrates respectively, in the conduct of such inquiries as aforesaid, shall have all the same powers and authorities as are by this Act conferred upon them with reference to appeals. . . .”

The Valuation of Lands (Scotland) Act Amendment Act, 1857 (20 and 21 Vict. c. 56), which enabled the Commissioners of Supply to appoint officers of Inland Revenue to be assessors, enacts, sec. 2,—“All persons entitled to appeal against valuations made by the assessors appointed under the said Act (1854) shall also be entitled to appeal, under and subject to the like rules and regulations, against the valuations to be made by such officer or officers of Inland Revenue appointed as aforesaid under this Act; and if upon any such appeal any officer of Inland Revenue, or the person appealing, shall apprehend the determination of the said commissioners or magistrates hearing such appeal to be contrary to the true intent of the said Act, . . . it shall be lawful for such officer or appellant respectively to require the said commissioners or magistrates to state specially and to sign the case upon which the question arose, together with the determination thereupon, and to transmit such case to the Commissioners of Inland Revenue to the end that the same may be submitted to the senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Causes in the Court of Session for their opinion thereon. . . .” The Act did not expressly refer to persons having a right of complaint.

The Valuation of Lands (Scotland) Amendment Act, 1879 (42 and 43 Vict. c. 42), sec. 6, enacts,—“It shall be lawful for any person interested to complain to the Commissioners of Supply of any county or to the magistrates of any burgh under the Valuation of Lands (Scotland) Acts to the effect that any particular set forth in any entry in the Valuation-roll for such county or burgh as the case may be, other than the yearly rent and value of the lands and heritages to which such entry refers, has been set forth erroneously therein; and such complaint shall be made and disposed of in the same manner and subject to the same conditions and provisions (except in regard to the right of requiring a case to be stated) in and under which complaints that such yearly rent or value has been stated by the assessor in such Valuation-roll at other than the just and true amount thereof may be made and disposed of.” Section 7 gives to persons “entitled to appeal against valuations made by assessors under the Valuation of Land (Scotland) Acts who are not officers of Inland Revenue” a right to have a case stated for the opinion of the Valuation Appeal Court. Section 8

No. 160.

June 17, 1892.
Ferrier v.
Assessor for
Edinburgh.

Argued for the respondent;—This was not the case of an appellant objecting to the valuation of his own property under section 9 of the Act of 1854, but the case of a complainer objecting under section 13 of that Act to the valuation of the property of the magistrates and town-council. A complaint could not found an appeal to the Valuation Judges. Section 8 of the Act of 1854 provided that the magistrates might hold a Court for appeals and complaints, which should be final. By the Act of 1857 the magistrates were empowered to adopt as assessors officers of Inland Revenue, and by section 2 those entitled to appeal under the Act of 1854 were entitled to appeal against assessors who were officers of Inland Revenue, and either appellants or assessors might demand a case. Thus cases were demandable against valuations by assessors who were officers of Inland Revenue. But no cases were demandable against valuations by assessors appointed under the Act of 1854. Accordingly, no case was demandable by the complainer. There was no other provision in the Valuation Acts which gave a right to demand a case. The Act of 1879 provided, by section 6, that anyone interested might complain regarding any entry other than value, and such complaints should be disposed of by the magistrates as in complaints regarding value, "except as to the right of requiring a case." The Act appeared to assume that a right to demand a case had been given to a complainer, but that was not the case. No such power had ever been given him. That was Lord Lee's view in *Rule v. Lord Abinger*,¹ and was the reasonable view. A complainer was concerned with the property of a third party, and it was enough if he got the judgment of the Assessor and of the magistrates upon it. An appellant was concerned with his own property, and it was reasonable that larger facilities should be given to him. The Legislature might have intended to give a complainer a right to demand a case, but it had not in fact done so.

The complainer's argument sufficiently appears in the opinion of Lord Wellwood. He further referred to cases in which complaints had previously been entertained without objection.²

At advising,—

LORD WELLWOOD.—I think this appeal is competent. The question we have to determine is, whether the word "appeal" used in the Act of 1879 includes "complaint." If it does so, there is no doubt that this appeal is good. The Act of 1879 undoubtedly proceeds upon the view that the word "appeal" in the Act of 1857 includes "complaint," because the 8th and 9th sections provide machinery for recording evidence and stating cases not only in appeals but also in complaints, and we should require a very strong argument to lead us to put a different construction upon these words from that which the Legislature has seen fit to do. I think the confusion has arisen from the word "appeal" being used somewhat loosely both in the Act of 1854 and in the Act of 1857. The 9th section of the Act of 1854 provides for appeals by persons whose property

provides that "either party to an appeal or complaint" to commissioners or magistrates "may at the hearing of such appeal or complaint require the evidence to be taken in shorthand writing at his expense." Section 9 provides that "in stating any case" the commissioners or magistrates "shall, in addition to the particulars now required to be stated, set forth the grounds of appeal or complaint," &c.

¹ *Rule v. Lord Abinger*, June 25, 1883, 10 R. 502, per Lord Lee, 508.

² *Burgh of Linlithgow*, March 7, 1878, 9 R. 1236; *Blantyre Parochial Board v. Assessor for Lanarkshire*, March 15, 1883, 10 R. 773.

is affected, and section 13 for complaints by third parties; and both these parties are to appeal to the magistrates in the same way, and their appeals or complaints are to be heard and determined by the commissioners or magistrates sitting as an Appeal Court. In the 8th section we find that the words are used interchangeably; sometimes the word "complaint" is added to the word "appeal," sometimes it is dropped. It is apparent that the word "appeal" is used loosely in the statute, and sometimes as including complaints as well as appeals.

No. 160.
June 17, 1892.
Ferrier v. Assessor for Edinburgh.

The main object of the Act of 1857 was to enable the commissioners to appoint officers of Inland Revenue to be assessors. The second section gives directions as to the rights of parties to appeal to the commissioners against the determination of such assessors, and also gives a right of appeal to this Court against the determination of the commissioners. If the present respondent's contention were correct, the result would be curious. There would be no power under the Act of 1857 for third parties to complain to the commissioners against the valuation made by the assessor if an officer of Inland Revenue; but there would be a power to appeal to this Court against a decision of the commissioners upon a valuation made by an officer of Inland Revenue. That result is so anomalous that it leads me to the conclusion that the word "appeal" in the Act of 1857 is used to include both complaint and appeal.

When we come to consider the Act of 1879, there can, I think, be no doubt that the framers of that Act were under the impression that the word "appeal" did include "complaint." The 6th section clearly recognises the right of a complainant to ask the commissioners to state a case to this Court. The 8th and 9th sections proceed upon the same assumption.

Upon a review and consideration of the three statutes, I have come to the conclusion that that word "appeal" must be held to include "complaint," and therefore that this appeal is competent.

LORD KYLLACHY concurred.

THE COURT found that the appeal was competent.

SMITH & MASON, S.S.C.—W. WHITE MILLAR, S.S.C.—Agents.

NATIONAL BANK OF SCOTLAND, Pursuers (Reclaimers).—*Jameson—Maconochie.*

No. 161.

JOHN CAMPBELL, Defender (Respondent).—*Dickson—W. Campbell.*

June 17, 1892.*
National Bank of Scotland, Limited, v. Campbell.

Rei interventus—Improbative writ—Cautioner.—A bank agreed to make advances to A. on his obtaining B's guarantee. A formal letter of guarantee, ending with the words "In witness whereof," was then prepared by the bank and handed to A for execution by B. A obtained B's signature and afterwards got two persons to sign as witnesses who had not seen B subscribe nor heard him acknowledge his subscription. A returned the document to the bank with the names and designations of the witnesses, the testing-clause was filled up by the bank, and the bank made an advance to A upon the faith of the guarantee.

In an action by the bank upon the letter of guarantee against B the defender pleaded that he was not bound, as the deed was not tested. The above facts were admitted or proved.

Held that the defender having signed the deed and delivered it to A, who was in *hac re* the bank's agent, he had delivered it to the bank as a guarantee

No. 161. for advances to be made to A, and that the bank having made advances upon the faith of it, the defender's imperfect obligation had been validated by *rei interventus*.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

1ST DIVISION.
Ld. Kyllachy.

Writ—*Cautionary obligation*.—*Question*, whether a letter of guarantee is a writing in *re mercatoria*.

In October 1891 the National Bank of Scotland, Limited, raised an action against John Campbell, shipmaster, Oban, for payment of £200, advances made by the bank to M'Dougall & M'Coll, builders, Oban, upon a letter of guarantee dated 28th February 1888, alleged to have been granted by the defender to the bank. The pursuers averred that they had made the advances on the faith of the letter. The letter of guarantee produced was *ex facie* probative,* but the pursuers admitted that the subscribing witnesses did not see the granter adhibit his signature or hear him acknowledge it.

The defender denied having signed the guarantee, and pleaded, *inter alia*;—2. *Esto* that the defender signed the said guarantee, it is not binding upon him, in respect it is neither holograph nor tested, and was not followed by *rei interventus*.

The pursuers pleaded;—2. The said guarantee is valid and effectual, in respect (1) it was granted in *re mercatoria*; (2) it was followed by *rei interventus*.

Proof was led. The greater portion of it related to the defender's averment that his signature was forged. This averment was held both by the Lord Ordinary and the Court to be negatived, the Lord Ordinary and the Court giving chief weight to the evidence afforded by a *comparatio litterarum*.

It appeared that the letter of guarantee was prepared at the head office of the bank in Edinburgh. It was then sent to their agent in Oban, who handed it to Mr Angus M'Dougall, of Messrs M'Dougall & M'Coll, to obtain the signature of the cautioner. M'Dougall deponed that he then got Campbell to sign it, and afterwards got his own son and one of his joiners to sign as witnesses, but they neither saw Campbell sign nor heard him acknowledge his subscription. M'Dougall then sent the document to Messrs Gor-

* The letter of guarantee was in the following terms. The parts printed in italics were in writing, the remainder printed:—"To the National Bank of Scotland, Limited.—You having agreed to give *M'Dougall & M'Coll, builders, Oban*, certain banking accommodation, I, *John Campbell, shipmaster, Park Cottage, Oban*, guarantee you against any ultimate loss to an extent not exceeding *Two hundred pounds sterling*, arising on *their* banking transactions with you, whether in respect of advances in money, discounting bills, acceptances for or on account of *them*, or in any other manner whatsoever, you being always entitled to make calls on *me*, from time to time, in respect of such loss, for such sums as you may fix: And I further declare that you may at any time or times, at your discretion, grant to the said *M'Dougall & M'Coll*, or to any drawers, acceptors, or endorsers of bills of exchange or promissory-notes received by you from *them* on which *they* may be liable to you, any time or other indulgence, and compound with *them*, or such drawers, acceptors, or endorsers, without discharging or satisfying my liability.

"This guarantee shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations of the said *M'Dougall & M'Coll*, declaring that this guarantee shall subsist and be binding upon *me*, notwithstanding any change in the constitution or partners of the said firm of *M'Dougall & M'Coll*: In witness whereof these presents, in so far as not printed, written by John Kinmont, law clerk in the head office of the National Bank of Scotland, Limited, in Edinburgh, are subscribed by me at Oban on the 28th day of February 1888, before these witnesses, John James M'Dougall, clerk, *Carrick House, Oban*, and Alexander Macpherson, joiner, 25 Shore Street, Oban."

don, Pringle, & Dallas, W.S., Edinburgh, the agents for his firm, who transmitted it to the bank with the schedule containing information for filling up the testing-clause. The testing-clause was then filled up in the head office of the bank, and an advance of £200 was thereafter made to M'Dougall & M'Coll on the faith of it. The defender deponed that in February 1887 (a year before the granting of the guarantee in question) he had been asked to become cautioner for M'Dougall & M'Coll, along with a Mr M'Nab, for £400, and that on signing that guarantee in the bank office he added to his signature the words "for two hundred pounds"; that Mr M'Lennan, the bank teller, said he had spoiled the document. He denied having signed any other guarantee. He admitted receiving a letter from M'Dougall upon 4th January 1891 informing him that the witnesses to his signature had neither seen him sign nor heard him acknowledge his subscription, and suggesting that he might escape liability on that ground.

The Lord Ordinary (Kyllachy), on 6th February 1892, assoilzied the defender.*

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

* "OPINION.—In this case the National Bank of Scotland seek to enforce against the defender, who is a shipmaster in Oban, an alleged letter of guarantee for the sum of £200, said to have been granted by the defender in security of an advance made at the bank's Oban branch to the late firm of Macdougall & M'Coll, builders in Oban. The guarantee bears to be signed by the defender and two witnesses, and bears a testing-clause in the usual form; and it is not disputed—at least I think it is sufficiently proved—that the bank on receipt and on the faith of the guarantee made to Macdougall & M'Coll the advance for repayment of which they now sue.

"The defender, however, denies the genuineness of his signature, and it is admitted that the instrumentary witnesses neither saw him sign nor heard him acknowledge his subscription. The questions which I have in these circumstances to decide are (1) whether the signature is genuine; and (2) whether, assuming it to be so, the professedly tested, but really untested guarantee, can be set up as a binding document either (1) as being a writ *in re mercatoria*, or (2) as followed and validated by *rei interventus*.

"I confess I should have had doubt as to the genuineness of the defender's signature if I had simply to weigh his (the defender's) evidence against that of the principal debtor Macdougall, who swears that the guarantee was signed in his presence. The defender, although his evidence was somewhat loose, and became at times somewhat confused, did not give me the impression of a person who was wilfully speaking untruth. And, on the other hand, the witness Macdougall is not, to say the least, a witness with a quite clean record. Because, apart from the irregularity to which he confesses (and which I am disposed to attribute to ignorance) of calling in the witnesses and obtaining their signatures outwith the presence of the defender, he quite frankly admitted that, at a period not very remote from that of the guarantee, he had been guilty of conduct towards the defender which shewed that in money matters he was, to say the least, not over scrupulous. But, as it happens, I do not require to elect as between the respective testimonies of these two witnesses. What is conclusive to my mind is the real evidence afforded by the signature itself, compared, as we have had the means of comparing it, with the admittedly genuine signatures of the defender. I have not found it possible to doubt; upon the *comparatio litterarum*, that the signature is the defender's genuine signature. It is not merely that there is resemblance. There is identity; and while forgery is always of course possible, I have not been able to reconcile that view of the matter with the singular ease and freedom of the handwriting. I am also bound to say this, that while the witness Macdougall may be so far a discredited witness, he yet gave his evidence in a manner which impressed me favourably. He was quite candid about his misappropriation of the defender's funds, and, although apparently not alive to the gravity of his offence, he appeared to me, so far as I could judge, to be speaking the truth. Moreover, while acquitting

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

The pursuers reclaimed, and argued on the pleas other than that of forgery;—(1) A letter of guarantee, like that sued on, was a writ *in re*

the defender of wilful falsehood, I am not, I confess, altogether satisfied with the explanation which he gives of his attitude when first called upon by the bank for payment. It is true that he had a year before the date of the guarantee in question (*viz.*, in 1887) signed a similar guarantee which he was told by the bank accountant had been spoiled. And it is just possible that he may have supposed that this was the guarantee on which the bank were claiming. But I hardly think that such is the natural inference from his conduct. He had been told that the guarantee in question was useless, and he does not explain how he came to believe otherwise.

“If, therefore, there had been no other question in the case, I should on the whole have found for the pursuers. But the questions which remain are questions of law, and they have led me, after a good deal of difficulty, to a different conclusion.

“In the first place, I cannot hold that the guarantee here in question was *per se* a valid document as being a writ *in re mercatoria*. I do not say that a guarantee granted to a bank for future advances requires to be authenticated by the statutory solemnities. It may be true that such a writ is *in re mercatoria*, and is therefore privileged. That question seems still open. See the opinions (not the rubric) in *Johnston v. Grant*, 6 D. 875. But a writ, although *in re mercatoria*, and therefore privileged, may yet be invalid for want of the statutory solemnities. Such solemnities, though not required by law, may be prescribed by the parties, and if, being prescribed, they are imperfectly observed, there is *locus penitentiae*. A holograph deed need have no witnesses and no testing-clause, but if it professes to be a tested deed, and the witnesses do not sign, or (as here) sign irregularly, I suppose there is no doubt that the deed would be invalid. Similarly, as decided long ago in the case of *Nasmyth v. Hare*, July 7, 1821, 1 Shaw’s App. Ca. 65, although in Scotland sealing is not required, yet if the granter on the face of the deed prescribes sealing as a solemnity which he contemplates, the want of the seal is fatal. Now here I think it sufficiently appears that when this deed left the bank and was sent for signature it bore the words ‘In witness whereof,’ and had a space left for a testing-clause in the usual way. It was intended in short to be a tested deed, and that being so, I think I am bound to hold that, until executed in the manner contemplated, there was *locus penitentiae*.

“In the second place, however, this does not dispose of the question of *rei interventus*. For however informal the document, it cannot be doubted that it was capable of becoming obligatory if it was followed by an advance made on the faith of it, and that advance was made in the knowledge of the defender, or might reasonably have been contemplated by him as the result of his signing the guarantee, and leaving it in the hands of Macdougall. It is on this part of the case that I have had most difficulty. The question raised is a delicate one, and one on which there is little or no authority; although certainly the whole subject is canvassed and some valuable observations are to be found in the opinions in the case of *Johnston v. Grant*, to which I have before made reference.

“The conclusion, however, to which I have come is this—that one must deal with the matter not by drawing inferences, always more or less conjectural, as to the probable views, intentions, and state of mind of the defender, but by applying to the case, in the absence of direct evidence, recognised legal presumptions. I confess I think it is quite probable that the defender, when he signed the guarantee and left it in Macdougall’s hands, had no thought of the necessity of acknowledging his subscription before the witnesses and contemplated nothing else than what happened, *viz.*, the handing of the document with or without the witnesses’ signatures to the bank. But there is no evidence to that effect, and I think that that being so, the legal presumption is and must be that he knew what he was doing, and knew that until he acknowledged his subscription his execution of the deed was incomplete. And if that was so, the question is,

mercatoria, and it was therefore probative without the solemnities required by the Act 1681, cap. 5.¹ This was the question at issue in the case of *Johnston v. Grant*, where the majority of the Judges were in favour of that view. The 6th section of the Mercantile Law Amendment Act, 1856, which provided for the subscription by the granter, or someone authorised by him, of a letter of guarantee, clearly did not contemplate that the document should be tested. (2) But even although the document was improbable it had been validated by *rei interventus*, as the pursuers had advanced money upon the faith of it.² By handing it signed to M'Dougall, who was acting for the bank in getting it signed, the defender barred himself from objecting to the transaction being carried through under the guarantee. It was for no other purpose that the guarantee was given to M'Dougall, and the cautioner's knowledge that the transaction had been completed was not material.

Argued for the respondent;—(1) The pursuers came into Court admitting that this was not a probative writ. On them was the *onus* of proving that the respondent had signed the letter of guarantee, and they had not discharged it.³ The letter of guarantee, for which the bank always provided a form, was more of the nature of a formal document, requiring the solemnities provided by the Act 1681, cap. 5, than of a writing *in re mercatoria*, and the terms in which it was framed obviously shewed that there was no intention of its being completed without the addition of a testing-clause. The defender was entitled to rely upon the words "In witness whereof" as proof that the document would not be acted upon until it was formally completed.⁴ The provisions of the Mercantile Law Amendment Act, 1856, favoured this view.

Was he bound to contemplate, and can he be held to have contemplated what followed? In other words, can I assume against him that he foresaw and contemplated either (1) that Macdougall would without further authority deliver to the bank a deed incompletely executed, and which could not be completely executed without his (the defender's) further intervention, and that the bank would proceed to make advances on the faith of a deed thus on the face of it incomplete? or (2) that Macdougall would do what he did do, viz., call in witnesses and obtain their subscriptions, and hand the deed to the bank as completely executed, with a schedule for the testing-clause setting forth a complete execution. I do not think I can properly make either of those assumptions, and therefore I do not think I can properly hold that the defender authorised the delivery of the document to the bank, or authorised or contemplated the making of the advances which are said to constitute the *rei interventus* in the case.

"The case would have been different if the advances had been made with the defender's actual knowledge. It *might* have been different if he had personally handed the document to the bank in an incomplete condition. It would certainly have been different if he had himself handed the document to the bank in the condition in which it reached the bank through the hands of Macdougall. But as the facts stand, the question arises differently, and I must therefore on the whole case assoilzie the defender."

¹ *Thomson v. Gilkison*, March 1, 1831, 9 S. 520; *Johnston v. Grant*, Feb. 28, 1844, 6 D. 875, 16 Scot. Jur. 376; *Paterson v. Wright*, Jan. 31, 1810, F. C., *affd.* July 4, 1814, 6 Pat. App. 38; *Caledonian Banking Co. v. Kennedy's Trustees*, June 15, 1870, 8 Macph. 862, 42 Scot. Jur. 520.

² *Ballantyne v. Carter*, Jan. 21, 1842, 4 D. 419, 14 Scot. Jur. 173; *Bell's Comm.* (7th edn.) i. 346; *Erskine's Inst.* iii. 2, 3; *Church of England Fire and Life Assurance Co. v. Wink*, July 17, 1857, 19 D. 1079, 29 Scot. Jur. 486; *United Mutual Mining and General Assurance Co. v. Murray*, June 13, 1860, 22 D. 1185, 32 Scot. Jur. 540.

³ *Geddes v. Reid*, July 16, 1891, 18 R. 1186.

⁴ *Naamyth v. Hare*, July 7, 1821, 1 Shaw's App. Ca. 65.

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

Besides, no case had been cited in which a letter of guarantee like the present had been sustained as a mercantile document. In *Johnston v. Grant* an analysis of the opinions of the Judges who took part in the decision shewed that the Court was equally divided. Documents in *re mercatoria* were entitled to privilege because of the rapidity with which they were prepared and dealt with, but that reason did not apply here. There was further an obvious difference between the business of a banker and that of a dealer in goods. (2) The plea of *rei interventus* could not avail the pursuers here, as they were not entitled to make an advance upon anything short of the completed document. M'Dougall was the bank's agent to get it completed; he had failed to get this done in a legal manner, and the bank could not take advantage by his failure. They must therefore be the sufferers, and the Lord Ordinary's judgment was right.

At advising,—

LORD M'LAREN.—This is an action for cash advances made to the principal debtor, Macdougall, on an account said to be guaranteed by a cautionary obligation signed by the defender Campbell. The writing contains a testing-clause; but the evidence establishes the defence that the witnesses signed outwith the presence of Campbell, and without his signature being acknowledged as required by law.

The defender pleads that his signature is forged, and the first question for consideration is the truth of this defence.

The Lord Ordinary has come to the conclusion that the signature is genuine; and on such a question the greatest weight is due to the opinion of the Judge who tried the case. So far as the case depends on parole evidence, it is a question of the degree of credit to be attached to the testimony of Macdougall, who says that the writing was signed by the defender in his presence, and that of the defender, who denies having signed it. The Lord Ordinary accepts the statement of Macdougall as reliable, and that, as I have said, is a very important element in the case. But further, the Lord Ordinary has held that the signature in dispute is identical with authentic signatures of Campbell, which have been produced for comparison; and I believe that your Lordships have come to the same conclusion on an examination of the documents.

Campbell's signature, although not a very artistic or free-handed performance, has a very distinct character, and it is one which I should imagine would not be easily imitated. The expert witnesses who were examined for the bank say that such a signature would be more difficult to copy than a signature in an ordinary current hand, and this observation appears to me to be well founded. It must be considered that in civil cases *comparatio litterarum* is always an important part of the evidence, and in the case of such documents as bills which are signed when no one is present, this is often a decisive element. Were it not for this test, on which men of business are accustomed to rely, it would be in the power of any man to repudiate his subscription to a mercantile document, on the ground that he had not been seen to write it; and that there was no direct evidence of the act of subscription.

There are other circumstances in the case which are not favourable to the defender's theory. One of these is the defender's statement at the end of his examination in chief, where he admits having received a letter from Macdougall, suggesting that he might get clear of his guarantee because the instrumentary witnesses had not seen him sign or heard him

acknowledge his subscription. It was suggested that the document here referred to might be a previous guarantee which the defender had signed in the bank, but had rendered useless by adding words limiting his responsibility. But this explanation is inadmissible, because the spoiled guarantee was executed in the presence of witnesses, as Macdougall and Campbell very well knew. Macdougall's letter must then have reference to the guarantee sued on, and this suggests two observations: First, it is incredible that Macdougall should have written to Campbell in such terms regarding an obligation which he knew that Campbell had never signed. Secondly, if Campbell had not in fact signed a guarantee he would instantly have repudiated the suggestion and challenged the writing as a forgery. Then the defender's action towards the bank is not that of a person who has been defrauded. It is not until he has seen the document and examined the signature that he comes to the conclusion that the signature is not his. This would be intelligible if it were a question of identifying an autograph, but the defender could not be in doubt as to whether he had in fact guaranteed Macdougall's cash-credit, and this excess of caution on the part of the defender is anything but favourable to the honesty of his defence. I agree with the Lord Ordinary that the defence of forgery has entirely failed.

No. 161.
June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

Having once arrived at the conclusion that the obligation sued on bears the subscription of the defender, the solution of the case does not seem to me to be difficult, because the obligation was given to Macdougall to be used for the purposes of credit, and the money of the National Bank was advanced in consideration of the defender having pledged his credit to the extent of £200.

We are familiar with cases in which a party to a contract claims the right to rescind on the ground that his deed is not executed in accordance with the statutory formalities, and in general this course is open to an obligant while matters are entire; that is, if there has not been payment or performance by the other party. But it is perfectly useless to plead the Statute of 1681 against the demand of a creditor who has performed his part of the bargain and is seeking fulfilment of the counterpart, for there is nothing more certain in our law than that *rei interventus*, or part performance, will set up an informal obligation, or, what is the same thing, will bar the right to rescind. Even in the case of a sale of heritable property the objection of want of attestation can only be taken when the case is *in nudis finibus contractus*, as was pointed out by the late Lord President in *Goldston v. Young*.¹ It is hardly necessary to elaborate a principle which is so strongly founded in natural justice, but there is one aspect of it which is very pertinent to cases of money obligations,—I mean that a party who is seeking to be relieved of a contract on the ground of informalities of execution, whether he proceeds by way of reduction or by exception, can only obtain relief on condition of making restitution. In the present case the defender would have to repay whatever sum the bank had advanced to Macdougall on the defender's credit as a condition of being relieved of his obligation. But as the bank actually advanced the whole sum which was guaranteed, restitution and payment are one and the same, the result being that the defender can only get a discharge of his obligation by payment in full. It may have been doubted at one time whether the advance of money to the principal obligant was *rei interventus* in a question with a co-obligant or cautioner. But this is no longer an open question since the decision in the case of the *Church of England Insur-*

¹ Dec. 8, 1868, 7 Macph. 188, 41 Scot. Jur. 122.

No. 161. *ance Co. v. Wink*, 19 D. 1079; and when it is observed that the consideration to the banker for making the advance is the undertaking of all the obligants to repay, it seems almost too clear for argument that the advance of money to the obligant, who is to operate on the account, is performance by the banker sufficient to bar any one of the obligants from rescinding or resiling to his prejudice.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

I do not understand the Lord Ordinary's view to be essentially different from what I have stated, but his Lordship has apparently been unable to give effect to the principle, because he holds that the deed was intended to have a testing-clause, and that the defender did not mean to be bound until his signature was attested. I think this difficulty is more apparent than real. In the first place, we have no evidence that the defender signed under such a condition. His state of mind on the subject is that he never signed at all, and we do not know what his answer would be as to the supposed condition if it were brought home to his memory or his conscience that he had signed. But further, I must point out that a mental reservation will not enable a debtor to get quit of his obligation. If this were so, the doctrine of *rei interventus* would be of very limited application, because the debtor would always say, "I signed the paper, but then I did not mean to be bound by it until a testing-clause was inserted." I do not know that the answer would be any the better if he could point to the words "In witness whereof" in proof that attestation was contemplated. In the present case the writing was delivered to Macdougall, who was the agent of the bank, to procure the cautioner's subscription. We must take it that the writing was signed and delivered unconditionally, because there is no evidence of any condition; and, in these circumstances, I apprehend that the writing was rightly given by Macdougall to the bank for the purpose of obtaining credit, and that the bank had sufficient authority to make the advance on the defender's credit.

The circumstance that Macdougall got two witnesses to sign the guarantee outwith the presence of the defender does not appear to me to affect the question of liability. Macdougall had no mandate from the defender to append a false or invalid attestation to his signature. An invalid attestation is no attestation, and the case is just the same as if nothing had been added after subscription.

I have only a word to add on the question which was argued to us, whether a letter of guarantee is a writing *in re mercatoria*.

I do not propose to offer any opinion on this question, which, as I think, has only a theoretical interest. If in such a case the writing had not been acted on I suppose it would be open to the guarantor to give notice to the bank that he meant to recall it. If advances had been made on the faith of the obligation, the obligation would be binding on the principle on which we propose to decide this case. The result of my opinion is that the bank is entitled to decree in terms of the summons.

LORD ADAM.—I have read over the proof in this case more than once, and have come to the conclusion that the Lord Ordinary and Lord M'Laren are right in holding that it has not been proved that Campbell's signature was a forgery, and that after a consideration of the parole evidence, the *comparatio litterarum* and the conduct of the defender at the time when the claim was made. I need not go over these matters again in detail.

But that being so, there is still left the ground upon which the Lord Ordinary has assoilzied the defender. The facts which raise the question are these. The

letter of guarantee was sent by the head office to their agent in Oban in this condition, partly in writing and partly in print, and it concluded with the words "In witness whereof." When the agent got it he handed it to Macdougall, the principal debtor, that he might get it signed. This was not in conformity with the usual and safe principle followed by bankers, which is to get such letters of guarantee signed in the bank's premises, in order to avoid the possibility of such an occurrence as has taken place here. But that is really a matter of no moment. What the bank did was to employ Macdougall as their agent in this transaction to procure the defender's signature, and he did in fact procure it. He afterwards got two persons to sign as witnesses of that signature, although they had neither seen the defender sign nor heard him acknowledge his signature. There is no doubt whatever that the document was informally executed, but, having so treated it, Macdougall sent it to his own agents in Edinburgh. No doubt he sent it with sufficient information to enable the bank to fill up the testing-clause, and that accordingly was done, and *ex facie* it was a probative document.

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

Upon the faith of that document the bank advanced the money, so that *rei interventus* took place on the faith of it; and there is no doubt that where the granter of an informal deed has signed it and delivered it, and *rei interventus* has followed upon it, he cannot plead the informality. That is conclusively settled by the cases of *Johnston v. Grant*, *The Church of England Assurance Company v. Wink*, and other cases. The question now is whether there is any reason why that well-established doctrine should not be applied to this case. The Lord Ordinary has held that it should not, and that upon somewhat subtle grounds. He starts with this proposition, that where parties to a contract prescribe that certain solemnities or formalities shall be observed in a deed of obligation and these are not fulfilled, they will not be bound. That means, that if parties make it a condition of incurring the obligation that certain formalities be observed, they will not be bound in the absence of such formalities, even although *rei interventus* has followed. Probably that is so. But has that rule got any application to the present case? There is no evidence in this case that the parties did prescribe any formalities or insist upon having a probative writ. The Lord Ordinary deduces such a stipulation merely from the words "In witness whereof" being in the document when sent for the purpose of being signed. I have no doubt the bank intended to obtain a probative deed, but it is a very long step to say, that because the bank wished such a deed, the parties made its being a probative deed a condition of the obligation.

So far, then, I think the first ground upon which the Lord Ordinary makes this an exception to the general rule fails. But further, he holds that the principle of *rei interventus* does not apply in this case, because, as far as I can gather from his note, he is of opinion that Campbell did not mean to grant his guarantee upon the document as it left his hands, but presumed, and was entitled to presume, that nothing further would be done until he had been summoned to acknowledge his subscription before witnesses, and therefore that it cannot be presumed to have been within the reasonable contemplation of Campbell that money would be advanced on the document in the condition in which it was when he handed it to Macdougall, in which case he thinks *rei interventus* would not apply. I cannot agree with that view. It appears to me, as Lord M'Laren has said, that where a person signs and delivers an informal document, he authorises that document to be put to the use for which it

No. 161.

June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

was intended, and that there was nothing to prevent the bank acting upon it—even if they knew it was informal—and trusting to the doctrine of *rei interventus*. Here they advanced money on the faith of the document, believing it to be a probative writ. But it was on the faith of Campbell's signature that they really advanced the money, and not upon the probative character of the writ. I cannot therefore agree to making an exception to the principle of *rei interventus* in this case.

I see the Lord Ordinary says,—“The case would have been different if the advances had been made with the defender's actual knowledge. It might have been different if he had personally handed the document to the bank in an incomplete condition.” In my view that is exactly what he did. He handed the document in an incomplete condition to the agent of the bank, Macdougall, and it humbly appears to me that when he did that he authorised the bank to make the use of it which it was intended to have.

LORD KINNEAR.—I am of the same opinion. The real questions in the case appear to me to be questions of fact, and when the first of these questions, whether the letter of guarantee was subscribed by the defender or not, has been decided, I think that that decision carries along with it the solution of the others. For when we once reach the conclusion that the defender is not to be believed when he denies his signature, it appears to me that we must also reject his testimony as unworthy of credit in every instance where it is in conflict with evidence which we think credible. That being so, I think it is proved not only that the defender subscribed the guarantee, but that the document was put by him into Macdougall's hands for the purpose of enabling him to obtain an advance from the bank.

If that be so, and if the money was thereafter advanced by the bank upon the faith of the guarantee, it does not appear to me to be material whether the document was formally completed as a probative instrument or not, because there can be no question that it was at least capable of being made obligatory by *rei interventus*. When it was delivered to Macdougall I agree with the Lord Ordinary that it was apparently incomplete, because it was obviously intended that it should be duly attested. It never was duly attested, because although two persons afterwards appended their signatures as witnesses, it appears that they were not themselves present when the defender signed, nor did he afterwards acknowledge his signature to them, and accordingly the document remained untested. But if money was advanced upon the faith of the signature which was attached for the purpose of guaranteeing an advance by the bank, and if the letter of guarantee was delivered to the borrower for the purpose of enabling him to obtain that advance, it appears to me to be immaterial whether the letter was obviously incomplete from the first or whether the irregularity which makes it incomplete was only discovered after the advances had been made.

I cannot see that there is any room for presumption as to the defender's intention, arising from the appearance of the deed. If he had sworn that he delivered it to Macdougall for the purpose of his having it completed by the attestation of witnesses, knowing that that could not be done without his presence, and that he never authorised Macdougall to deliver it to the bank, or to make any use of it, but only to procure witnesses to whom he might acknowledge his signature, there might have been strong grounds for sustaining the Lord Ordinary's view that he was entitled to resile until the document had been finally

completed. But it is impossible for the defender to put forward a case of that kind, because he denies his signature, and if we cannot accept his denial, the question whether he delivered the guarantee to Macdougall, and for what purpose, is not to be decided by any legal presumption, but is a pure question of fact to be determined according to the evidence. I agree with your Lordships in thinking it proved that it was in fact delivered, and for the purpose of being used as a guarantee.

No. 161.
June 17, 1892.
National Bank
of Scotland,
Limited, v.
Campbell.

LORD PRESIDENT.—I agree with your Lordships.

[His Lordship then dealt with the evidence regarding the plea of forgery.]

For the decision of the legal question on which we differ from the Lord Ordinary, the essential fact is that the writ when signed was delivered by the defender to Macdougall without any special instructions, and in particular with no instructions to complete the testing-clause. Macdougall was *in hac re* the agent of the bank, and therefore delivery to him was delivery to the bank. I cannot find in the survival of the words "In witness whereof" the constitution of a condition restricting the legal effect of signature and delivery, nor do I see in these words a silent mandate to Macdougall to do something for behoof of a man who could speak if he wanted anything further done. I therefore answer in the affirmative the first alternative query put by the Lord Ordinary towards the end of his note.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, and pronounced decree in terms of the conclusions of the summons.

MACKENZIE, INNES, & LOGAN, W.S.—GILL & PRINGLE, W.S.—Agents.

MISS HENRIETTA SCOTT AND OTHERS (Scott's Trustees), Petitioners
(Respondents).—*Dickson—Craigie.*

No. 162.

JAMES SHAW, Respondent (Appellant).—*C. K. Mackenzie.*

June 17, 1892.
Scott's Trustees v. Shaw.

Burgh—Dean of Guild—Title to Sue—Edinburgh Municipal and Police Amendment Act, 1891 (54 and 55 Vict. c. cxxxvi.), sec. 50—Open space—Ventilation—Saloon.—Section 50 of the Edinburgh Municipal and Police Act, 1891, enacted,—that "every new house and any building altered for the purpose of being used as a house, shall have in the rear thereof, or immediately adjacent thereto," a certain "open space . . . provided always that in any case where the thorough ventilation of any house or building is, in the opinion of the Dean of Guild Court, otherwise secured, . . . the said Court may, in their discretion, allow the open space to be reduced; provided also that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild Court may sanction the erection of saloons upon such open space of such height and construction as to them shall seem proper. . . . Provided . . . that . . . all existing houses having any open space adjacent thereto shall, as regards such open space, be subject to the provisions of this section applicable to new houses."

An application for warrant to convert the ground and basement stories of a house into business premises, and for the erection of a saloon of two stories for the manufacture of tobacco on an existing "open space" behind, was opposed by the proprietor of adjoining premises. The Dean of Guild granted the warrant, an appeal held that, as the Dean of Guild was satisfied in regard to the ventilation of the new premises, the objector had no title under the section above cited to interfere with the discretion which was vested in the Dean to allow the conversion proposed and the erection of the saloon.

No. 162.

June 17, 1892.
Scott's Trustees v. Shaw.

1st Division.
Dean of Guild
of Edinburgh.

THE trustees of the late Reverend Thomas Scott, proprietors of 9 Gayfield Square, Edinburgh, asked warrant of the Dean of Guild to convert the ground and basement stories of these subjects into business premises, and to erect a workshop of two stories on the open ground behind the house.

James Shaw, proprietor of 8 Gayfield Square, opposed the petition.

In the record which was made up, the petitioners stated that the superiors of the subjects had no objection to the warrant being granted; that the buildings were to be used partly as an office of a wholesale tobacconist, and partly as premises for the purpose of spinning tobacco; that it was not intended to use them in any way as a dwelling-house.

The respondent averred, *inter alia*, that the use to which the petitioners proposed to put his premises would be injurious to him and his tenants, and would be in contravention of the provisions of the 50th section of the Edinburgh Municipal and Police Amendment Act, 1891,* "by not leaving an open space adjacent to the existing dwelling-house of the extent prescribed" by that section. He further objected to the proposed operations, "because the light, ventilation, and sanitary state of his property will be injured."

The petitioners pleaded, *inter alia*;—(1) As the operations are confined to the petitioners' own property, and can be executed without danger, and will not be in law or in fact a nuisance or a contravention of any law common or statutory, the petitioners are entitled to warrant.

The respondent pleaded, *inter alia*;—(1) The proposed operations being in contravention of the provisions of section 50 of the Edinburgh Municipal and Police Amendment Act, 1891, the warrant craved ought to be refused. (4) The proposed operations being injurious to the respondent, in the circumstances stated, warrant ought to be refused.

The following was the description of the proposed alterations of the premises given in the note to the Dean of Guild's interlocutor,—“The basement plan shews a kitchen and bedroom, and workshop behind; the ground floor plan shews an office and a room and workshop behind; the first floor plan shews a kitchen and sitting-room, and the attic plan shews

* The Edinburgh Municipal and Police Amendment Act, 1891, section 50, enacted,—“Every new house, and any building altered for the purpose of being used as a house, shall have in the rear thereof, or immediately adjacent thereto, an open space at least equal to three-fourths of the area to be occupied by the intended house, where such house is not of greater height than four stories; and where such house shall exceed that height such open space shall be of equal area with that of such house, and such open space shall be free from any erections thereon other than water-closets, coal-houses, or other conveniences to be used in connection with such house, all which conveniences shall, as to height, position and dimensions, be erected subject to the consent and approval of the Dean of Guild Court: Provided always that in any case where the thorough ventilation of any house or building is, in the opinion of the Dean of Guild Court, otherwise secured, or under other special circumstances, the said Court may, in their discretion, allow the open space to be reduced: Provided also, that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only the Dean of Guild Court may sanction the erection of saloons upon such open space, of such height and construction as to them shall seem proper, such saloons to continue so long only as such building is so used for business purposes: Provided further, that from and after the passing of this Act, all existing houses, having any open space adjacent thereto, shall, as regards such open space, be subject to the foregoing provisions of this section, applicable to new houses, to the extent to which such open space is available.”

a bedroom." The workshop was a low building of two stories to be No. 162. erected on the open ground behind the house, entirely covering it.

The Dean of Guild on 14th April 1892 pronounced this interlocutor:—
June 17, 1892.
Scott's Trustees v. Shaw.
 "Finds that the petitioners' operations are confined to their own property and can be executed without danger: Finds that the proposed operations are not in contravention of the provisions of the Edinburgh Municipal and Police Amendment Act, 1891, founded on by the respondent. . . ."

By a subsequent interlocutor, dated 28th April, the Dean of Guild repelled the respondent's pleas in law, and granted warrant as craved.

The respondent appealed to the Court of Session, and argued;—1. Even assuming that this was an existing "house," the terms of the 50th section required that there should be "an open space" behind. The provision that that space might be "reduced" could not be stretched so far as to permit of its being entirely done away with, and of what was now open being wholly covered over. The Dean of Guild was therefore outside his statutory powers in allowing the abolition of the "open space." 2. It could not be said that a use for the purpose of manufacturing tobacco was a use for "business premises only." If it was, the erection of a "saloon" was all that could be sanctioned. But the proposed building on the open space was not a saloon—which, in strict language, was a building of one story only. 3. It was said that the respondent had no title to object on the ground of want of ventilation to his premises. But this was not pleaded, and upon the merits, the Dean of Guild had taken no account of the ventilation of the respondent's premises.

Argued for the petitioners;—1. The respondent had no title to object. He had not averred how he was injured, and in regard to ventilation, which was the only matter with which the 50th section of the Act was

* "NOTE.—The petitioners desire to convert the ground and basement stories of their house, No. 9 Gayfield Square, into business premises, and to erect a workshop on the garden ground behind. The respondent objects that the proposed operations would be . . . (2) a contravention of section 50 of the Edinburgh Municipal and Police Amendment Act, 1891. . . .

"Now, this is not a 'new house,' nor, in the sense of the Act as the Dean of Guild reads it, 'a building altered for the purpose of being used as a house'; it is not the conversion of a house into a building to be used for business premises only, but it is very like the 'erection of a house with a shop on the ground floor.' It is the alteration of a house by converting the ground floor into business premises—(Here followed the passage above quoted).

"The idea of the Act seems to be that in such a house there is a smaller resident population, and therefore less need of open space. Now, such premises are permitted to have saloons, and, so far as the Dean of Guild is aware, this description is not so appropriated to any particular and different kind of erection as to prevent its application to the long low building which the petitioner desires to erect in his background. He seems, therefore, to have under this section a direct right to the Dean of Guild's warrant; but, even supposing this particular part of the section does not directly apply, the Dean of Guild thinks that in this case the matter of ventilation is left to his discretion. Even supposing this is 'an existing house having an open space adjacent thereto,' and that the provisions of this section must apply to it, the Dean of Guild thinks that it would still be open to him to permit the present proposals if he were satisfied that the ventilation of the premises was satisfactorily secured. On the question of ventilation, the Dean of Guild has no doubt. The burgh engineer has examined the plans, and has made certain suggestions, which the petitioners must carry out as a condition of obtaining warrant. When these are given effect to, the Dean of Guild is of opinion that, in view of the general circumstances of this house and its locality, the thorough ventilation of the premises is amply secured. . . ."

No. 162. concerned, the Dean of Guild had under that section an absolute discretion. This was either a "new house," or it was "a building altered for the purpose of being used as a house," in either of which cases, if the Dean was satisfied in regard to the ventilation, he might dispense with the "open space." If it did not fall within the first part of the section, it fell within the second, which authorised the erection of a saloon such as was proposed.¹ The case of *Pitman*² was in point, dealing as it did with the corresponding section in the Edinburgh Municipal and Police Act, 1879.

June 17, 1892.
Scott's Trustees v. Shaw.

LORD PRESIDENT.—I think this judgment can be supported, and should be affirmed on the ground stated by the Dean of Guild towards the close of his note. He says,—“Even supposing this is ‘an existing house having an open space adjacent thereto,’ and that the provisions of this section (50th) must apply to it, the Dean of Guild thinks that it would still be open to him to permit the present proposals if he were satisfied that the ventilation of the premises was satisfactorily secured.” Although this was not a new house, it had an open space adjacent to it, and accordingly under the last proviso of the 50th section the provision in question applied to it. Well, then, the Dean of Guild has proceeded to exercise his jurisdiction under this section, and he does so for the purposes and under the conditions stated in the case of *Pitman*. He has to consider the interest of the ventilation of the house in question, and make up his mind whether it is secured. That is a matter with which the neighbour has nothing to do, and to say, as this appellant says, or said in his original statement, that the proposed building will injure the light, ventilation, or sanitary state of his property is to introduce a question alien to that which has to be considered under the 50th section. Accordingly, I think that so far as this section is concerned, the appellant has no business to interfere, and that his statements are irrelevant.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT dismissed the appeal.

RONALD & RITCHIE, S.S.C.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

No. 163.

MRS JEAN JAMIESON, Pursuer (Appellant).—Comrie Thomson—James Reid.

June 18, 1892.
Jamieson v.
Russell & Co.

RUSSELL & COMPANY, Defenders (Respondents).—Jameson—Younger.

Reparation—Master and Servant—Insufficient provision for servant's safety—Ship in course of construction—Unfenced and unlighted tank.—In an action of damages brought by the widow of a ship carpenter against his employers for damages on account of his death when employed by them in the building of a ship, the pursuer averred that on the occasion in question the ship had been launched and was being made ready for sea; that the deceased, having finished his work at about half-past five in the evening (when it was dark) was leaving the ship by the only exit available to him, when he fell into an open tank about twenty feet in depth and was killed; that this tank was close to the foot of a ladder up which he had to go, was unfenced, and not protected in any way, nor lighted; that the defender was not aware that the tank was open and unprotected; that it was the defenders' duty to have fenced, covered, or lighted it; that the deceased relied and was entitled to rely on their doing so; that at other times they both covered or fenced the tank and lighted it.

¹ *Boswell v. Magistrates of Edinburgh*, July 19, 1881, 8 R. 986.

² *Pitman v. Burnett's Trustees*, Jan. 26, 1882, 9 R. 444.

The defenders pleaded that the action was irrelevant.

Held (diss. Lord M'Laren) that the action was relevant.

Forsyth v. Ramage & Ferguson, Oct. 25, 1890, 18 R. 21, *distinguished*.

No. 163.

June 18, 1892.

Jamieson v.
Russell & Co.

1ST DIVISION.
Sheriff of Ren-
frew and Bute.

MRS JEAN GUY OR JAMIESON, residing at 12 Arthur Street, Greenock, brought this action in the Sheriff Court at Greenock against Russell & Company, shipbuilders, Greenock, concluding for £500 as damages for the loss of her husband, John Jamieson.

The defenders pleaded, *inter alia*, that the action was irrelevant.

The following were the pursuer's material averments:—"On 14th January 1892 the deceased John Jamieson was engaged, along with a number of the defenders' other employees, on board a large five-masted sailing and steam vessel named the 'Marie Rickmers,' then lying in the James Watt Dock, Greenock, which had shortly before been launched from their shipbuilding yard. The structural work of the vessel had been completed, and the said workmen were employed in finishing and making it ready for sea. . . . John Jamieson had been employed at different parts of the ship from time to time, but on the day in question (14th January) he was working on the 'tween deck, near to the foremost bulk-head, and about half-past five on the evening of that day, having finished his day's work, he proceeded to leave the ship by the only way available to him. He walked from the foremost bulkhead along the 'tween deck to amidships in order to ascend by a ladder to the main deck, but when near the foot of this ladder he fell a depth of about twenty feet to the bottom of an open tank, and sustained injuries from which he almost immediately died. This tank, which was not fenced or protected in any way, was about 5 feet long and 3½ feet broad, and it and another tank of the same size were situated close to the foot of said ladder, and in or near the only path of exit available to the said deceased. Deceased was not aware that said tanks were open and unprotected. It was quite dark at the time, and it was impossible for him to see them. It was the defenders' duty to have fenced or covered said tanks, or lighted them up, and the deceased relied, and was entitled to rely, on their doing so. They culpably failed to do so on the night in question. At other times they both covered or fenced said tanks, and lighted them with large stationary naphtha lamps. Counter statements denied, and in particular denied that the deceased was supplied with candles or a lamp to light the way, and that there was a lighted lamp resting on the ventilator. There were no men in or working about the tank at the time of the accident, and the fencing or lighting of the tank so as to prevent such an accident would in no way have interfered with any work requiring to be done. The large stationary naphtha lamp above referred to was, when lighted, hung over the tanks beyond the reach of the workmen. Moreover, the tanks could easily have been protected at all times by wooden planks laid along the top of them. As a matter of fact this was done immediately after the accident, without any hindrance or inconvenience to the progress of the work."

The Sheriff-substitute (Begg) allowed a proof before answer.

The pursuer appealed for jury trial.

Argued for the defenders;—The action was irrelevant. It was ruled by the case of *Ramage & Ferguson*.¹ That case established the general rule that a workman engaged upon an unfinished ship took the risk arising from the existence of open spaces in the ship as a necessary incident of his employment. There was nothing in the averments here to take the case out of that rule. It was not said that this particular

¹ *Forsyth v. Ramage & Ferguson*, Oct. 25, 1890, 18 R. 21.

No. 163. tank was always lighted, or that there was a general duty on shipbuilders to have such tanks lighted or fenced. Nor was there any averment that the deceased could not have got a hand-lamp from the defenders if he had asked for one.

June 18, 1892.
Jamieson v.
Russell & Co.

Argued for the pursuer;—The case was relevant, and ought to be sent to a jury. The principle of *Ramage & Ferguson* was this, that there was no duty on shipbuilders to light or fence such spaces in a ship under construction as were necessarily open during the building of the ship. The tank here was not of that description. It was usually fenced or lighted, or both; its condition on the evening in question was due to an oversight, which the deceased was not bound to anticipate. *Ramage & Ferguson* consequently did not apply.

LORD ADAM.—This action of damages is brought by the widow of a workman who was killed on board of a ship in the course of construction upon 14th January last, at Greenock. It is averred that he was engaged in work on board that vessel, and on that particular occasion in the forward part of the ship. His work being finished he had to leave and go home, and it appears that the only available passage by which he could go was a passage leading to a ladder, and that there was on both sides of the passage an open tank 20 feet deep. Into one of these tanks the deceased fell, and was so injured that he died.

Now it is said that this case is ruled by that of *Ramage & Ferguson*. In my opinion it is not. In that case nothing was disclosed but the ordinary risk which every workman working on an unfinished ship must run. There the passage used was lighted, although but dimly, and in going along the workman fell into a manhole which was open, and necessarily open for the convenience of those employed in the construction of the vessel. That was an ordinary risk in such circumstances, and we held it was the duty of the workman to go very carefully and look after himself. The case here is different. As I read the averment upon record, it is said that the tank into which the deceased fell was at other times usually covered and lighted, whereas on the occasion in question it was, according to the averment, neither covered nor lighted. It is further averred that a large naphtha lamp which usually hung over the tank was not there. It is said that the deceased was entitled to rely, and did rely, upon matters being as they had been before, and upon the tank being either lighted or covered if not lighted. In these unusual and extraordinary circumstances set forth in this record we have nothing but a case for a jury. I cannot read the case of *Ramage & Ferguson* as laying it down that a workman employed upon a ship in course of construction can never recover damages for any accident he may meet with through falling into an unfenced place. It is for a jury to say whether they think this place ought to have been protected. The averments disclose a case not of ordinary but of extraordinary risk, and I do not think we can prevent it being considered by a jury.

LORD M'LAREN.—If this case had occurred in England, I suppose it would have gone to a jury, and any questions of law relating to the obligation incumbent on the employer in such circumstances would have been raised after the verdict. But according to the practice and forms of procedure in this Court we direct the issue which is to be submitted to a jury, and this implies the consideration of the relevancy of the pursuer's averments before the issue is approved. This is especially necessary in cases of injury to person where the ground of action is neglect of duty, and the statement of the duty neglected is a necessary proposition in the pursuer's case.

No. 163.

June 18, 1892.

Jamieson v.
Russell & Co.

The case of *Ramage & Ferguson* has been commented on as furnishing the nearest analogue to the present case, because there the Court were of opinion that no neglect of duty on the part of the employer had been set forth upon record. Now, in the present case the duty in which it is alleged the employer failed is stated alternatively as a duty either to cover or to light the open tank into which the workman fell. This was an unfinished vessel, and the workman was at work in the forward part of the ship, and about half-past five on a winter evening, as he was crossing the vessel on his way home, he fell into an uncovered tank. It is quite evident that lights must be provided in winter to light the men at their work after the daylight fails; and that some light had been provided on this occasion is evident on the pursuer's own shewing, because the deceased was working up to half-past five, and necessarily it must have been by artificial light. She might have had a case if she had said that although there was a fixed light enabling him to work there was no hand-lamp provided which either he or his fellow-workmen could have used in proceeding homewards. If such a statement had been made—although I doubt the possibility of the pursuer being able to make it with truth—it would have been relevant, for I do not hold that in unfinished ships the workmen must provide themselves with lamps. But I do not so read the averment on record. I think the averment is objectionable because it is alternative, and the objection is not got over by taking each alternative separately. It is not averred that there were not lights to which the deceased could have helped himself. The other duty which it is said the employers neglected was that of fencing. That duty was presented in a curious way in the argument, because it was said that although it might not have been the duty of the employers to fence the tank in the daytime, someone should have been set to cover it when night closed in. But it is distinctly laid down in the case of *Ramage & Ferguson* in general terms that there is no duty of fencing the unfinished portions of buildings or vessels in the course of construction. The Lord President in that case put the reason for this on the proper ground, namely, the impossibility of fencing consistently with the progress of the work of completing the ship.

It is said that we do not know enough about shipbuilding to lay down absolutely what is and what is not impossible to be done. But a Court of law would be a very inefficient institution if its members were to profess ignorance of the ordinary processes of agriculture, commerce, and industry which are known to the rest of the world. We must take such knowledge of the arts as we have along with us. How would it be possible so to fence an unfinished building or vessel that a workman should not fall into a hole if he were inattentive? It may be that some parts of a ship in the progress of construction are specially dangerous and are in use to be fenced. If there had been a statement of such a practice as being usual, but in this case neglected, I should have thought that also a relevant case to be sent to a jury. But we are merely told that there was here an open tank which should have been covered. Then, is it the law that every open space in a ship which is being built is to be covered? If so, I suppose that until the decks are finally made up with permanent planking, there must be some temporary covering, otherwise there will be traps left for unwary workmen. The notion of such a duty is sufficiently alarming, yet this is positively the duty in which the defenders are said to have failed. I am therefore against sending this case to a jury on the question of want of fencing.

No. 163.

June 18, 1892.
Jamieson v.
Russell & Co.

My only doubt has been with regard to the lighting. As I have said, I think there was a duty on the part of the employers to provide lights, but I do not think we have such a fair and candid averment that lights were not available to the workmen as should lead us to send the case to a jury. If that statement could have been truly made it would have been made. I think that most probably the statement is not made because the pursuer knows she cannot prove it. I am of opinion that on this point also the action fails for want of relevant and sufficient averments of a duty neglected.

LORD KINNEAR.—I think it is reasonable to hold that when a workman brings an action of damages against his employer founded on fault, it is not relevant to say merely that he fell into a tank, or some other open space, which had been left unfenced during the construction of a building or a ship. It is matter of common knowledge, and follows from the nature of things, that in building a house or a ship there must be some open spaces which may be dangerous. Therefore to make out a relevant case of fault the workman must say more than this; but, on the other hand, I am by no means prepared to say that it is an impossible thing to suppose an open tank, during the building of a ship, which it might be the duty of the employer to fence for the protection of his workmen. That may be a question of circumstances, and therefore we must look here to see whether there is more than a bare averment that the deceased fell into a tank. Now, I find it alleged, first, that the tank was left open, and secondly, that it was the duty of the employer to fence it or cover it or light it up, and that he failed in that duty. If the matter stopped there I should consider the statement relevant, although wanting in specification, because it avers that, although it is not necessary to fence every space, this particular space ought to have been fenced. That leaves the matter somewhat bare, and I go on to see if there is nothing more. The pursuer says further that the deceased relied upon this tank being fenced, and proceeds to give the reason why he did so, namely, because at other times it had been covered and lighted with a large naphtha lamp. I am not prepared to say that as a matter of fact it is impossible to believe that, or that if it were proved it discloses no ground of liability. For example, the ship in the course of being built may have reached such a stage in its construction that men no longer needed to work in the tanks, or for some other reason it may have been the practice to cover these tanks. Now, if a jury were satisfied that a reasonable and cautious man in the position of the deceased was entitled to rely upon finding this tank covered or lighted on this particular occasion, I should not be prepared to say that that conclusion of the jury must necessarily be inconsistent with reason whatever may have been the evidence on which they proceeded. It is a question for a jury to try, and I do not think we can safely throw out the case without inquiry as to what were the facts.

LORD PRESIDENT.—Viewing this question apart from authority, I arrive at the conclusion that there is issuable matter here, and that the pursuer should not be put out of Court. I take very much the same view of the record as Lord Kinneer does. The deceased was, it is averred, misled by the want of light and especially by the cessation of light on this particular occasion. It is of course not enough to say that on a ship in process of building a space was left unfenced or unlighted; there must be further explanation of how or why there is a duty to fence or light.

So much is clear, and we are unchecked by authority, but I admit there is a difficulty in this case arising out of the decision in the case of *Ramage & Ferguson*. No doubt that case differs from the present, as all such cases must differ from one another, and it may be possible to find a difference in this case upon which a different decision might be justified. But I must say that, looking to the opinions in that case as a whole, I should have had some difficulty in supposing that the Court which threw out that case would not have thrown out the present one. I am relieved, however, by what has just been said by Lord Adam, whose opinion in *Ramage & Ferguson* caused me most anxiety, for his Lordship finds no difficulty in distinguishing the present case. Accordingly, I feel set free from the authority of *Ramage & Ferguson* to follow my own opinion, and I think we should grant the issue proposed.

No. 163.
June 18, 1892.
Jamieson v.
Russell & Co.

THE COURT repelled the first plea in law for the defenders, and approved of the issue proposed by the pursuer.

MACPHERSON & MACKAY, W.S.—REID & GUILD, W.S.—Agents.

BATCHELOR'S TESTAMENTARY TRUSTEES, Pursuers (Respondents).—*Boyd*. No. 164.
JAMES HONEYMAN, Defender (Appellant).—*Kennedy*.

June 18, 1892.
Batchelor's
Trustees v.
Honeyman.

Triennial Prescription—Act 1579, c. 83—Merchant's account with cross entries.
—A cattle-dealer sued a farmer for a balance brought out on an account which contained entries of the prices of cows and potatoes sold by the dealer to the farmer at specified dates over a period of ten years, and entries of items of cash paid, and of the value of dung delivered, and cows sold by the farmer to the dealer. *Held* (distinguishing the case from that of *M'Kinlay v. Wilson*, 13 R. 210), that the account was not an account-current, and that the triennial prescription applied to it.

In February 1892 the testamentary trustees of the late Frances Batchelor, farmer and cattle-dealer, Craigie, near Dundee, sued James Honeyman, farmer in Hillhouses, near Dundee, in the Sheriff Court of Forfarshire for £81, 9s. 6d., being a balance brought out on a "statement or account-current," as they termed it in their condescendence, produced with their petition.

2D DIVISION.
Sheriff of
Forfar.

The account commenced 1st September 1877 and ended 1st October 1887.

The nature of the account may be judged of from the following extracts:—

"1883.

Mar. 28.	2 Cows,	£35 10 0
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"	70 loads dung @ 7s. 6d.,	.	.	.	£26 5 0	
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June 11.	By one calf,	.	.	.	1 10 0	
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Sept. 18.	By cash,	.	.	.	20 0 0	
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1884.

April 1.	By cash,	.	.	.	20 0 0	
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May 8.	1 Cow,	.	.	.		16 10 0
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	By cash,	.	.	.	6 0 0	
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Sept. 9.	1 Cow,	.	.	.		23 0 0
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Dec. 9.	By cash,	.	.	.	23 0 0"	
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The account ended as follows:—

"1886.

Jan. 12.	By cash,	.	.	.	18 0 0	
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April 6.	By bill,	.	.	.	20 0 0	
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July 27.	1 Cow,	.	.	.		17 0 0
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Sept. 6.	By bill,	.	.	.	20 0 0	
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No. 164.	1887.								
	June 1.	By bill,	.	.	.	£20	0	0	
June 18, 1892.	Oct. 1.	By bill,	.	.	.	20	0	0	
Batchelor's									
Trustees v.									
Honeyman.						£448	0	6	£529 10 0
									448 0 6
						Balance due,			£81 9 6"

The defender pleaded prescription.

The Sheriff-substitute (Campbell Smith), on 9th April 1892, sustained that plea, and found that the pursuers could only prove their case by writ or oath.

The Sheriff (Comrie Thomson), on 20th May 1892, recalled this interlocutor, and allowed a proof.

The defender appealed, and argued ;—The only possible support for the Sheriff's judgment was the case of *M'Kinlay*.¹ But that case was easily distinguishable from the present. There there were on both sides of the account entries of cash transactions, commissions, and loans of money. Here there were no entries of transactions arising out of the relation of principal and agent. The present account was simply a merchant's account, with certain deductions in respect of payments made in money or money's worth.

Argued for the pursuers ;—The account here was stated to be an account-current, and they were entitled to a proof to shew what the true footing of the parties was. The result of a proof would be to shew that this was the case of two merchants carrying on a course of dealing, with entries on both sides, and a resulting balance. That constituted an account-current. *M'Kinlay's* case was disposed of on a proof.

LORD JUSTICE-CLERK.—I take the case first on the footing that there is no heading to the account. What we have then is simply a statement of sales by the one party to the other, and in settling with each other, in place of having separate receipts and separate statements of accounts, the value of the durg sold by the one is set off against the value of the cows sold by the other, and thus a cash balance is brought out. That is all that the pursuers set out, and all that they could be allowed to prove.

Now, does it matter what the pursuer puts at the top of his account as its title? Nothing of that kind could ever alter the character of the account so as to make it other than a trader's account.

There is therefore no doubt there is prescription here.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I also concur. This case is distinguished in almost every point from the case of *M'Kinlay*, on which I presume that the Sheriff relied. This is simply a merchant's account.

THE COURT recalled the interlocutor of the Sheriff of 20th May, sustained the defender's plea of prescription, found that the pursuer could only prove the constitution and resting owing of the debt sued for by the defender's writ or oath, and remitted to the Sheriff to proceed.

HENDERSON & CLARK, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

¹ *M'Kinlay v. Wilson*, Nov. 18, 1885, 13 R. 210.

DUTHIE BROTHERS & COMPANY AND ANOTHER, Pursuers (Respondents).— No. 165.

Dickson—Younger.

ROBERT DUTHIE, Defender (Reclaimer).—*Asher—J. A. Reid.*

June 20, 1892.
Duthie
Brothers & Co.
v. Duthie.

Process—Amendment—Conditions—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 29.—Where a party to a cause has been allowed to amend the record on conditions imposed by the Lord Ordinary under section 29 of the Court of Session Act, 1868, he cannot, after making his amendments, object to the competency of the conditions.

Opinions that the Lord Ordinary has a discretionary power under the Act to attach conditions to such amendments as he may authorise with a view to the ultimate determination of the true points in controversy, and that the conditions are not limited to the mere payment of a sum of expenses.

ON 19th October 1891, an action was raised by "Duthie Brothers & Company, shipowners, 6 Crosby Square, London, E.C., part owners and managers of the steamship 'Telephone,' of Aberdeen," and Alexander Grant, bookkeeper, Langham Road, London, against Robert Duthie, shipowner, Footdee, Aberdeen, as owner of 5-64th shares of the vessel, for payment of his share of a debt of £1247 incurred against the steamer by James Aiken junior, its former manager, prior to 11th April 1888, when he ceased to be manager.

The pursuers stated;—"Prior to April 1888, James Aiken junior, shipowner, Aberdeen, was the registered owner of 40-64th shares of said steamer, and was, up to the 11th April 1888, the managing owner thereof. On his ceasing to act as managing owner on said date, the pursuers undertook the management."

The defender admitted that the pursuers "are the managing owners of the 'Telephone,'" but "denied that in April 1888 the defender was owner of shares in the 'Telephone.'"

The defender further stated that when the pursuers assumed the management they had purchased Mr Aiken's shares from the Commercial Bank, who held a mortgage over them, at the low price of £3000, in respect of a balance of debt against the steamer during Mr Aiken's management, "which balance, in terms of the purchase, they became bound to pay." He further stated,—"The defender acquiesced in the management of the vessel by the pursuers' firm only on the understanding that the ship was to be managed in Aberdeen."

The defender, *inter alia*, pleaded;—"The defender not being due or indebted to the pursuers in the sums sued for, is entitled to absolver, with expenses."

On 1st December, the Lord Ordinary (Stormonth Darling) closed the record, and on 19th December allowed a proof to both parties.

On 15th January 1892 his Lordship granted diligence for the recovery of documents.

On 18th February, the morning fixed for the proof, the defender stated that he had discovered from the writings recovered that the pursuers' title was defective, and he moved the Lord Ordinary for leave to amend his record. The Lord Ordinary accordingly discharged the diet of proof, "in respect it is stated the defender desires to amend the record."

The defender proposed to make extensive amendments on his defences. In these he objected to the pursuers' title to sue as managers or owners of the "Telephone." *Inter alia*, he averred that the pursuers had taken the management of the steamer without authority from the owners; that the title to the forty shares produced by them under diligence consisted of three bills of sale pretended to be granted by the Commercial Bank of Scotland, Limited, as mortgagees of 13, 14, and 13 shares in favour of

No. 165
June 20, 1892
Duthie
Brothers & Co.
v. Duthie

James, William, and Alexander Duthie, the individual partners of Duthie Brothers & Company. The bills conveyed no right or title to the pursuers Duthie Brothers & Company. The defender further averred that the pretended bills of sale were signed by the agent of the bank, who, under the bank's charter, had no right or authority to sign them.

On 16th March the Lord Ordinary pronounced this interlocutor:—"Opens up the record: Allows the defender to amend the record as proposed at the bar, on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last," &c.

James Duthie, William Duthie, and Alexander Duthie, partners of the firm of Duthie Brothers & Company, lodged a minute craving to be sisted as pursuers both as partners and as individuals.

The Lord Ordinary, on 17th May 1892, pronounced this interlocutor:—"In respect of minute 90 of process, sists the minuters in terms thereof: Allows the pursuers to answer the defender's amendments, and the same having been done, of new closes the record on the summons and defences, Nos. 1 and 5 of process, and appoints the cause to be put to the Procedure Roll: Grants leave to reclaim."

The defender reclaimed, and argued;—Under the diligence to recover documents he had for the first time obtained information which enabled him to maintain the plea of no title to sue. That plea went to the root of the pursuers' case, and the Lord Ordinary was right in allowing him to place it on record by way of amendment, for the amendment was necessary to determine the dispute between the parties in the sense of 29th section of the Court of Session Act, 1868.* The only condition of amendment which could be imposed upon him was one of payment of expenses. The Lord Ordinary was not entitled to attach a condition which was incompetent and unlawful. It was settled that it was incompetent to add a new instance to a cause without the consent of the defender.¹ The defender could only be said to have consented by having failed to reclaim against an interlocutor which he could not reclaim against. In the circumstances he was not barred from raising the question now.

Argued for the pursuers;—The Lord Ordinary's discretion as to the imposition of conditions for amendment was not confined to conditions as to payment of expenses. The word "otherwise" in section 29 shewed this. It was only reasonable that when he allowed the defender at a late stage in the proceedings to alter completely the state of his pleadings to the prejudice of the pursuers, he should impose some condition which should have the effect of placing them as nearly as possible in the position they would have been in had the amendment been made at the

* The Court of Session Act, 1868, enacts, sec. 29: "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment."

¹ *Hislop v. Macritchie's Trustees*, June 23, 1881, 8 R. (H. L.) 95, per Lord Watson, p. 106.

proper time.¹ If the defender considered the condition too harsh, he should have asked the Lord Ordinary's leave to reclaim against the interlocutor imposing the condition. Having made the amendments on the condition imposed, the defender must be held to have accepted it, and could not now reclaim.

No. 165.
June 20, 1892.
Duthie
Brothers & Co.
v. Duthie.

LORD PRESIDENT.—It is important to observe that on 18th February 1892 the Court was to have proceeded to take the proof in the cause under its previous interlocutor, and up to that time the defender's pleas were of a nature which is sufficiently indicated by saying that the first plea was: "The defender not being due or addebted to the pursuers in the sums sued for, is entitled to absolvitor, with expenses."

There had been no challenge of the pursuers' title, and no call made upon them to produce instruments instructing their title.

On 18th February the defender informed the Court that he desired to amend his record, and thereupon the diet of proof was discharged. It turned out that the amendments proposed were of the most material description. We have a copy of the original record with the alterations upon it, and a single glance shews that the amendments alter the whole record.

When the Lord Ordinary was apprised of the nature of the amendments he had to consider upon what terms they should be allowed. He prescribed these terms in his interlocutor of 16th March: "Allows the defender to amend the record as proposed at the bar, on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last."

When the defender was informed of the conditions upon which he was allowed to make his proposed amendments, he had a clear option before him. He could either make the amendments on the conditions imposed, or could abstain from making them. If he considered the terms of the Lord Ordinary too onerous, he should have asked leave to reclaim against the interlocutor prescribing those terms; but even if that had not been granted, his proper course would have been to go on and take his fate on the existing record, and, if need were, raise the question of the conditions of amendment as soon as he was able to ask our judgment upon it on a reclaiming note.

Instead of that, however, he has made the amendments on the Lord Ordinary's terms by altering his record and authenticating the alterations, and it is, in my opinion, too late now for him to object to them. It is therefore unnecessary to examine these terms on their merits. It is sufficient to say that the defender is disabled from challenging them because he has accepted them.

LORD ADAM.—I am of the same opinion. The interlocutor of 16th March allows the defender to amend the record "on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last."

¹ Thomson v. Hughson & Co., March 2, 1861, 23 D. 679, 33 Scot. Jur. 318; Keith v. Outram & Co., June 27, 1877, 4 R. 958.

No. 165. Now it appears to me that under the 29th section of the Court of Session Act of 1868 the power of the Lord Ordinary to fix the conditions upon which amendments shall be allowed is not limited to conditions as to expenses. He can impose other conditions if he thinks it right to do so. I do not think it necessary to consider whether the conditions here imposed by the Lord Ordinary are conditions such as I would have imposed. I agree with your Lordship in thinking that parties who have been allowed to amend their record on certain conditions, and have thereafter made the amendments, cannot come here to ask us to say that those conditions ought never to have been imposed. The interlocutor of the 16th March has been implemented.

June 20, 1892.
Duthie
Brothers & Co.
v. Duthie.

LORD M'LAREN.—The power of fixing conditions for amendment allowed to parties to a cause by the Court of Session Act of 1868 is not limited to conditions as to expenses.

The Lord Ordinary has a discretionary power to attach conditions to such amendments as he may authorise, with a view to the ultimate determination of the true points in controversy. Where the effect of allowing a defender to make amendments is to alter the conditions of the controversy to the prejudice of the pursuer, it seems only reasonable that new conditions should be imposed, such as shall have the effect of obviating the difficulty, or placing the pursuer as nearly as possible in the position in which he would have been if the matter of the amendment had been pleaded at the proper time.

Here, as your Lordship has said, these amendments (which go to the right and title of the pursuer to recover) were not proposed until after the record was closed and a proof allowed. The effect of allowing such amendments unconditionally is that the pursuer would be obliged to go on with his action under conditions which he never contemplated, because if he had known that the objection to title was to be raised he might have abandoned his action, or might have amended his title.

This, therefore, seems a suitable case for imposing a condition other than the award of a small sum of expenses.

Whether the conditions which the Lord Ordinary has here imposed are the best possible it is not necessary to inquire. I was not much impressed by the argument which we heard against them. Mr Asher said that the conditions must not be unlawful or impossible, and I do not suppose that any Judge would think of imposing conditions which were not pertinent to the subject of the action.

As the defender, however, has made his amendments under the conditions imposed by the Lord Ordinary, I agree that it is no longer in his power to object to the interlocutor authorising him so to amend.

LORD KINNEAR.—I am of the same opinion. When the Lord Ordinary intimated that he would only allow the amendments on certain conditions, the party proposing to amend had a clear option before him. He might either accept the conditions and alter his record, or he might say he was not prepared to accept the conditions, and move the Lord Ordinary to give effect to the amendments proposed by him, notwithstanding that he did not intend to comply with the conditions. The necessary result of this would be that the Lord Ordinary would refuse his motion, and would thus give him a judgment against which he might reclaim, if he desired to bring the question before the Inner-House.

If he desires to come at once to the Inner-House, he will move the Lord Ordinary for leave to reclaim. If the Lord Ordinary thinks leave should not be granted, the question will remain open until the final decision of the case. But what he cannot do is to alter the record by virtue of an interlocutor giving leave to amend on conditions, and then to reject the conditions on which leave to amend has been given.

I think by altering his record the defender has accepted the conditions imposed upon him, and upon which alone amendment was allowed.

THE COURT adhered.

J. & J. Ross, W.S.—MORTON, SMART & MACDONALD, W.S.—Agents.

MRS ELIZABETH MURPHY OR FLANNIGAN, Petitioner.—*Watt*.
JAMES MUIR (Inspector of Poor of Parish of Bothwell), Respondent.—*J. A. Reid*.

No. 166.

June 20, 1892.
Duthie
Brothers & Co.
v. Duthie.
Inspector of
Bothwell.

Parent and Child—Minor pubes—Custody—Child's choice of residence.—An orphan girl, born in Scotland, thirteen years of age, was boarded out by a parochial board to which she had become chargeable. Her paternal grandmother, who resided in Ireland, presented a petition to have the parochial board ordained to furnish her with the girl's address, and for the custody of the girl. A curator ad litem appointed by the Court to the girl stated that the girl wished to remain where she was, that the arrangements made by the board for the boarding, education, and wellbeing of the girl were satisfactory, and that, in his opinion, nothing short of force would induce the girl to go to her grandmother, and concurred in craving the Court to refuse the petition.

The Court *refused* the prayer for custody, on the ground that nothing had been shewn to justify the Court in interfering with the girl's choice of residence.

The Court being equally divided in opinion as to granting an order for the girl's address, on the motion of parties continued the cause *quoad ultra*.

ON 28th November 1891 Mrs Elizabeth Flannigan, residing at Upper Drumquill, County Monaghan, Ireland, with consent of James Flannigan, her son, presented a petition praying the Court to find the petitioner entitled to the custody of her two grandchildren, Mary and Rose Flannigan, and to have James Muir, as representing the Parochial Board of the parish of Bothwell, ordained forthwith to give the address of the children, and to deliver them up to the petitioner.

The petitioner averred that her son Matthew Flannigan, labourer, Rutherford, the father of the children, had disappeared from his home on 30th November 1890, had not since been heard of, and it was believed that he had been drowned in the Clyde. He was a widower, and left four children. Two of them were residing with the petitioner. Mary Flannigan was born on 1st July 1877, and Rose on 16th May 1879, and they had become chargeable to the parish of Bothwell. In October 1891 her son James, who resided with her, had applied to the Parochial Board of the parish for the custody of the children, but the respondent, Muir, had refused the application, and had declined to give him their address. The petitioner stated that she was able to maintain the children.

Answers were, on 16th December, lodged by James Muir, as representing the parochial board. The respondent stated that the elder child Mary was about to enter domestic service in Scotland, and while admitting that Matthew Flannigan had disappeared, he did not admit that he had died. In refusing the custody of the children he was acting in accordance with the instructions of his board, and in the best interests of the minors, who expressly desired to remain in Scotland, and had never seen their grandmother. The respondent denied that the petitioner was

No. 166.

June 21, 1892.
Flannigan v.
Inspector of
Bothwell.

in a position to maintain the children, and stated,—“She is tenant of a small holding, five acres in extent, at a rent of £3, and has no other means of subsistence. The respondent believes and avers that the said minors would, if sent to the petitioner, be sent out to work for the support of the petitioner.” He also stated that the Board of Supervision approved of the position he had taken up. He submitted that the prayer of the petition should be refused, in respect (1) the petitioner had not set forth, and did not possess, any title to insist in the petition; (2) that the children being minors *puberes* were entitled to choose their place of residence, and had declined to go to Ireland; and (3) that the petitioner was not in a position to maintain them. The respondent further founded on the Act 54 and 55 Vict. cap. 3.*

Argued for the petitioner;—At common law the question as to the custody of children was one for the discretion of the Court. In one case¹ the relatives of a deceased father had succeeded in inducing the Court to take away children from their mother, and in another case² a father had been considered unworthy of the charge of his children. Now here nothing was said against the petitioner's character. The substance of the answers was to the effect that her ability to support the children was doubted. That certainly was no ground for refusing the petition. She was at all events at the present stage of matters entitled to obtain the address of the children, for they could not make a free choice if they never made the petitioner's personal acquaintance.³ But (2) under the Act 54 and 55 Vict. c. 3, the Court had power to fix the children's residence.

Argued for the respondent;—In the first place, the petitioner did not state that the father of the children was dead, and until that was established the grandmother could have no possible right to their custody. But apart from that, it was settled that minors *puberes* were entitled to choose their own residence,⁴ and they absolutely declined in the present case to go to Ireland to their grandmother, who had never taken any interest in them. The Act 54 and 55 Vict. c. 3, only applied to pupils, but assuming it applied to minors, under the 4th section, the children were entitled to exercise their own free choice in fixing their residence.

On 20th February 1892, the Court appointed the respondent, James Muir, to intimate the petition and answers to Rose Flannigan, named in the petition; also appointed George Gillespie, Esq., advocate, curator ad litem to Rose Flannigan.

On 8th March Mr Gillespie lodged a minute in which he stated that he adopted the respondent's answers, and concurred in craving the Court to refuse the petition.†

* Section 4 of 54 and 55 Vict. c. 3, enacts,—“Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice.”

¹ Denny v. Macnish, Jan. 16, 1863, 1 Macph. 268, 35 Scot. Jur. 183.

² Harvey v. Harvey, June 15, 1860, 22 D. 1198, 32 Scot. Jur. 548.

³ Hutchison v. Hutchison, Dec. 13, 1890, 18 R. 237.

⁴ Fraser on Parent and Child, p. 363; Ersk. i. 7, 14.

† “The curator ad litem stated that, since his appointment, he had had a meeting in Edinburgh with his ward, who had come to Edinburgh in the care of a daughter of the person with whom she is now boarded. The ward was healthy looking, well dressed, and evidently well cared for. The girl who accompanied her was eighteen years old, of exceptionally good manners, neat, and well dressed. She was very kind in her behaviour to the ward, who, again, seemed much attached to her.

“The curator had some talk alone with the ward. She spoke quite frankly

At the hearing on Mr Gillespie's minute, counsel for the petitioner intimated that she no longer insisted in the prayer of the petition so far as it referred to the custody of Mary Flannigan. Counsel on both sides substantially repeated their former arguments.

No. 166.
June 21, 1892.
Flannigan v.
Inspector of
Bothwell.

At advising,—

LORD PRESIDENT.—The leading prayer of this petition is for the custody of two girls who are of the ages of fifteen and thirteen respectively. Their father and mother are dead. The girls were born and have always lived in Scotland, their father having been a labourer in Glasgow. He died or disappeared in 1890, and the girls then became chargeable to the Parochial Board of Bothwell. They were boarded out; the elder is now in service; the younger is still boarded out but looks forward to soon engaging in service.

In these circumstances we have to deal with this application.

The petitioner, who is the paternal grandmother of the girls, does not now press for the custody of the elder girl, and as she is fifteen, and a maidservant, this is not surprising. She persists, however, in her prayer for the custody of the younger girl.

The petitioner seems to take a view of her rights which is free from all complexity, for in the petition she gives the Court no information whatever as to her own circumstances, or as to the manner of upbringing which she proposes for her grandchild.

On the other hand, we have obtained from the curator ad litem whom your Lordships appointed a very satisfactory account of the position and prospects

and intelligently. She stated that the family with whom she was boarded fed and lodged her well, and were kind to her. They were Catholics, and she attended a convent school. The curator observed that she could read well, and could write fairly. Her sister Mary, she stated, was in service in the country town in which she (the ward) is boarded, and came to see her frequently. Mary had, before she went to service, boarded with the same family as the ward now boards with. She expressed most distinctly her determination not to go to Ireland, or to see her grandmother or uncle. The curator is satisfied that this determination is genuine, and has not been inspired by anyone. It depends not on any dislike of Ireland or her relatives,—for she has never been in Ireland, and never heard anything of her relatives either from her father while he lived, or from anyone else,—but upon her liking for her present surroundings and her prospects. She intends, in about two years' time, to go into service, like her sister. Her determination not to go to Ireland is so strong that, in the opinion of the curator, nothing short of force would induce her to go.

"She is boarded with a labourer in a country town. His wages are about 20s. a-week. He has living with him his wife, two sons, aged respectively twenty and seventeen, and earning respectively 20s. and 12s. a-week, and he has two daughters aged twenty-four and eighteen. The elder daughter is a domestic servant, and is not resident with her father. The other daughter was the girl whom the curator saw. She gave both the Flannigans excellent characters, and confirmed generally what the curator had been told by the ward herself. She had been educated in the same school as that which the ward now attends.

"There was laid before the curator the information which the respondent had collected, by correspondence and by a visit to the locality, as to the character and the circumstances of the petitioner and her son James Flannigan. *Prima facie* it justifies the statements made in the answers.

"Looking to the whole circumstances of the case, and in particular to the plain determination of the ward, the curator adopts the answers lodged by the respondent, and concurs in craving the Court to refuse the petition."

No. 166. of the girl as she is at present. She is comfortably boarded with a family of her own faith, who treat her well, and to whom she is attached; she is being properly educated, and looks forward to going into service like her sister, who had been boarded in the same family, and whom she sees frequently. The report by the curator ad litem shews that the girl is well where she is, and I have heard nothing to suggest that she would be better with the petitioner, even if we had to determine this question irrespective of her own wishes.

June 21, 1892.
Flannigan v.
Inspector of
Bothwell.

Those wishes, however, are of the most definite kind. She desires to stay where she is and to go into service in Scotland like her sister. She expressed to the curator ad litem most distinctly her determination not to go to Ireland, and he adds, "her determination not to go to Ireland is so strong that in the opinion of the curator nothing short of force would induce her to go."

In dealing with the case of a minor *pubes* it would, I suppose, even at the highest estimate of our powers, require a very strong case of conflict between the wishes of a young person on the one hand and his or her safety or welfare on the other, to justify us in enforcing our choice of a residence against his or hers. In the present case there is no such conflict. The fact that the parochial board supply this girl's board and have found her this abode cannot alter the facts of her wellbeing and thriving, or entitle us to make an order which there is no other consideration to support.

I am therefore for refusing the prayer for custody.

As regards the prayer for an order on the respondent to give to the petitioner the addresses of the girls, the Court is equally divided in opinion. If, therefore, the parties cannot otherwise arrange, an order will be pronounced for a hearing before seven Judges.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"In respect that the petitioner now no longer insists on the prayer of the petition so far as it refers to the custody of Mary Flannigan, refuse said portion of the prayer: Further, refuse the prayer of the petition so far as regards the custody of Rose Flannigan, and decern; and on the motion of parties, *quoad ultra* continue the cause."

A. B. CARTWRIGHT WOOD, W.S.—CURROB, COWPER, & CURROB, W.S.—Agents.

No. 167. TOWN-COUNCIL OF OBAN, Pursuers (Reclaimers).—*Dickson—Craigie.*
CALLANDER AND OBAN RAILWAY COMPANY, Defenders (Respondents).—*Asher—Deas.*

June 21, 1892.
Town-Council
of Oban v.
Callander and
Oban Railway
Co.

Railway—Property—Compulsory acquisition of land—Servitude—Callander and Oban Railway Act, 1878 (41 and 42 Vict. c. clxvii.), sec. 28.—When land is taken by a railway company under their compulsory powers it is taken absolutely and free of all servitudes, unless it be otherwise provided in the special Act.

A railway company by their private Act obtained compulsory powers to acquire land, and were taken bound to satisfy every claim competent to the town-council of a burgh for the "loss of all rights of servitude of which they shall be deprived by the construction of the company's works."

Some years after the execution of the works the burgh contended that the clause by implication saved its servitude of way over a strip of ground in front of the railway station, which had been taken by the company and converted by them into a garden, in respect that no works had been constructed to deprive the burgh of its right. *Held* that the servitude had been extinguished.

By their Act of 1878 the Callander and Oban Railway Company were authorised to make a railway to Oban, and a quay and sea-wall in the Bay of Oban. Under the 28th section of the Act it was provided "that the company shall satisfy every claim competent to the town-council for the loss to the public of all rights of servitude which they at present possess along the embankment erected by Robert Macfie upon the shore of Oban Bay, of which they shall be deprived by the construction of the company's works."

No. 167.

June 21, 1892.
Town-Council
of Oban v.Callander and
Oban Railway
Co.1st DIVISION.
Lord Low.

The railway company, under the powers conferred upon them, erected various works in Oban, including a railway station and a quay and sea-wall, for which purpose they acquired certain ground by compulsory purchase from Mr Macfie.

In March 1891 the Town-Council of Oban brought an action against the railway company, in which, *inter alia*, they asked for declarator of a right of servitude of way over the ground in question in favour of the burgh of Oban.

They averred that they had acquired the right of servitude, which extended over a space of fifteen feet in breadth, by grant from Mr Robert Macfie, dated 20th February 1877. In referring to the provisions of the 28th section of the Act quoted above they averred that the defenders had not acquired the right of servitude in any legal way, and that the ground was never required for their works or undertaking.

The defenders stated, *inter alia*, that there had been an agreement between them and the pursuers that a certain new road which was authorised by their Act was to be in lieu of the servitude road. "The pursuers are therefore barred by their own actings from now raising the question, more particularly after the interval which has been allowed to elapse in the non-use of the said servitude, and their acquiescence in the defenders' appropriation of the same. Explained that said servitude being inconsistent with the provisions of the said 1878 Act, and the Acts incorporated therewith, has been destroyed or suspended."

The pursuers denied that the new road was a substitute road, and that the alleged agreement bore the construction put upon it by the defenders.

The pursuers pleaded, *inter alia*;—(2) Alternatively, the pursuers having a right of servitude and tolerance of using the strip of ground marked D on plan No. 2, and the defenders having denied their right thereto, and put fences thereon, decree of declarator and interdict should be pronounced in terms of the alternative conclusions of the summons.

The defenders pleaded, *inter alia*;—(6) The alleged servitude being inconsistent with the 1878 Act, and the execution of the railway and works thereunder, has ceased to exist.

It was proved that the land over which the right of servitude had existed was enclosed, and formed into ornamental ground for the purpose of improving the access to the station.

The Lord Ordinary (Low), on 19th January 1892, assoilzied the defenders.*

* "OPINION.—. . . The next conclusion of the summons is for declarator that the pursuers have a servitude of way over a piece of ground marked D on plan No. 2. . . . There is no doubt that, in 1877, Mr Macfie granted a servitude of way over the ground marked D, and that although the defenders acquired the land they did not acquire the servitude.

" . . . There is therefore much to say for the view that the pursuers have forfeited the right, but, however that may be, the matter is dealt with in the 28th section of the Act, which provides that 'the company shall satisfy any claim competent to the town-council for the loss to the public of all rights of servitude which they at present possess along the embankment erected by

No. 167.

June 21, 1892.
Town-Council
of Oban v.
Callander and
Oban Railway
Co.

The pursuers reclaimed, and argued;—It might be true that where land was taken for the purposes of a railway under compulsory powers all servitudes affecting it were thereby extinguished. But it was necessary to this principle that the land so taken should be used for the purposes of the undertaking, which it was averred and proved was not the case here. Accordingly the right of servitude was still existent. The terms of the 28th section of the Act were quite consistent with this view. Indeed the words of the section specially pointed to its adoption in this case.

Argued for the respondents;—When ground was acquired compulsorily for the purposes of a railway company all servitudes affecting it were thereby extinguished, unless special provision was made in the Act for their retention.¹ It had never been held that the land so acquired must necessarily be used for the purposes of the railway works, and the words of the 28th section of the Act could not be read as supporting such a doctrine. A railway company was not bound to utilise all the ground it took for the immediate purposes of its works.²

At advising,—

LORD PRESIDENT.— . . . The next question is the pursuers' claim of servitude of way marked D D D, and I think that it admits of decision on a definite legal ground. The servitude was constituted by deed over land which has since been taken by the defenders under their compulsory powers. Now, when land is so taken by a railway company it is taken absolutely, with a resulting extinction of all servitudes, unless there be some particular provision in the special Act keeping them alive. Here it is suggested that this result is operated

Robert Macfie upon the shore of Oban Bay, of which they shall be deprived by the construction of the company's works'; and then follow provisions as to the manner in which the amount of compensation is to be settled.

"Now, it is not disputed that this section refers to the servitude in question, and it is admitted that the town-council have not claimed, and have no intention of claiming compensation for the loss of the servitude, for the obvious reason that they have received from the company a better road than the servitude way, and one equally convenient, and have therefore suffered no damage from the loss of the servitude. The pursuers' argument, however, I understand to be that the section does not apply, because the company have not constructed 'works' upon the ground covered by the servitude. Now, the company acquired the whole of B and C, the object being to obtain an access to their station from that side. They did not require the whole of the ground for the road of access, but they laid out what was not required for the roadway as ornamental ground, with the view of improving the general appearance of the access to the station. There is no doubt that they spent a good deal of money upon the ornamental ground, by building a new breast wall to the Black Lynn, and levelling up and enclosing and planting the ground. No authority was quoted to me to the effect that it was *ultra vires* of a railway company to lay out a piece of ornamental ground as an adjunct to their station, or the access to their station, and undoubtedly it is quite a common practice for that to be done. It seems to me that the ground having been acquired and used by the railway company in connection with their railway, the 28th section of the Act applies, and that the pursuers are only entitled to claim compensation in the manner therein provided for the loss of the servitude. I may add that it seems reasonable to assume that the town-council did not fence off the servitude road in the manner provided in the grant because they were aware that the railway was in contemplation, and that the railway company would possibly wish to acquire the ground."

¹ Walker's Trustees v. Caledonian Railway Co., Jan. 21, 1881, 8 R. 405, (H. of L.) March 29, 1882, 9 R. 19.

² Harris v. London and South-Western Railway Co., May 11, 1889, 60 L. T. 392.

by the 28th section of the defenders' Act. I do not think this is the case. I assume (although the defenders disputed) that the section applies to this particular right of way, and I find that it makes special provisions for compensation. *Prima facie* this does not point to any alteration of the general statutory result upon servitudes of the taking of the servient tenement. It was argued, however, that the words "of which they shall be deprived by the construction of the company's works" imply that, unless and until works are constructed on the ground the servitude shall continue to subsist; and it was said that, as the ground is at present occupied as a garden, therefore that event has not yet occurred, and the servitude still exists. I think this argument unsound. I do not think that the words in question relate to the specific physical occupation of the ground in question by the structures or excavations of the works. The company's works have been constructed under their statute, and the land in question was taken for the purposes of the company's works; these facts seem to me to make up the event contemplated by section 28. So far, therefore, from displacing the ordinary statutory result, viz., the extinction of the servitude, the section assumes and provides for it.

I am therefore against the pursuers on the whole of their case as laid on servitude.

LORD ADAM, LORD M'LAREN, and LORD KINNAR concurred.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—R. BRUCE COWAN, W.S.—Agents.

MRS BARBARA DUNCAN OR WALLACE, Pursuer (Respondent).—

Comrie Thomson—Watt.

THE CULTER PAPER MILLS COMPANY, LIMITED, Defenders (Reclaimers).—

Ure—Salvesen.

No. 168.

June 23, 1892.
Wallace v.
Culter Paper
Mills Co.,
Limited.

Reparation—Unfenced machine—Volenti non fit injuria.—Where a workman engages in any employment, he takes upon himself all the ordinary risks incidental to his employment. Where, however, there are additional risks created by his employers' fault, and an accident happens to the workman, it is a question of fact to be determined on the evidence whether the workman either expressly or by implication has voluntarily agreed to relieve his employer of the consequences of those risks, and if he has not the employer will be liable.

In an action of damages by the widow of a workman who was killed while pointing out a defect in a calendar machine at which he was working to his employers' engineer, it was proved that the machine was dangerous and should have been fenced, that the accident was due to the employers' failing to fence the machine, and that the deceased had on several occasions prior to the accident complained to the engineer and foreman of the works of the want of a fence.

Held (1) that the defenders were in fault in failing to fence the machine; (2) that the fact of the deceased continuing to work knowing the danger did not imply an agreement to relieve his employers of responsibility for the consequences of their fault; and (3) that the defenders were liable in damages.

Smith v. Baker & Sons, L. R. [1891] A. C. 325, followed.

In August 1890, Mrs Barbara Duncan or Wallace, Clovenraig, Peterculter, Aberdeenshire, brought an action against the Culter Paper Mills Company, Limited, for £500 as damages for herself and her children for the death of her husband, James Wallace, a workman of the defenders, who had died on 25th January from injuries sustained by being caught

1st Division.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

No. 168. in a calendar machine belonging to the defenders at which he was working on the previous day. The action was laid at common law and under the Employers Liability Act, 1880.

June 23, 1892.
Wallace v.
Culter Paper
Mills Co.,
Limited.

The defenders pleaded ;—(1) The deceased having been killed through no fault of the defenders, or of those for whom they are responsible, they ought to be assoilized, with expenses. (2) Contributory negligence.

A proof was allowed. The following statement of the result of the proof is taken from the opinion of Lord Adam :—" I think it is proved in this case that the calendar machine in question was defective and dangerous in respect that it was unfenced ; that the defenders knew that it was unfenced but allowed it to remain in that condition, because they did not think that it was dangerous ; that the deceased James Wallace knew or believed that it was dangerous in respect that it was unfenced, but that he nevertheless continued to work at the machine ; that on 24th January 1890, while engaged in pointing out a defect in the machine to the engineer at the works, he was caught by a wheel or other part of the machine, which was at work at the time, and was drawn into it, and received injuries of which he died next day ; that the accident would not have occurred had the machine been fenced ; that Wallace had frequently complained of the unfenced condition of the machine, and, in particular, that he had complained to Fraser, the engineer of the works in charge of it, who had promised to have it fenced by the New Year, but that this had not been done." It was proved that Wallace had been working for nine months at the machine. The evidence of the defenders' secretary shewed that they knew of the defect.

On 18th May 1891, the Sheriff-substitute (Hamilton Grierson) assoilized the defenders.

On appeal, the Sheriff (Guthrie Smith), on 4th February 1892, recalled this interlocutor, repelled the defences, and found the defenders liable in £300 damages.

The defenders appealed, and argued ;—There was no fault established on their part. The machine was not one which, in its ordinary working, was dangerous, and it had never occurred to those qualified to judge that it required fencing. The deceased had himself worked at it for nine months, and if he had taken the ordinary precaution of stopping the machine when he proposed to point out the defect, the accident would not have happened. Even if it could be held that failure to fence was a fault, it was the fault of Fraser, the foreman, and not that of the defenders, a limited company, with no knowledge of the state of the machine in question. The import of the proof was that the deceased, an intelligent man, had *volens* continued to work on in face of an intrinsic defect in the machine, well known to him. In these circumstances, it was well established by a long series of cases¹ that the maxim *volenti non fit injuria* applied. The deceased had virtually agreed to take the risk of an accident, and had relieved his employers of all responsibility. The law of England was to the same effect.² The case of *Smith v. Baker*³ did not apply. It did not profess to overrule the Scots cases, and it appeared to be decided upon the ground that the injured workman had been exposed to a danger

¹ *M'Gee v. Eglinton Iron Co.*, June 9, 1883, 10 R. 955; *M'Neill v. Wallace & Co.*, July 7, 1853, 15 D. 818, 25 Scot. Jur. 492; *Crichton v. Keir & Crichton*, Feb. 14, 1863, 1 Macph. 407, 35 Scot. Jur. 247; *Wilson v. Wishaw Coal Co.*, June 21, 1883, 10 R. 1021; *Fraser v. Hood*, Dec. 16, 1887, 15 R. 178; *M'Ternan v. White & Bee*, Jan. 25, 1890, 17 R. 368.

² *Thomas v. Quartermaine*, 1887, L. R., 18 Q. B. D. 685; *Griffiths v. The London and St Katherine Docks Co.*, 1884, L. R., 13 Q. B. D. 259.

³ *Smith v. Baker & Sons* L. R. [1891], App. Cases, 325.

from an operation in another department over which he had no control. Lastly, the maxim was applicable as a defence in an action under the Employers Liability Act, 1880,¹ the remedy given by the Act not affecting the principle that an injured man shall not recover where he has himself taken the risk. The case of *Clarke v. Holmes*² had, since its date, been reconciled with previous authorities, on the ground that the Court had thought there was a statutory duty on the employers to fence, and that they were precluded from drawing the inference that the pursuer had taken the risk because the machine was fenced when he came to his employment, and he had obtained a promise that it should be fenced when it was out of order.

Argued for the pursuer;—The machine was dangerous, and as matter of reasonable precaution against ordinary danger, should have been fenced. The pursuer had a good ground of action against the defenders under the Employers Liability Act, because their foreman, Fraser, had neglected to take this precaution. At common law, also, the ground of action was equally well founded, because it was clearly proved by the evidence of the defenders' secretary that they concerned themselves with the management of the works. The maxim *volenti non fit injuria* did not apply to the proved facts of the case. It was no doubt true that where a workman engaged in a hazardous operation he took upon himself all the ~~ordinary risks incident to his employment~~. It was, however, very different where there were additional risks unnecessarily created by his employer's fault. In that case, if an accident happened, it was not to be presumed that the workman had undertaken these risks, and his mere knowledge of the risks was not sufficient to imply his willingness to take them. In short, it was in each case a question of fact to be decided upon the evidence whether the employer had proved that the workman had voluntarily incurred a risk which but for his will would have fallen on the employer.³ Here, so far from the deceased being *volens*, he had complained that the machine was not fenced, and had even obtained a promise from his superior that it should be fenced by the New Year.

At advising,—

LORD PRESIDENT.—The facts relating to the death of James Wallace are not complicated. His business was to work a calendar machine. Some defect had occurred in the machine (the particular nature of which it is not at all necessary for present purposes to ascertain), and while he was, in accordance with his duty, pointing out this defect to the overseer, his clothes got caught by the machine, he was drawn into it and killed.

The fault on the part of the defenders alleged to have caused the death, and to found liability, is that the machine was unfenced, whereas it ought to have been fenced. In my opinion it is proved that, as matter of reasonable precaution against ordinary danger, the machine ought to have been fenced, and that

¹ *Yarmouth v. France*, 1887, 19 Q. B. D. 647, per M. of Rolls (Esher) 654; *Stuart v. Evans*, 1883, 49 Law Times, 138.

² *Clarke v. Holmes*, 1862, 7 Hurl. and Norm. 937, and 31 L. J. Exch. 356.

³ *Smith v. Baker & Sons*, L. R. [1891] A. C. 325, per Lord Herschell, 361; *Bartonshill Coal Co. v. Reid*, Jan. 17, 1858, 3 Macq. App. 266, Paters. App. 785, 30 Scot. Jur. 597; *Sword v. Cameron*, Feb. 13, 1839, 1 D. 493, 11 Scot. Jur. 330; *Holmes v. Worthington and Another*, 1861, 2 Foster and Finlason, 533; *Woodley v. Metropolitan District Ry. Co.*, 1877, 2 Exch. Div. 384; *Thomas v. Quartermaine*, L. R., 18 Q. B. D. 685; *Clarke v. Holmes*, 7 Hurl. and Norm. 937, *supra*, note 2; *Yarmouth v. France*, 19 Q. B. D. 647.

No. 168.

June 23, 1892.
Wallace v.
Cutter Paper
Mills Co.,
Limited.

No. 168.

June 23, 1892.
Wallace v.
Culter Paper
Mills Co.,
Limited.

the want of fencing caused the accident. Further, the evidence of the defenders' secretary brings home to the defenders themselves the direct responsibility for the want of fencing. The claim of the pursuer is therefore one at common law, and does not depend on the Employers Liability Act, 1880.

The defenders, however, have maintained the application of the maxim *volenti non fit injuria*; and this was the part of the defence which was strenuously maintained. Here again the facts are free both from controversy and complexity.

The absence of fencing was of course palpable. It is, I think, proved that Wallace complained of the want of fencing, as constituting a needless danger. Knowledge of the fact which created the danger, and of the danger thereby added to his work by the fault of his employers, are thus brought home to him. He was, therefore, to use the phraseology of recent decisions, *sciens*—was he *volens*?

That he was not willing, but on the contrary was unwilling, that the machine should remain unfenced, is directly proved. But there remains the question whether, by going on working while the machine remained unfenced, he demonstrated (for there is no other evidence of it) a willingness to accept the risk. Now, much of the difficulty which has gathered round this legal question has arisen from the ambiguity of the terms "risk," and "accepting the risk." If "risk" means simply "danger," and "accepting the risk" means "encountering the danger," then every workman who is *sciens* of a dangerous defect in machinery, and goes on working, accepts the risk in that sense, for he exposes his life and limbs to the danger of loss or injury. But, about such a workman, there remains over the question whether he "accepts the risk" in this other sense, that he agrees to relieve his master of the consequences of any injury caused by what, *ex hypothesi*, is the master's fault, and insures himself against the risk. In the case before us, there is no evidence of any such agreement. The occurrence of injury, owing to the want of fencing, was a chance and not a certainty, nor a chance approaching a certainty; and the measure of probability of injury was still less calculable or exactly appreciable in the case (which is that before us) of the workman having (in course of his duty) to do what he had never done before, viz., approach the machine in order to point out something in the inside of the machine. So far as the evidence shews, the attitude of Wallace when he communicated with the representatives of his employers on the subject was one of protest against the want of fencing; and I think the proper inference from his conduct is that, complaining of the defect, and not getting it at once removed, he let his employers take the consequences of their omission so long as it should continue.

The defenders, with commendable distinctness, confined their argument to the legal question which they desired to raise, and did not challenge the amount of the Sheriff's award. I am for dismissing the appeal; but as the Sheriff has confined himself to an assessment of damage, and has not given a decree, it will be necessary for us to pronounce a decree apportioning the sum between the pursuer, as an individual, and her children, for whom I presume she sues under the Guardianship of Infants Act, 1886.

LORD ADAM.—(After giving the result of the proof as reported above)—These being the facts of the case, the question is whether they disclose any valid ground of action against the defenders. The defenders maintained to us that

they did not, because they shewed that, as Wallace knew the dangerous condition of the calendar machine, he must be held to have undertaken the risk of injury resulting therefrom, and that, therefore, in accordance with the maxim *volenti non fit injuria*, the pursuer could not recover damages. No. 168.
June 23, 1892.
Wallace v.
Culter Paper
Mills Co.,
Limited.

I may say that I think that if the pursuer is entitled to recover damages at all, she is entitled to do so at common law; it is no answer to say that the defenders did not know that the machine was dangerous, if in point of fact it was so.

If we were to look only to the previous decisions in our own law, there would be difficulty in coming to a clear conclusion in favour of the pursuer in this case. The cases of *M'Gee v. Eglinton Iron Co.*, 10 R. 955, and *Fraser v. Hood*, 15 R. 178, and other cases to which we were referred, point to an opposite conclusion,—while the cases of *Sword v. Cameron*, 1 D. 493, and the *Bartonshill Coal Co. v. M'Guire*, 3 Macq. 266, tend, as was pointed out in the House of Lords in the case of *Smith v. Baker & Sons*, L. R. [1891], App. Cas. 325, to support the pursuer's case.

It appears to me, however, that the case of *Smith v. Baker & Sons* rules the present case. It is true that that case was not an appeal in a Scotch case, but there is no difference in the laws of England and Scotland as regards this matter. The case was decided on a review of the previous cases, Scotch as well as English, and I think it is of equal authority as if it had been decided in a Scotch appeal.

I think it was determined in that case that it was a question of fact in each case whether a workman, who has been injured in the course of his employment, has agreed either expressly or by implication to take the risk of the injuries he may have sustained, or, as it is put by Lord Watson, whether he has agreed that, if injury should befall him, the risk was to be his and not his master's, "risk" being here used as applicable to liability for the consequences of the injury, and not, of course, to the personal injury.

A workman may very well be presumed to have undertaken the risk of all injuries occurring in the ordinary course of his occupation, whether that occupation be a dangerous one or not—but where, as in this case, the injury has resulted from the negligence of the employers, the workman cannot be presumed to have undertaken the risk of injuries resulting from that negligence. Nor will the fact that he continued in his employment in the knowledge of the danger necessarily imply that he agreed to accept the risk. In the words of Lord Herschell, "where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk, and does not remonstrate, does not preclude his recovering in respect of the breach of duty."

Except that Wallace continued his work at this unfenced machine, there is no other fact founded on by the defenders to shew that he undertook the risk. On the other hand, it is proved that he complained to Fraser, the engineer, of the unfenced condition of the machine, and received a promise that it should be fenced, facts which shew that he did not consent that the machine should remain unfenced, and that he did not willingly work with it in that condition. I am of opinion that the appeal should be refused.

LORD M'LAREN.—There can be no doubt that a workman by engaging in a hazardous service takes upon himself all the ordinary risks incident to the employment. I agree with your Lordships, and I think it is in accordance

No. 168. with the judgment in *Smith v. Baker*, that the question whether a workman has taken extraordinary risks upon himself is one of fact to be ascertained in the course of the cause.

June 23, 1892.
Wallace v.
Culter Paper
Mills Co.,
Limited.

The true principle was laid down by Lord Kinnear in *M'Gee v. Eglinton Iron Company*, where, after stating the defenders' argument that as the workman voluntarily worked in the face of danger he did so at his own risk, his Lordship says,—“It may be that the pursuer should have refused to work with implements which he knew to be improper and insufficient. But I do not think this can safely be determined upon the record and without inquiry. There was a duty on both parties, and it is a question for a jury to consider whether in the circumstances which may be proved at the trial the fault lay with the defenders or with the pursuer himself.”

Now, the judgment of the Court in *M'Gee's* case was one of dismissal of the action, but on looking at the opinions one sees that the decision proceeds entirely upon the condition of the record in the particular case, and the case cannot be considered as laying down general principles inconsistent with what I conceive to be the true principle enounced by the Lord Ordinary, and more fully developed in *Smith v. Baker*.

There are cases (it is easy to figure them) where a workman does take upon himself special risks. For instance the case of a sailor or engineer engaging to proceed on a voyage in a ship which is in such a condition as not to be classed at Lloyd's, but which is not so unsound that the Board of Trade would prevent its going to sea. No doubt if the workman proceeds to sea knowing that the vessel is unclassified he takes the risk consequent upon his service in an unclassified vessel, although it is true that by a large expenditure the ship might be restored to her class. The other extreme is the case of a workman who notices a slight defect in the machine with which he is working, but who does not wish to put his master and the other workmen to the inconvenience of the day's work being stopped for repairs. Now, if the man could not, without breach of contract, throw up his service on the ground of this known defect, it is hard to say that by continuing to work he takes on himself the risk of personal injury which may be the result of working with a defective machine. In the absence of any evidence tending to shew that the workman had agreed to relieve the master of his responsibility for negligence, I should not infer the existence of such an agreement. In the present case it appears that the pursuer's husband knew or was of opinion that a certain part of the mechanism ought to be fenced, but it would strike one as a strong, and perhaps not quite legitimate proceeding, if the deceased workman had thrown up his employment because the machine was not fenced immediately after he called the foreman's attention to it.

I agree with your Lordship in holding it not proved in this case that the deceased had taken upon himself the risk of the injury from the unfenced machinery, and that the interlocutor of the Sheriff ought in substance to be affirmed.

LORD KINNEAR.—I am of the same opinion. I think the only difficulty arises from the difficulty of reconciling some of the previous decisions.

I agree in what I think was indicated by Lord M'Laren, that there is nothing in the decisions which tends directly to invalidate the distinction which has been taken as regards liability between the risks which are necessarily incident to a dangerous employment and those additional risks which may be unneces-

sarily created for the employed by the fault or negligence of the employer. No. 168.
 But then of course it is possible that a servant may agree to take such risks upon himself if he choose, and in some of the cases cited it appears to me to have been assumed that if a man comes to harm through his employer's negligence his knowledge of the fault when he incurred the danger is in itself conclusive evidence that he has taken the risk upon himself, or, in other words, has agreed to relieve his employer of the consequences of his fault.

June 23, 1892.
 Wallace v.
 Culter Paper
 Mills Co.,
 Limited.

Now, if that is to be regarded as an inference of fact, it seems a somewhat violent assumption; but I think that but for the decision in *Smith v. Baker* we should have had to consider whether or not it was imposed on us by previous judgments as a proposition in law.

But I agree with your Lordships that we are relieved of that difficulty by the decision of the House of Lords in *Smith v. Baker*, and that we are not required by any rule of law to consider the servant's knowledge of a danger arising from the master's fault as equivalent to an agreement to relieve the master of liability. The question whether a man who knows of his danger has agreed to take the risk upon himself is a question of fact to be determined with reference to all the circumstances of the case.

Upon the evidence in this case I agree that the pursuer's husband did not voluntarily agree to relieve his employer of the liability to fence the machine properly, and I think the Sheriff's judgment is right.

A joint minute was lodged for the parties stating that the defenders and appellants were willing to pay the sum of damages proposed to be awarded on a discharge by the pursuer and her whole family; and an obligation having been given to grant such a discharge, counsel for the parties concurred in decree being pronounced for the sum of £300 in favour of the pursuer.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff appealed against: Find in fact that on 24th January 1890 the pursuer's husband, James Wallace, while in the course of his duty in the employment of the defenders, pointing out to an engineer a defect in the calendar machine at which he worked, came in contact with part of the machinery, was drawn into the machine, and received bodily injuries, whereof he died on the following day: That the said machine was unfenced, whereas it ought, for the due safety of the workmen, to have been fenced: That the death of the said James Wallace was caused by the want of fencing: That the machine was left unfenced through the fault of the defenders: That on or prior to 24th January 1890 the said James Wallace knew that the said machine was unfenced: That the said James Wallace had on several occasions prior to the said date complained to the foreman in charge of the department in which he worked, and also to the engineer in charge of fencing in the defenders' mill, of the want of fencing of the machine in question as creating a needless danger in working it: Find in law that the defenders are liable at common law in reparation for the death of the said James Wallace: In respect of the joint minute, decern against the defenders for payment to the pursuer of the sum of £300."

ANDREW URQUHART, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

No. 169.

F. W. B. HERON MAXWELL AND OTHERS (John Maxwell Heron's Trustees), First Parties.—*Howden*.

June 23, 1892.
Maxwell
Heron's Trus-
tees v. Max-
well Heron.

VIOLET BRIDGET MAXWELL HERON AND OTHERS, Second Parties.—

*Jameson—Cooper.*GUY MAXWELL HERON, Third Party.—*Ure—Blackburn.*

Provisions to children—Bond of provision—Bankruptcy—Surrogatum.—The proprietor of an estate, which he had disentailed, became bankrupt. At the date of his sequestration the estate was burdened with a bond for £6000 which he had granted to trustees "in trust, for payment to the children of" his "marriage surviving me who would not have succeeded" under the entail, "or in case of such of them as shall predecease me, their lawful issue or representatives claiming right in virtue of special settlement by marriage-contract of the sums to be received by them." The bond contained a declaration that if at the granter's death there should only be two of such children, issue or representatives, surviving, the obligation should be restricted to £5000, and if there should only be one, £4000, and that if there should be none the provision should lapse. The date of payment was to be the first term twelve months after the granter's death.

In the sequestration the trustees for the children, of whom there were two, were ranked for £2510, as the value of their contingent claim on the estate, and received payment of that sum.

In a special case the two children claimed the sum from the trustees as the value of their contingent right, or at least the interest of the fund. *Held* that the sum, with the interest thereon, fell to be held by the trustees till the first term a year after the granter's death.

2D DIVISION.

IN 1883 John Maxwell Heron, heir of entail in possession of the estate of Heron, presented a petition for disentail. In the course of the proceedings he, in implement of obligations in his antenuptial contract of marriage, granted a bond and disposition in security over the estate in favour of F. W. B. Heron Maxwell and others, "in trust for payment to the children of the said marriage surviving me who would not have succeeded under said . . . deed of entail to the said entailed lands and estate, or in the case of such of them as shall predecease me, their lawful issue or representatives claiming right in virtue of special settlement by marriage-contract of the sums to be received by them in such proportions, if more than one, as I shall appoint. . . ." The bond was for £6000, payable at the first term one year after his death, but it contained a declaration that if at the date of the granter's death "there should only be two such children surviving, or the lawful issue of two such children, or the representatives of two such children claiming right in virtue of special settlement by marriage-contract, the obligation should be restricted to £5000, and if there should be only one such child, or issue, &c., to £4000, and if he should not be survived by any child, or issue or representative as before mentioned, the provision should lapse.

The estates of the said John Maxwell Heron were sequestered on 11th July 1887, and the estates over which the bond and disposition in security extended—then held in fee-simple—were sold by the trustee in the sequestration. At that time he had three children, Violet, born in 1870, Guy, born in 1871, and Basil, born in 1878. The rights of the younger son and the daughter, under the bond, were valued by the trustee in the sequestration, in terms of the *Bankruptcy Acts*, at £2510, 11s., after taking into account all the contingencies mentioned in the bond. This valuation was concurred in by the trustees, and in the ranking and division of the claims of the heritable creditors on the price of the heritable estates, the trustees, for behoof of the children, were

ranked and preferred by the Court for that sum, which was paid over to No. 169. them.

The children having claimed payment of the money, a special case was presented to the Court. The trustees were the first parties, the children, Violet and Basil, and the father as curator to the younger of them, were the second parties, and the elder son, Guy, was the third party.

June 23, 1892.
Maxwell
Heron's Trustees v. Maxwell Heron.

The questions at law were—“(1) Are the second parties now entitled to payment from the first parties of the sum of £2510, 11s., with the interest accrued? or (2) Are the first parties bound to retain the said principal sum until the first term of Whitsunday or Martinmas which shall happen one year after the said John Maxwell Heron's death? and (3) In the event of question two being answered in the affirmative, are the first parties bound to accumulate the interest of the principal sum with principal; or are they entitled meanwhile to pay or apply said interest to or for behoof of the second parties?”

The first parties maintained that the sum in question was the value, ascertained at the time of ranking, of a sum which was not due to the second parties until one year after the death of the said John Maxwell Heron, and that it should remain in their hands as trustees, with accumulation of interest, until that date.

The second parties maintained that the sum being the present value of their contingent claims ascertained in terms of the Bankruptcy Statutes, was now payable to them, and required that the sum should now be paid to them. In any case, they required that the interest on the principal sum should be paid over to them as it accrued.

The third party concurred with the first.

LORD YOUNG.—The first parties here are trustees, who were in possession of a bond on the conditions and terms which that bond itself expresses. They were to receive nothing if the children predeceased their father, and they were to receive, if any of the children survived him, a sum in proportion to the number of the children. The father's estate was burdened with this bond thus conditionally and provisionally. Then, as its owner became bankrupt, the estate had to be sold, and to that end cleared of this burden.

The only way of clearing the estate was to ascertain the amount of the bond by valuation, and to pay over that sum to trustees. The sum so paid came in lieu and place of the original bond, and, except as regards the amount of the trust fund, does not alter the position or the rights of the children. Who the children may be at the date of the father's death, we cannot tell. Two of the children are of age, but the third is a boy of thirteen. If they were all of age it might not have been difficult for them to come to some arrangement, although it might not have been very easy in view of the possibility of other children being born.

I think, then, that as matters are, as the parties cannot arrange, the trustees must hold the money for the trust purposes for which they held the original bond. They must also accumulate the interest for the same purpose.

LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT answered the first question in the negative, the second in the affirmative, and the first alternative of the third question in the affirmative, and the second alternative in the negative.

J. & F. ANDERSON, W.S.—J. K. & W. P. LINDSAY, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

No. 170.

SAMUEL HAMILTON (Wilson's Trustee), Pursuer and Real Raiser.

JOHN ADAM INGLIS, Claimant (Respondent).—*Constable*.

June 23, 1892.

Inglis v.
M'Neils.DANIEL M'NEIL AND OTHERS, Claimants (Reclaimers).—*M'Lennan*.

Succession.—*Division per stirpes or per capita*.—A testator directed her trustees to pay the whole residue "equally between John Inglis and the children of Daniel M'Neil . . . equally between them." John Inglis was a nephew of the testator, and Daniel M'Neil's wife was a niece. Both survived the testator. *Held* that the division was bipartite between Inglis and the M'Neils, and equal again among the M'Neils, of whom there were eight.

2D DIVISION.
Ld. Stormonth
Darling.

MRS MARION ADAM OR WILSON died in 1885, leaving a trust-disposition and settlement, in which she directed her trustees ". . . (Second) To make over my furniture equally between John Inglis, 5 Eliza Terrace, Begg Street, Paddington, Sydney, and the children of Daniel M'Neil before mentioned, including the said Daniel M'Neil junior, equally between them. (Third) To pay the whole residue of my means and estate equally between the said John Inglis and the said children of the said Daniel M'Neil, equally between them, . . . and to divide all my napery and body clothes equally between the said Mary Adam or Ramsay and the said wife of my brother, John Adam."

John Inglis and Mrs M'Neil were children of a deceased sister of the testator. Both survived the truster. Mrs M'Neil had eight children at the date of the truster's death. The truster was also survived by a brother, by a sister, and by the issue of a predeceasing brother.

The trustees raised a multipoleinding to determine whether the division of the residue was to be *per stirpes* or *per capita*.

John Inglis claimed one-half of the fund. The M'Neils, on the other hand, claimed each a ninth of the whole, leaving John Inglis a ninth.

The Lord Ordinary (Stormonth Darling), on 18th May 1892, sustained John Inglis's claim, and an amended claim for the M'Neils, whereby as an alternative to one-ninth each the family claimed one-half of the fund equally among them.*

* "OPINION.— . . . The testator was survived by a sister, a brother, and by the descendants of another brother and sister. She does not seem in her will to have followed the rules of intestate succession, but she made a selection from her relatives, benefiting chiefly the claimant John Inglis, who was a son of one of her sisters, and the other claimants, the M'Neil family, who were the children of a sister of Inglis, and therefore grandnephews and grandnieces of her own. That being so, it would of course be improper to attach too much importance to the mere fact of propinquity in construing this will, because it is obvious that she did not look with equal favour upon all her relations, but made a certain selection from among them. At the same time, I think it has a certain bearing, as I shall afterwards explain.

"The clause requiring to be construed is the residuary clause, which contains a direction to the trustees 'to pay the whole residue of my means and estate equally between the said John Inglis and the said children of the said Daniel M'Neil, equally between them'; and the question is whether that imports a bipartite division, or a division *per capita* into nine shares. I am of opinion that it imports a bipartite division, and in so deciding I do not think that I am running counter to any rule of law. There is a rule, or more properly perhaps, a presumption in favour of division *per capita* in the simple case where a fund is left to certain persons equally among them, although some of these persons are named and some are only described as a class, and probably that rule would hold even where, as here, the beneficiary named is one degree nearer in relationship than the beneficiaries who are called as a class. But then it is equally well established that any indication of a contrary intention must receive effect,

The M'Neils reclaimed, and argued ;—The bequest to Mr M'Neil's children shewed that they were selected for themselves, and not as representing their parent. The rule in favour of division *per capita* was well fixed.¹ In England the rule had been carried a long way.² In Scotland too it had been applied where on the one side was an individual, and on the other "the children" of some one named.³ The difficulty however was as to the repetition of the direction to divide equally; it was submitted that that did not infer two divisions, but was to be read as if the second "equally" were "share and share alike," *i.e.*, a mere affirmation of the first "equally." Lord Westbury had inclined to this view in a similar case,⁴ and it had been so decided in Scotland.⁵

No. 170.
June 23, 1892.
Inglis v.
M'Neils.

Argued for John Inglis ;—Lord Westbury's opinion in *Davis's* case⁴ was at the best *obiter*, but his Lordship seemed in the course of his judgment to waver in his opinion. In *Renny's* case the destination was to the children of a person named, and two individuals and the survivors of them. Hence it was inferred that all the beneficiaries were to be placed on the same footing. Mr Jarman and the Judges who decided *Payne's* case laid down that the rule, which was no doubt for a division *per capita*, would be very easily displaced. Now here the reduplication of the direction to divide equally was fully sufficient to displace it.

and I think in the present case such an indication is afforded by the repetition of the words 'equally between them.' It was contended for the claimants, the M'Neils, that these words were merely redundant, but it is a well-settled rule of construction that some meaning must be found for every word in a will, if that be possible, and I think, according to the construction contended for by the claimant Inglis, it is possible to find an intelligible meaning for the repetition of these words. The clause then would simply mean that the division of the residue is to be bipartite,—that is to say, an equal division between Inglis and the M'Neil family; and the purpose of the insertion of the words, 'equally between them,' a second time would be to provide, what no doubt the law would have provided, but what it was quite natural for the testatrix herself to provide, that the division among the M'Neil family should also be equal.

"Now I confess that, while that is the main ground which has led me to a conclusion in favour of Inglis, I am also to some extent, and I think legitimately, influenced by the consideration that he was a nephew, while the M'Neil family were only grandnephews and grandnieces. That consideration might not be enough by itself to overcome the presumption in favour of division *per capita*; but when you find words, as I think you do here, indicating a contrary intention, it is, as it seems to me, a perfectly legitimate thing to bring in aid of that construction the fact that the beneficiary named was one degree nearer in relationship than the beneficiaries called as a class, and that therefore a division *per capita* was a natural division, and indeed the kind of division which I think we would expect if there were nothing to the contrary. It is reasonable to conclude that the testatrix was more likely to deal with the family of a niece as being in place of their mother than to put each of them on the same footing as her nephew, and if words can be found which fairly bear that construction, I have, at all events, the satisfaction of thinking that the construction which I am adopting is in accordance with the ordinary motives of the human mind. For these reasons I shall sustain the claim of Inglis to one-half of the fund *in vivo*, and the claim of the M'Neils to the remaining half."

¹ *M'Laren on Wills and Succession*, i. 724; *Bogie's Trustees v. Christie*, Jan. 1882, 9 R. 453; *M'Courtie v. Blackie's Children*, Jan. 15, 1812, Hume, 270.

² *Jarman*, ii. p. 194; *Payne v. Webb*, 1874, L. R., 19 Eq. 26.

³ *Grant and Others v. Fyffe*, May 22, 1810, F. C.; *M'Courtie*, *ut supra*.

⁴ *Davis v. Bennet*, 1862, 31 L. J. Ch. 337.

⁵ *Renny v. Crosbie and Others*, Dec. 3, 1822, 1 S. 60.

No. 170. LORD JUSTICE-CLERK.—The usual rule ought to be followed here, viz., that we should give a meaning to every word which the testator has used, if a reasonable meaning can be found, and not that we should suppose that the testator has put in words which have no meaning.

June 23, 1892.
Inglis v.
M'Neils.

Now this latter course is the course which Mr M'Lennan asks us to take. He asks us to read the words "equally between," used at the beginning of the bequest, and the words "equally between them," at the end of it, as meaning the same thing.

I concur in the remark made for the respondent that the natural meaning of a bequest given equally to an individual, and to the children of another individual, is a bequest *per stirpes* and not *per capita*, and that it requires very distinct words to authorise any other division.

Now the first "equally between" means that there is to be an equal division between the two classes, and the meaning of the second "equally between them" is that there is to be an equal division among the members of the second class.

LORD YOUNG.—I do not think that this case is free from doubt, but in *dubio* I think the probabilities are in favour of the Lord Ordinary's view, although I am not sure that I should put it so touchingly as he has done, viz.:—"I have, at all events, the satisfaction of thinking that the construction which I am adopting is in accordance with the ordinary motives of the human mind."

I do think, however, that it is more probably in accordance with the intention of the testator that it should be so. I do not think it is desirable to attempt to express any rules for such cases. The only rule, and it is a very simple rule, is that a conveyancer who is writing a will should ascertain his client's intention as clearly as he can, and should then express it as clearly as he can.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT adhered.

CUMMING & DUFF, S.S.C.—P. J. PURVES, Solicitor—Agents.

No. 171. ALEXANDER PRINGLE, Petitioner (Respondent).—*Dundas*—*C. K. Mackenzie.*

June 28, 1892.
Pringle v.
Pringle.

ROBERT KEITH PRINGLE AND ANOTHER, Respondents (Reclaimers).—*Mackay—Salvesen.*

Entail—Disentail—Valuation of expectancies—Deduction of improvement expenditure—Entail (Scotland) Act, 1882 (45 and 46 Vict. c. 53), sec. 6.—At the date of a petition for disentail a sum borrowed for improvement expenditure was secured by a terminable rent charge. Under the Entail Act 45 and 46 Vict. cap. 53, sec. 6, the heir in possession is entitled, when one-fourth of the capital sum is repaid, to grant a bond over the estate for the remaining three-fourths.

In the valuation in 1890 of the expectancies of the second and third heirs substitute they objected to more than three-fourths of the original sum being deducted from the value of the estate on the ground that only three-fourths could be made a permanent burden on the estate.

Held that the whole sum remaining unpaid at the date of the execution of the instrument of disentail fell to be deducted from the value of the estate.

Entail—Disentail—Valuation of expectancies—Deduction of succession-duty.

—*Held* that the succession-duty which a substitute heir would have to pay on succeeding to an entailed estate was not a proper element of deduction from the value of his expectancy in the case of a disentail. No. 171.

Entail—Disentail—Date of valuation of expectancies.—The date of execution of the instrument of disentail is the date at which the value of the expectancies of the substitute heirs is to be calculated, and they are not entitled to interest on that value until it is consigned or secured.

Entail—Disentail—Valuation of expectancies—Average life.—*Opinion* (per the Lord President) that there may be circumstances in which the Court, in valuing the expectancy of a substitute heir, ought to take account of the fact that his prospect of life is better than the average.

Averments which it was *held* did not amount to the statement of a case of an exceptionally good life of an officer in the Indian army.

Entail—Disentail—Expenses.—Observations on the liability for expenses of persons opposing petitions for disentail.

[*SEQUEL* of case reported *ante*, June 12, 1891, 18 R. 895.]

In this petition, presented on 29th July 1890, by Alexander Pringle, heir of entail in possession of the estates of Whytbank and Yair, for authority to record an instrument of disentail of the estates, the next heir consented to the disentail. A remit was made by the Lord Ordinary (Low) on 18th June 1891 to Mr J. J. M'Lauchlan, actuary, to ascertain the value in money of the expectancies of Robert Keith Pringle and Alexander Pringle, who were father and son, and the second and third heirs of entail.

1ST DIVISION.
Lord Low.

The actuary reported the capital value of the estate to be £27,285. He made a deduction in respect of certain annual rent charges running for twenty-five years from Martinmas 1882, Whitsunday 1885, and September 1889 respectively, which he explained as follows:—"In fixing the sum to be taken as the value of the estate at the time when the above-mentioned Robert Keith Pringle and Alexander Pringle may be expected to come into possession of it, the actuary has deducted a sum of £1673, 16s. 3d. in respect of the drainage rent charges, being three-fourths of the amount originally advanced. He finds that by the year 1898 one-fourth of all the sums borrowed in consideration of these rent charges will have been repaid; and assumes that the heir in possession will thereafter (in terms of section (6) (4) of the Entail (Scotland) Act, 1882) substitute for the rent charges a bond and disposition in security over the estate for the sum mentioned above."

The report further bore:—"The various heirs of entail interested in the property, so far as material, are as follows, the ages being calculated as at the date of the petition, 29th July 1890:—(A.) The heir in possession—Alexander Pringle, born 13th March 1837, aged fifty-three. He was married in 1870, and his wife was born 5th August 1849, and is thus almost forty-one years of age. They have had no issue. (B.) The first heir—Robert Pringle, born 15th February 1832, aged fifty-eight. He was married 29th December 1868, and his wife is aged forty-nine. There have been seven daughters born of the marriage, but no son. (C.) The second heir—Robert Keith Pringle, born 12th March 1802, aged eighty-eight. His wife was born 6th December 1826, and is thus aged sixty-three. He has four sons (including D, mentioned below) and five daughters. (D.) The third heir—Alexander Pringle, the eldest son of C, born 27th October 1850, aged thirty-nine. He is, or was, at the date of the petition, a captain in the Bombay Native Infantry, and in India or elsewhere furth of Scotland."

After stating his estimate of the value of C and D's expectancies, the actuary made this explanation:—"The actuary has made an allow-

No. 171.
June 28, 1892.
Pringle v.
Pringle.

ance in his calculations for the fact that, in consequence of D's occupation and residence, his life is exposed to more than the average risk, the effect of such allowance being to reduce the value of D's interest by £305. This is based on the assumption that D will be ten years more in India, and that the extra risk of death to which he will be subject during the whole remainder of his life is correctly represented by an extra premium at the rate of 1 per cent per annum, payable during these ten years. It may be stated that the practice of the Life Assurance Society with which the actuary is himself connected is to charge an additional premium for military service in India in time of peace at the rate of 30s. per cent per annum; and this, of course, includes a margin for expenses and contingencies. The rate of 1 per cent has been confirmed by a comparison with the mortality experienced by the Standard Life Assurance Company among this class of lives between the years 1870 and 1885. The actuary has also taken into account that D will have to pay succession-duty on coming into possession of the estate, a deduction of £17 being made from the value of his interest in respect of such duty."

The petitioner objected to the actuary's report on the ground that in fixing the value of the estate he ought to have deducted the whole amount of improvement expenditure charged under the bond of annualrent, in so far as not repaid at the date of valuation.

The second and third heirs objected to the actuary's report,—“(1) In respect that the actuary has estimated the value in money of the expectancies or interests of the respondents as at the date of presentation of the petition, viz., 29th July 1890, when the ages of the petitioner and each of the heirs were two years less than they are now. By this increase in the ages the life interest of the petitioner is largely diminished in value, and the value of the respondents' expectancies or interests, particularly that of the third heir, is considerably increased. They submit that the value of the respondents' expectancies or interests should be ascertained as at the present date, and according to present circumstances; or otherwise, that interest should be added to the value ascertained as at 29th July 1890, from that date till consignment in bank . . . (2) In respect that the actuary has deducted £305 from the value of the expectancy or interest of the third heir, on the assumption that he will be ten years more in India. . . . (3) In respect that the actuary has deducted £17 for succession-duty. . . .”

On 13th April 1892 the Lord Ordinary (Low) pronounced this interlocutor:—“Finds that, in estimating the value in money of the expectancies or interests of the second and third heirs of entail, there falls to be deducted from the valuation of the estate the capital sum of improvement expenditure charged upon the estate by way of annualrent, in so far as the said capital sum had not been repaid by the heir of entail in possession at the date when the valuation of the estate fell to be made, and the value of the expectancies or interests of the next heirs ascertained: Allows the third heir, the respondent Alexander Pringle, to lodge in process a statement of any circumstances which he considers to be material, in view of the deduction which the reporter has made from the value in money of his expectancy or interest in respect of his residence in India: To the above extent and effect sustains the objections stated to the bar to said report, and *quoad ultra* approves of the report, except in so far as regards the said deduction from the value of the expectancy or interest of the said Alexander Pringle, and reserves the question whether the said deduction falls to be made in whole or in part, and continues the cause.”

The following statement was thereafter lodged for the third heir:—

" . . . Captain Pringle has held his commission in India for twenty years. He is about to return home on furlough, and he may then marry and remain in this country. He will be entitled to the rank of major in December next. His father served thirty years in India, and is now in the ninety-first year of his age. Captain Pringle is in good health, and it is submitted that no deduction ought to be made, either on the ground of residence in India, or assumed further residence of ten years there, in the absence of proof of actual bad health and an injured constitution. No. 171.

June 28, 1892.
Pringle v.
Pringle.

"In any view, it is submitted, that it should be assumed that he may soon be in this country on furlough, and may remain thereafter at home.

"It would not be fair to Captain Pringle to assume that his life has undergone an average shortening of the lives of Europeans in India, which would put upon him a share of the injured and shattered constitutions due to original weakness, disagreeing with the climate, or indiscretions and bad habits on the part of some who go from this country to India. It should be assumed that the expected duration of his life is at least equal to the average of those whose constitutions are good, and agree with the climate of India, and have not suffered from any indiscretions or bad habits."

The actuary reported upon that statement as follows:—" . . . If what is stated on behalf of Captain Pringle is correct, it follows that, before we can say what deduction (if any) ought to be made from the value of his interest on account of his being an officer in the Indian army, a variety of facts personal to himself must be inquired into, such as his family and personal history, the present condition of his health and constitution, and his habits and mode of life, also his prospects of being employed on dangerous service, or, on the other hand, of retiring and coming home.

"The actuary is of opinion that such a course would be contrary to the practice invariably followed in the usual case of the valuation of the expectancy or interest of an heir resident in this country, and engaged in an ordinary civil occupation. In that case, in the absence of any allegation that the life is a damaged one, the practice of actuaries is, he believes, to calculate the value on the footing that the heir is an average life of his age; the probabilities of life used being taken from a table which represents the mortality in a body of mixed lives, containing persons in all varieties of condition as regards health. . . ."

On 13th May following the Lord Ordinary pronounced this interlocutor:—"Approves of said report: Finds that the value in money of the expectancy or interest of Robert Keith Pringle, the second heir, is £68 sterling, and that the value in money of the expectancy or interest of Alexander Pringle, the third heir, is £5781 sterling."*

* "OPINION.—In my opinion, the fact that the respondent Captain Pringle is and has for many years been resident in India cannot be left out of view in estimating the value of his interest in the entailed estate. I do not think that it can be disputed that the probability of life of a person residing in India is less than that of a person resident in the United Kingdom. Insurance companies certainly act upon the assumption that that is the case, and protect themselves against the risk of persons insured going to a tropical climate.

"In dealing with Captain Pringle's case the actuary has assumed that he has the average prospects of life for a man of his age; that his prospects of life have been diminished to the average extent by his residence in India, and that he will retire from the army and cease to reside in India at the usual time for officers in his position. Unless there are special circumstances taking Captain

No. 171.

June 28, 1892.
Pringle v.
Pringle.

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June 28, 1892.
Pringle v.
Pringle.

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The actuary reported upon that statement as follows:—" . . . If what is stated on behalf of Captain Pringle is correct, it follows that, before we can say what deduction (if any) ought to be made from the value of his interest on account of his being an officer in the Indian army, a variety of facts personal to himself must be inquired into, such as his family and personal history, the present condition of his health and constitution, and his habits and mode of life, also his prospects of being employed on dangerous service, or, on the other hand, of retiring and coming home.

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No. 171.

June 28, 1892.
Pringle v.
Pringle.

The second and third heirs reclaimed, and argued;—1. The actuary had taken the sound view in regard to the deduction from the value of the estate on the head of improvement expenditure. Assuming that the heir of entail lived until 1898, he would then by the 4th subsection of section 6 of the Entail (Scotland) Act, 1882, be entitled to charge the borrowed money, which would by that date be reduced to three-fourths of the whole, by way of a bond and disposition in security over the estate. Three-fourths of the expenditure was all that could be charged permanently on the estate, and it was therefore all that affected the interests of the next heirs. The expenditure was not a burden on the estate until it was so chargeable, although it might be a burden on the successive heirs of entail. Section 7 of the Entail Act of 1882 was not applicable, as it seemed to contemplate the case where the heir of entail was himself the creditor when the petition was presented. He was not the creditor here, but had borrowed on the credit of the entailed estate. 2. The averments to the effect that Captain Pringle's life was better than the average ought to be taken into account in valuing his expectancy. This resulted from the decision of the House of Lords in the case of *Macdonald*,¹ where it was held that circumstances which adversely affected the life of an heir of entail should be considered in the question of value. The rules of insurance companies were not in point, as they put safe values for themselves upon the lives of their insurers. 3. The date at which the value

Pringle's case out of the ordinary rule, it appears to me that the principle adopted by the actuary is sound.

"When the case was last before me I allowed Captain Pringle an opportunity of stating any special circumstances which would necessitate his case being dealt with as an exceptional case. He has lodged a statement, but I do not think that it contains any averment of fact which necessitates further inquiry. He admits that he has been for twenty years in the Indian army, and although he says that he may retire at an early date, he does not dispute that in the ordinary course of his profession he may serve for other ten years. The case therefore, upon Captain Pringle's own shewing, appears to me to be the ordinary case of an officer serving in the Indian army, which can, I think, only be dealt with as an average case.

"I was also asked to delay the case in order that further communication might be had with Captain Pringle. I do not think that any further delay can be granted. The petition was brought in July 1890, and therefore there has been ample time to obtain from Captain Pringle all necessary information.

"The next question is, at what time is the value of the interest of Captain Pringle to be ascertained? That seems to me to be settled by the case of *Macdonald* in the House of Lords. The date fixed in that case was the execution of the instrument of disentail, and I do not find that that date was taken or account of any special circumstances in the case. I think that the learned Lords intended to lay down a general rule, and this was the view of the decision taken by Lord Kinnear in the case of *Sprot*, 19 S. L. R. p. 738. It was contended, however, for Captain Pringle, that if the value of his interest is fixed as at the date of the instrument of disentail, he is entitled to interest upon the amount until it is consigned or secured. *Prima facie*, the request is not an unreasonable one, but I find no warrant for it in the statute. The statute directs the Court to ascertain the value in money of the interest of the heir whose consent is required, and on that being done, to direct 'the sum so ascertained' to be paid into bank or secured. Thus, *Macdonald's* case settles that the value of the interest is to be ascertained at the date of the instrument of disentail, and the statute directs the Court to order the sum so ascertained, and no greater sum, to be consigned or secured. I am therefore of opinion that I have no power to allow interest."

¹ *Macdonald v. Macdonald*, Jan. 16, 1879, 6 R. 521, 869, revd. March 12, 1880, 7 R. (H. L.) 41.

of the heirs' expectancies ought to be calculated was not the date of the execution of the instrument of disentail, but of its being recorded. The former had no doubt been assumed in the House of Lords in the case of *Macdonald* to be the proper date, but that was of consent of parties, and that case was therefore not an authority. Lord Kinnear's judgment in *Sprot*¹ merely followed *Macdonald's* case. The Entail Acts had left the question open, and although there were *dicta* in Lord Hatherley's opinion in *Macdonald's* case (7 R. (H. L.) 47), to the effect that the date of execution of the instrument was the date at which the value should be taken, they were *obiter*. It was unreasonable that the heir of entail in possession should enjoy the estate for the period between the execution of the instrument of disentail and its recording, which might be a prolonged period, without some allowance being made to the substitute heirs for the increase in value of their expectancies. The date of recording the instrument of disentail was really the true date, and failing that, interest ought to run until that date or until consignment. 4. Succession-duty ought not to be deducted from the value of the expectancy. It was a payment which went to the Crown, and not to the heir, and the disentailer ought not to benefit by that.

Argued for the petitioner;—1. To adopt the reclaimers' view would come to this, that the estate would have to be valued as at a future date, but it was impossible to say what burdens might then be upon it.² Besides it would be unfair to the heir in possession to deduct less than the whole improvement expenditure, as the subsequent heirs would get the benefit of the enhanced value of the estate. There was no previous case in which this had been done. Section 23 of the Entail Act, 1882, dealing with the sale of an entailed estate, supported the view that it was the net value of an estate after deducting existing burdens which was to be taken. 2. No averments were made instructing anything exceptional in Captain Pringle's case which called for special treatment, and which made it better than an average case. 3. The date of execution of the instrument of disentail was the date at which the expectancies of subsequent heirs fell to be valued. This was concluded by the authority of the cases of *Macdonald* and *Sprot*. There was no warrant in the Entail Acts for allowing interest on the value of the expectancy as asked by the reclaimers. 4. Succession-duty ought to be deducted from the amount of the heir's interest, in accordance with the view taken by the actuary.

At advising,—

LORD PRESIDENT.—Four points have been argued under this reclaiming note.

1. The reclaimers challenged the first finding in the Lord Ordinary's interlocutor. Certain rent charges affect the estate, and the Lord Ordinary holds that the actual amount of these is to be deducted in estimating the value of the estate. The alternative course contended for by the reclaimers, and stated by the actuary, is to deduct only three-fourths of the amount, inasmuch as by 1898 one-fourth of the money will have been repaid, and he assumes that the heir in possession will substitute for the rent charges a bond and disposition in security for the reduced amount. This latter, however, is to assume that something will be done which may or may not be done, and the Lord Ordinary seems to judge rightly in deducting present burdens from present value.

¹ *Sprot*, June 27, 1882, 19 S. L. R. 738.

² *Entail Amendment Act*, 1875, sec. 5, subsec. (2) (a); *Baird v. Baird*, July 15, 1891, 18 R. 1184.

No. 171.

June 28, 1892.
Pringle v.
Pringle.

2. The claim of the reclaimers that interest should be allowed on the values of the expectancies from the date of their ascertainment is met by the conclusive answer that the statute gives no warrant for giving interest on the ascertained value. The more plausible contention of the reclaimers was that the values should be ascertained as at the date of recording the disentail, and in the present case that the original calculations should be rectified so as to bring them down to date. Of this proposal, however, it is to be observed that the suggested calculation would necessarily be conjectural and approximate as applying to an uncertain future date, and although the margin of uncertainty might not be great, this is an objection to the soundness of the suggestion as matter of statutory explication. But the decision of the House of Lords, and particularly the opinion of Lord Hatherley in the case of *Macdonald*, seem to settle the question in favour of the date of the instrument of disentail. It is to be observed that the substitute heirs are not deprived, during the interval between the commencement or the termination of the disentail procedure, of any right which they had previously enjoyed, for during that period they have exactly what they had before, viz., the chance of succession. There does not therefore seem any unfairness in the operation of what must be taken to be the rule fixed by the House of Lords.

3. The next point is as to the loading of Captain Pringle's expectancy by reason of his residence in India. In so far as the objections of that gentleman relate to the chances of his staying in or returning from India, I think they touch matters too speculative to be dealt with otherwise than by the rough rule of average adopted by the actuary. The subject of his health is in a different region. If there had been specific statements that certain exceptional elements of strength of constitution gave him a chance of life above the average, I should have thought that on the principle of the case of *Macdonald* he would be entitled to have this ascertained. But when the averments actually made are examined they fall much short of such a case, and come to no more than a vague statement that he is above the inferior lives which depress the average. I think the Lord Ordinary, having given the objector a special opportunity of defining the case he desired to make out, and nothing better being presented, acted rightly in disregarding it.

4. We are asked by Captain Pringle to strike out a deduction of £17 which under the report of the actuary is made from the value of that heir's expectancy as representing the succession-duty which he would have to pay. I think this should be altered. The Court is not called on to consider all the expenses which would attend or ensure the succession of the substitute heirs. He would no doubt have to pay succession-duty if the law remained the same as it is now, and he would also have to make up his title, and this would cost money also. But the payment of the succession-duty is a sequel of the succession, and is not a proper deduction from the value of the thing succeeded to.

LORD ADAM.—The first question, it seems to me, in logical sequence, is, at what date are the values of the next heir's expectancies to be ascertained? In this case I see that the petition was presented on 29th July 1890, and no doubt the instrument of disentail was presented along with it, and a remit was made on 29th August to ascertain the value of the estate. No particular date was specified as at which the value was to be ascertained, that being in conformity with the usual practice. It appears to me that it would be odd if the report

were desired to ascertain the value of the estate at some future date, which was not and could not be then known. But I think also that the matter was under the consideration of the House of Lords in the case of *Macdonald*, and, though it was not one of the subjects of appeal, it is quite clear from the opinion of Lord Hatherley that his opinion was that the proper date for the ascertainment of the value of the estate was the date of the execution of the instrument of disentail. Practically that is the same date as the presentation of the petition. No doubt, however, it might be the case that after the instrument of disentail was executed a considerable time might be allowed to elapse before the beginning of the process, and accordingly I consider that the date at which the value of the next heirs' expectancies should be ascertained is the date when the instrument of disentail is produced in process, and the matter becomes litigious. With that observation, I concur in the opinion expressed by Lord Hatherley.

No. 171.

June 28, 1892.

Pringle v.
Pringle.

With regard to the question whether interest should be paid on the ascertained value of the expectancies, I agree with the Lord Ordinary that he has no power to order any further sum than the ascertained value to be paid into bank.

As regards the capital sum of improvement expenditure charged upon the estate by way of annualrent, I confess that I do not quite understand the view of the actuary on this matter. He says,—“In fixing the sum to be taken as the value of the estate at the time when the above-mentioned Robert Keith Pringle and Alexander Pringle may be expected to come into possession of it, the actuary has deducted a sum of £1673, 16s. 3d. in respect of the drainage rent charges, being three-fourths of the amount originally advanced. He finds that by the year 1898 one-fourth of all the sums borrowed in consideration of those rent charges will have been repaid, and assumes that the heir in possession will thereafter (in terms of section (6) (4) of the Entail (Scotland) Act, 1882), substitute for the rent charges a bond and disposition in security over the estate for the sum mentioned above.” It seems to me that the actuary has set himself a question which is not at all the question which he had to solve. What he had to do was to ascertain the present value of the estate, and, if the estate is burdened with this rent charge, it is worth so much the less, and his duty was to deduct the value of the burden from the value of the estate. I therefore think that the Lord Ordinary's decision is quite right on this point.

With regard to the deduction made from the value of Captain Pringle's expectancy, in respect of his residence in India, I agree with the Lord Ordinary. His Lordship has treated the life as an average life, subject to the ordinary risks of an officer in the Indian service. The manner in which such questions are to be treated is discussed in *Macdonald's* case, and the rule laid down is that in the general case the life is to be taken as an average life, but that, if averments are made tending to shew that there are exceptional circumstances affecting the life, these should form the subject of inquiry. The averments made by Captain Pringle in this case are, however, of a very indefinite kind. He says that “he may marry and remain in this country.” Such possibilities do not admit of calculation, and the averments are not in my opinion of a nature to be sent to proof.

On the remaining question as to succession-duty, I agree with your Lordship.

No. 171.

June 28, 1892.
 Pringle v.
 Pringle.

LORD M'LAREN.—The subject which the Court has to value, with the assistance of the actuary, is the interest or expectancy of the heir who is to be compensated. That interest may be resolved into three elements, the value of the estate, the probability of the heir surviving to enjoy the succession, and the possibility of the birth of nearer heirs. All these elements are matters of opinion, and that opinion must be based on an examination of the averages established by an examination of a large number of similar cases. The method of averages is employed just as much in the valuation of land as in the valuation of life, because, as the estate is not put up for sale, one can only judge of its value by making a comparison of values determined by actual sales of similar lands. Now, whether the valuation is of land or of expectation of life, all elements having a substantial bearing on the result ought to be taken into account, over-refinements being avoided in making the calculation. The case offers an illustration of what I mean by refinement, in the proposal to take account of the succession-duty which might be chargeable against the heir. This is clearly not a legitimate element in the calculation. I should regard any attempt to estimate the value of land at a future date as of the same character, because we have no means of ascertaining what will be the value of land in the future. While, then, I agree that all circumstances substantially affecting the result ought to be taken into account, and while we have the authority of the House of Lords that weight must be given to elements which tend to shorten life, such as disease or an unhealthy constitution, or, as in this case, an unfavourable climate, I should wish to reserve my opinion as to whether the case of a person who avers that he is of exceptionally good health can be treated as a special case. My reason for doubting whether effect should be given to such averments is that no materials exist for determining the weight to be given to such a specialty. We are not bound by the practice of insurance companies, which, as we know, never take into account the fact that a man enjoys exceptionally good health or comes of a very long-lived family. But in the absence of tables of expectancy applicable to exceptionally good lives, I do not see how this element is to be introduced into the calculation.

On all the other points I agree with your Lordship.

LORD KINNEAR.—I am of the same opinion. I think the judgment of the House of Lords in the case of *Macdonald* lays down a general rule as to the date at which the value of the expectancies of the heirs-substitute is to be ascertained. If we had no such guide I confess that I am unable to see any other possible date which as a general rule could be adopted, although it is possible that there may be circumstances in which the general rule to which I refer would fall to be displaced.

The two other dates which it was contended were more appropriate were in the first place the date at which the Court comes to approve of the instrument of disentail, and in the second place, the date at which the instrument of disentail comes to be recorded. Both these dates are, I think, inadmissible, because the Entail Amendment Act of 1875 requires not only that the value of the expectancies shall be ascertained, but also that the amount of that value shall be paid into bank or otherwise secured, before the consents of the next heirs can be dispensed with. It is out of the question, therefore, to say that the valuation which is to fix the sum to be paid into bank is to be postponed until the interlocutor dispensing with the consents of the next heirs has been pronounced.

On the other points I agree with your Lordships, and have nothing to add. No. 171.

June 28, 1892.
Pringle v.
Pringle.

The petitioner moved for expenses from the date of the Lord Ordinary's interlocutor of 13th May 1892, and argued;—This had been an unsuccessful reclaiming note, and the usual rule ought therefore to be followed. The opinion of Lord Gifford in the case of *Macdonald* applied to Outer-House expenses only.

The reclaimers argued that they should not be found liable in expenses; they had been successful upon the point relating to succession-duty. Lord Gifford's opinion in *Macdonald's* case was in point.¹

LORD PRESIDENT.—I think that no expenses should be found due. The success has been divided, though no doubt the balance is on the side of the petitioner, but all the questions argued were fairly and properly raised. I do not wish to imply that a party is entitled to take the opinion of the Inner-House on any question which may be raised in an entail petition. In many cases his proper course is to abide by the judgment of the Lord Ordinary.

LORD ADAM concurred.

LORD M'LAREN.—I think it is a sufficient protection against vexatious litigation in proceedings of this kind that the party raising questions has to bear his own expenses. I think the rule applied by the Second Division in *Macdonald's* case is a sound one.

LORD KINNAR concurred.

THE COURT adhered to the interlocutors reclaimed against, with this variation, that in the latter, dated 13th May, the sum of £5798 was substituted for £5781, and refused the reclaiming note, finding neither party entitled to or liable in expenses in the Inner-House, and remitted to the Lord Ordinary to proceed further as might be just.

HOPE, MANN, & KIRK, W.S.—GILL & PRINGLE, W.S.—Agents.

WILLIAM M'GINTY AND ANOTHER, Pursuers (Reclaimers).—*C. J. Guthrie* No. 172.
—*W. Galbraith Miller*.

GEORGE M'ALPINE, Defender (Respondent).—*Salvesen—Younger*.

June 28, 1892
M'Ginty v.
M'Alpine.

Husband and Wife—Business carried on by spouses jointly—Earnings—The Married Women's Property (Scotland) Act, 1877 (40 and 41 Vict. cap. 29), sec. 3.—The Married Women's Property Act, 1877, by section 3, enacts,—“The jus mariti and right of administration of the husband shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name.”

A carter on his marriage in 1875 with a fish-hawker gave up his own business and along with his wife carried on the fish-hawking business. They had two sons, which bore the husband's name. Each of them worked a separate district, and each bought the fish for his or her cart. The wholesale merchants who had previously supplied the wife, at the request of both spouses rendered their accounts in the husband's name. The earnings of both spouses were lodged in

¹ *Macdonald v. Macdonald*, 6 R. 1011.

No. 172. bank in name of both of them or either or the survivor. On the wife's pre-decease in 1891, her executor claimed as against the husband the wife's share in the proceeds of the business at her death, as "earnings" in the sense of section 3 of the Married Women's Property Act, 1877.

June 28, 1891.
M'Ginty v.
M'Alpine.

Held that the wife was to be regarded merely as her husband's agent in the management of the business, and that therefore the Act was inapplicable.

1st Division.
Lord Kin-
cairney.

In October 1891 William M'Ginty and another, executors-dative *qua* next of kin of Mrs Ellen M'Alpine, who had died intestate on 11th August 1891, raised against George M'Alpine, husband of the deceased, an action of count, reckoning, and payment of a sum of money which they averred had been earned by the deceased separately from her husband in a fish-hawking business, and which had been taken possession of by the defender at his wife's death.

The pursuers pleaded;—(1) The pursuers being the executors duly appointed of the said deceased Ellen M'Ginty or M'Alpine, are entitled to ingather her means and estate for the purposes of the executry; and the defender being in possession of her said means and estate is bound to count and reckon with the pursuers for the same, and to pay them the amount thereof.

The defender pleaded;—(2) The deceased Ellen M'Ginty or M'Alpine not being possessed of any separate estate, the defender is entitled to be assolized, with expenses.

The following was the import of the proof: In 1875 the defender, a carter in Glasgow, married the deceased, who was a widow, carrying on a fish-hawking business. After the marriage the defender gave up his carting business, and he and his wife, who was a most successful sales-woman, together continued to carry on the fish-hawking business. They had two vans, which were marked with the husband's name, and they each worked a separate district and bought the fish for their own cart. Occasionally, when the wife was unable to go her rounds, her husband arranged for someone else to take her cart. On returning home the earnings of both were put together, and the wife lodged them in the Royal Bank of Scotland on deposit-receipt in name of both spouses, "or either or the survivor." The wholesale fish-merchants from whom the wife had bought fish prior to her marriage were desired by both spouses to render their accounts in name of the husband. At the date of the wife's death the money in bank at the credit of the joint account amounted to £800. In cross-examination the defender deponed,—“The business was my wife's when I married her. (Q.) When did it become yours? (A.) It was as much hers as mine; we both wrought to one another's hands. (Q.) Do you mean that you grew into a partner? (A.) Yes, we wrought hand to hand. (Q.) Were you a full partner at her death? (A.) All was left over to me at her death. I refer to the will.* (Q.) Apart from the will, were you a full partner any time during your wife's life? (A.) I don't know what you mean. (Q.) You have said the business belonged to your wife when you married her; when did it become yours—was it by the will? (A.) Everything was signed over to me about eighteen months before her death. I refer to the will. (Q.) Is that your claim to the property, or do you make any other claim? (A.) It was all left over to me. (Q.) Do you make any other claim except that the money was all left to you? (A.) No, there is no other claim that I see. Re-examined.—I don't profess to know anything about law. I have mentioned all the facts in connection with the business. . . . By the Court.—. . . While

* On 17th March 1890 the defender and his wife had each made a will in favour of the other, but these were admittedly improbativa.

your wife lived did the money in the bank belong equally to you and to her? (A.) Yes." No. 172.

On 2d March 1892 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the defender and his wife, Ellen M'Ginty or M'Alpine, carried on business jointly as fish-hawkers: Finds that the business was carried on in the name of the defender: Finds that the provisions of the Married Women's Property Acts, 1877 and 1881, do not apply: Finds that the said deceased Ellen M'Ginty or M'Alpine did not thereby earn any separate estate: Finds that she predeceased the defender, and that there was no issue of the marriage: Finds that the earnings of said trade now belong exclusively to the defender: Therefore repels the plea in law for the pursuers, and assoilzies the defender from the conclusions of the summons, and decerns." * June 28, 1892.
M'Ginty v.
M'Alpine.

* "NOTE.—The facts of this case are simple, but there are questions of law involved which are of general importance.

"In 1875 the defender, George M'Alpine, was married to Mrs Cameron, a widow, who had for some time carried on the trade of a fish-hawker. The defender had been a contractor, but on his marriage he gave up his own business, and he and his wife thereafter carried on the business of fish-hawking together, apparently with remarkable success. Their business was a continuation of that which had been carried on by the defender's wife before marriage. There was, however, only one business carried on by the husband and wife together. The money which they earned was lodged in bank in name of 'George and Ellen M'Alpine (i.e., the husband and wife), or either or the survivor.'

"The name of the defender was on the carts which they used, and the dealers from whom they purchased fish rendered their accounts to him.

"On 17th March 1890 the defender and his wife each executed a settlement in favour of the other. But these were admittedly improbativ and ineffectual. The defender, when examined as a witness, answered in the affirmative the question whether the money lodged in bank belonged equally to him and his wife.

"It is plain enough, I think, that each regarded the money in that light, and also that they intended that the survivor should have the whole, although it is admitted that neither the wills nor the terms in which the money was lodged in bank are effectual to attain that purpose.

"The wife predeceased on 11th August 1891. The money in bank at that date amounted to about £800, and this question is between her next of kin and her husband, each claiming the whole, although it was said for the pursuers that they would be content with a-half. I am of opinion that the defender is entitled to absolver.

"At common law the earnings of a wife fall undoubtedly under the *jus mariti* of the husband, and form part of his estate when the marriage is dissolved by the death of the wife. This was so at common law even where the wife carried on a separate business, much more when she and her husband carry on business together. The business so carried on by the wife is at common law to be regarded as the husband's business, and she as his agent or assistant; *Ferguson's Trustees v. Willie, Nelson, & Co.*, December 11, 1883, 11 R. 261, per Lord President, p. 266. The fact that the wife carried on the business before marriage, and that after marriage the spouses continued her business, can make no difference.

"This case presents the speciality that the husband regarded the funds as belonging equally to himself and his wife. But that would not, I think, affect the result if the case is to be determined by the law as it stood after 1855 (18 Vict. c. 23, sec. 6), and before the Women's Property Act, 1877. I think it really amounts to no more than an admission that the money constituted goods in communion, and if so, it fell under the *jus mariti*, and belonged exclusively to the husband at the wife's death. That would be so unless the admission of the husband could be brought up to this, that part of the money in bank was

No. 172. The pursuers reclaimed, and argued ;—This was not a case of a business jointly carried on by two spouses for their mutual benefit. Prior to the marriage it had been carried on by Mrs M'Alpine, who was a successful saleswoman, and after the marriage she was merely assisted by her husband, whose previous business had been that of a carter. She worked

June 28, 1892.
M'Ginty v.
M'Alpine.

the separate estate of the wife, from which the *jus mariti* was excluded, which I think it cannot be.

"If that be so, the next question is whether section 3 of the Married Women's Property Act, 1877 (40 and 41 Vict. c. 29), applies to a case where a wife did not carry on a separate business, but carried on a business jointly with her husband. It is a question of some importance. The section provides that the *jus mariti* of the husband 'shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on in her own name.'

"The latter words of the section do not apply, because the trade of fish-hawking was not carried on in Mrs M'Alpine's name at all, but in the name of the defender. All the proof points to that.

"The question is, whether the previous words 'wages and earnings acquired or gained in any employment, occupation, or trade,' apply. In the case of *Ferguson's Trustees v. Willis, Nelson, & Co.*, the Lord President took occasion to state his view as to the proper interpretation of these words. He says, pp. 266-7,—'That seems to point to the case of a married woman employed in business as a servant or manager or the like, and whether paid by salary or by wages, or by a share of profits,—these are in future to be exempted from the husband's *jus mariti*.'

"I am not sure that that opinion was essential to the judgment in that case, but whether it was so or not, it is of course of great weight and authority. No case was quoted in which the Act was held applicable to anything but an employment or business carried on by the wife apart from her husband, and I was informed that there have been no decisions in England in which the analogous statute had been applied to such a case.

"To apply the Act to every case where the earnings resulted from the joint efforts of husband and wife, would give the Act an alarmingly wide application, going far beyond the true scope of the statute. For example, a great many shops are kept by the husband and wife jointly; on many farms the farmer's wife contributes materially to the earnings,—in fact, the Act in that case would cover a great number of the ordinary industries of life. If it had been meant that the Act should apply to such cases, there would, I think, have been some provision as to the principles on which joint earnings should be appropriated. I am of opinion that the Act does not apply to a case of trade carried on by husband and wife jointly, and that such trading does not result in any earnings from which the husband's *jus mariti* is excluded.

"The pursuers contended, that inasmuch as the trade was originally carried on by the wife and merely continued by the husband, it should be regarded as her separate trade, and that he was to be held as merely her assistant. I think, however, that there are neither facts nor law to justify that view.

"The pursuers also referred to the Married Women's Property Act, 1881 (44 and 45 Vict. c. 21), and in particular to subsection 2 of section 3. The provision is that the *jus mariti* and right of administration shall be excluded by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.

"No attempt has been made to ascertain the portion of the whole sum which was earned after 1881. But as I think none of it truly became the property of the wife, I think the clause has no application. I do not think that in any view it refers to earnings from trade covered by the prior statute.

"I am therefore of opinion that this money all belonged in law to the husband; and I would think so even although I should hold that that was not the opinion of the husband and wife themselves. . . ."

a district separate and distinct from that worked by her husband, and she it was who placed the earnings in bank. The very terms of the document instructing these payments implied that each spouse was entitled to one-half of the money.¹ What the wife made on her own account in the business must, therefore, be regarded as "earnings" in an "employment, occupation, or trade," in the sense of section 3 of the Married Women's Property Act, 1877.² These were excluded from her husband's *jus mariti* and belonged exclusively to her at her death. Her interest in her separate earnings was further protected from her husband by the Married Women's Property (Scotland) Act, 1881 (44 and 45 Vict. c. 21), sec. 3, subsec. 2.

No. 172.

June 28, 1892.
M'Ginty v.
M'Alpine.

Argued for the defender;—In 1875, when the spouses married, the business previously carried on by the wife became at common law her husband's business, and there was no proof that after 1877 he had agreed that his wife should have any interest in the business separate from his. The goods were bought upon his credit, the vans bore his name, and the fact that she took an active part in the business did not alter her husband's legal position as proprietor of the business. The Act of 1877 had then no application. The latter portion of section 3 applied only to a woman carrying on business in her own name, while the first portion of the section had never been held applicable to anything but an employment carried on by the wife apart from her husband.³ If there were no earnings protected by the Act of 1877, it followed that there was no property acquired by her after 1881, and the Act of 1881 therefore had no application.

At advising,—

LORD PRESIDENT.—The money in question in this action was made out of fish-hawking, carried on by two spouses during the period of their married life. The proceeds of the endeavours of both were daily put together, and the money, according to the terms of its investment with the bank, now belongs to the defender. The pursuers assert right to some portion of this money as representing the "earnings" of the wife in virtue of the Married Women's Property Act, 1877 and 1881.

It seems to me that their success depends on his establishing in fact that the wife had a separate business from that of the husband.

The main facts are these: The wife was a fish-hawker before her marriage to the defender, and the defender on their marriage abandoned his own business of carting and took to the business of fish-hawking. From the date of the marriage, the wholesale merchants, who theretofore had supplied the woman, now supplied her husband, in this sense, that they changed the name of the accounts from hers to his, and they made this change in their debtor at the desire of both husband and wife. It is also to be noted that the carts bore the name of the husband. *Prima facie*, therefore, the business was the husband's, and the fact that the wife took about one of the carts and was a most efficient saleswoman is quite consistent with that view.

But then the pursuers make much of the facts that the wife took one cart

¹ Bank of Scotland v. Robertson and Others, Jan. 12, 1870, 8 Macph. 391, 42 Scot. Jur. 180; Trotter v. Spence, Jan. 21, 1885, 22 S. L. R. 353.

² Aitchison v. Aitchison, June 16, 1877, 4 R. 899; Morrison v. Tawse's Executrix, Dec. 18, 1888, 16 R. 247; Henderson v. Henderson, Oct. 25, 1889, 17 R. 18.

³ Ferguson's Trustees v. Willis, Nelson, & Co., Dec. 5, 1883, 11 R. 226, per Lord President, pp. 266 and 267.

No. 172. one road, while the husband took another cart another road, and she chose the fish for her cart. When the wife was unable to go her round, the husband had to provide otherwise for her route, but such was the normal arrangement. This is really all that there is to denote separation of business, and it seems to me quite insufficient. The proper legal view of the position of the wife was that she was the agent of her husband in the conduct of a part of his business, and if this be so, the Act of 1877 has plainly no application.

June 28, 1892.
M'Ginty v.
M'Alpine.

In order to come under the 3d section of the Act of 1877 the wife must have some other "employer" than the husband, or the "occupation or trade" must not be simply the occupation or trade of her husband, if it is to yield "earnings" in the sense of the section.

In the view of the facts which I have stated, the Act of 1881 has no application.

LORD ADAM.—This action deals with a claim made by the executors of a Mrs M'Alpine against her husband for the amount of separate estate alleged to have belonged to Mrs M'Alpine, which the executor says was in the hands of her husband at the date of her death. The claim is founded on the 3d section of the Married Women's Property Act of 1877. That clause has two branches. The first deals with the wages or earnings acquired by any married woman "in any employment, occupation, or trade in which she is engaged." The second deals with what is acquired by her "in any business which she carries on under her own name." I agree with the construction put upon the clause by the late Lord President in the case of *Ferguson's Trustees*, that the first branch refers to the employment of a married woman in the service of some other person, and the second to business carried on in her own name. The present claim is founded especially upon the latter branch of the clause, and fails, unless it is established in point of fact that the business in which the earnings are alleged to have been made was a business carried on under Mrs M'Alpine's own name. It is unnecessary for me to go over in detail the facts of the case. They have already been referred to by your Lordship. The business no doubt was originally hers, but it became the property of the husband on their marriage in 1875 *jure mariti*, the Marriage Act of 1877 not being then in existence. It was thereafter carried on by him; the accounts were in his name; the vans from which the fish were sold bore his name; and I need only say further, that I can find nothing in the evidence to shew that, in any sense, the business in question was carried on under Mrs M'Alpine's own name. It is just the ordinary case of a business carried on by the husband and wife for their mutual benefit, she assisting him in the business.

The other branch of the clause seems to me to have no application. I do not say that if it can be shewn, for example, that a husband has employed his wife and paid her wages which she has kept separate, that that part of the section might not apply, but there is no case of that kind here. This seems to me just the ordinary case of a wife assisting her husband in the management of his business, and that the pursuers' claim therefore fails.

LORD M'LAREN.—It appears to me that the general scope of the Married Women's Property Act is to place women who have married without entering into a marriage-contract in as favourable a position as those who have married with a contract securing a separate estate to the wife.

It is difficult to see how the Legislature could accomplish more than this.

The Act of 1887 is not limited in its application to the case of a woman living apart from her husband, but applies also to the case of a woman living with her husband, but having a separate business of her own, it may be as a shop-keeper, or in the exercise of some literary or artistic occupation. In such a case a voluntary contract made before marriage to the effect that the earnings of such business should belong to the wife as separate estate would be effectual under the common law, and this separation of estates is accomplished by the operation of the Act of Parliament in cases where there is no antenuptial contract. In the present case there was no separate trade carried on by the wife in her own name. The husband and wife together continued to carry on the business of fish-hawking, which had prior to the marriage been carried on by the wife alone. There was no separation either of the capital or profits of the business, and no distinctive use of the wife's name in the business carried on after marriage.

The case therefore does not fall within either the principle or the words of the Act. One can see that there would be extreme inconvenience in practice, and that questions very difficult to solve might arise, if it were the purpose of the Legislature that there should be separate interests in a business carried on jointly by the husband and wife. It is difficult to see how in such a case the legitimate interests of creditors could be safe-guarded, and I am therefore not surprised that the operation of the Act is limited to the case of a business carried on by the wife alone and in her own name.

LORD KINNEAR concurred.

THE COURT adhered.

A. C. D. VEET, S.S.C.—STURROCK & GRAHAM, W.S.—Agents.

MISS JANE ELIZABETH BOWERS AND ANOTHER, Petitioners.—*W. Campbell*. No. 173.
JAMES ALEXANDER MOLLESON (Mrs Pringle Pattison's Curator Bonis),
Respondent.—*C. K. Mackenzie*.

June 28, 1892.
Bowers v.
Pringle Pattison's Curator Bonis.

Judicial Factor—Curator Bonis to incapax—Voluntary annuity out of ward's estate—Increase of amount—Nobile officium.—While the Court may authorise the curator bonis to a person incapax to continue the payment of a voluntary annuity to a third party which the ward previous to incapacity had been in the habit of paying, it will not grant authority to increase the amount of the annuity, although the exigencies of the annuitant may have become greater.

ON 14th May 1889 the Junior Lord Ordinary (Wellwood) authorised James Alexander Molleson, C.A., the curator bonis to Mrs Elizabeth Pringle Pattison, of Haining, to continue the payment out of the curatory estate of an annuity of £30 to Miss Jane Elizabeth Bowers and Miss Euphemia Douglas Bowers, which Mrs Pringle Pattison had for many years been in the habit of paying previous to her incapacity. The authority was granted upon the petition of the Misses Bowers, who described themselves "as the only or nearest relations of the said Mrs Pringle Pattison resident in Scotland."

ON 8th March 1892 the Misses Bowers, who were then sixty-two and fifty-seven years old respectively, presented another petition praying that the annuity should be increased to £50, and alleging that in their declining years they were more in need of support than ever, that the present annuity was insufficient for their necessities, and that the increase would be inappreciable as regarded the income of the ward.

1ST DIVISION.
Lord Low.

No. 173. On 21st March the Lord Ordinary on the Bills (Stormonth Darling) remitted to the Accountant of Court to report.*

June 28, 1892.

Bowers v.

Pringle Patti-

son's Curator

Bonis.

On 14th April the Lord Ordinary on the Bills (Low) reported the petition to the First Division.†

Argued for the petitioners;—While the Court would probably never authorise the curator bonis to one *incapax* to pay an annuity to a person to whom the ward was under no obligation of support, if the ward prior to his or her incapacity had disclosed no intention to favour in this way the person claiming the annuity,¹ the case was different where the ward had been in the habit of paying the annuity. The previous stage of this case, as well as reported authority,² shewed that the Court, being thus satisfied of the ward's intention, would authorise the continuance of the annuity, if in the whole circumstances that course seemed expedient. To authorise an increase of the amount of the annuity beyond the sum which the ward had been in use to pay, was simply to apply the same principle of carrying out the ward's presumed intention. For if the circumstances of the annuitant made an increase necessary to his or her support, and the ward's estate could bear such an increase, then presumably the ward, if he had remained *capax*, would have himself made the increase. If that were the rule, the present case was within it.

C. K. Mackenzie, for the curator bonis, stated that he offered no argument, but left the matter in the hands of the Court.

LORD PRESIDENT.—I do not think that we are entitled to authorise the Lord Ordinary to grant the prayer of this petition. The duty of the Court in relation to the estate of a ward is that of conservation. No doubt there have been cases, and this is one, in which the Court has regarded the payment of an annuity which the ward himself has paid as part of the expenditure authorised by the ward, but it appears to me to be a long step to take to increase an allowance, the amount of which the ward himself has settled, because of an alleged increase in the exigencies of the donee or owing to a change of circumstances. It is admitted that there is no reported instance of the Court having authorised an expenditure of this sort, and there is certainly no example of a fresh act of benevolence even where the circumstances were most clamant. It appears to me that it would be a bad precedent were we to grant this application.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT remitted to the Lord Ordinary to refuse the prayer of the petition.

ANDREW CLARK, Solicitor—STRATHERN & BLAIR, W.S.—Agents.

* The accountant reported, *inter alia*, that the gross income of the estate was £4172, and that after payment of taxes and other expenses and payments on account of the ward, and payment of the annuity of £30, a surplus income of £341 then remained.

† "NOTE.—I know of no authority for increasing an annuity under such circumstances as those which are disclosed in this case, and I doubt if I have power to do so. As the question is one of novelty, and as there seems to be no doubt as to the necessitous circumstances of the petitioners, I have thought it best to report the case."

¹ Balfour, Jan. 26, 1889, 26 S. L. R. 208.

² Gardner, Nov. 28, 1882, 20 S. L. R. 165.

HON. JAMES M. O. BYNG AND ANOTHER (Lucas' Trustees), Pursuers
(Respondents).—*Lees—Sym.*
EBENEZER ERSKINE SCOTT AND ANOTHER (Beresford's Trustees), Defenders
(Reclaimers).—*Comrie Thomson—Guthrie.*

No. 174.

June 29, 1892.
Lucas' Trustees v. Beresford's Trustees.

Trust—Title to sue—Inter vivos trust—Liability of trustees to account for their intromissions to creditors in a bond and disposition in security over the trust-estate.—By *inter vivos* deed of trust a trustor conveyed certain heritable property to trustees, directing them to pay therefrom any sums which they might borrow on the security of the trust-estate, with the interest accruing thereon, to pay the surplus of the rents to his wife during her life, and on her death to convey the trust-estate to his daughter. *Held* that the trust not being a trust for creditors the creditors in a bond and disposition in security granted by the trustees had no title to call them to account for their intromissions with the trust-estate.

Bon-Accord Marine Insurance Company v. Souter's Trustees, June 13, 1850, 12 D. 1010, and Dec. 11, 1850, 13 D. 295, distinguished.

By *inter vivos* deed of direction and declarator of trust, dated 9th November 1870, and recorded 16th April 1881, Sir George Beresford conveyed the quarries, lands, and estate of Ballachulish to certain trustees for the following purposes,—(First) for payment of the expense of executing the trust-deed, and of managing and executing the trust; (Second) in payment of the sums which might be borrowed by the trustees upon the security of the estate, and the interest which should accrue thereon; (Third) the surplus of the annual rents and produce, in so far as the same should not be applied by the trustees to the preceding purposes, was to be applied for the sole and separate use of Lady Beresford during her life; and (Fourth) on Lady Beresford's death the estate was to be conveyed to her daughter Miss Beresford (afterwards Mrs Drummond) on her marriage.

1st DIVISION
Lord Kin-
cairney.

Sir George Beresford's trustees having borrowed a sum of £10,000 from Admiral Lucas, granted a bond and disposition in security for that sum, dated 27th and 31st March and 8th April, and recorded 30th April 1879, in favour of the said Admiral Lucas, his heirs, executors, or assignees whomsoever, and this bond and disposition in security was in the same year by deed of assignation assigned to Admiral Lucas's marriage-contract trustees.

Admiral Lucas's trustees called up the sum in their bond and disposition in security upon 22d November 1889, and in December 1891 they brought an action of count, reckoning, and payment against Ebenezer Erskine Scott and Thomas Bennet Clark, the acting trustees under Sir George Beresford's trust, to have them decerned and ordained to exhibit and produce a full and particular account of their whole intromissions as trustees under the said deed of direction and declarator of trust, whereby the true balance due by them to the pursuers might appear and be ascertained.

The defenders pleaded, *inter alia*;—(1) The pursuers have no title to sue.

Upon 28th March 1892 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Having considered the cause, repels the first plea in law for the defenders, and before further answer, and under reservation of the whole other pleas of the parties, appoints the defenders to produce an account of their intromissions as trustee or trustees under the deed of direction and declaration of trust libelled, with the vouchers thereof, by the third sederunt day of the ensuing session: Grants leave to reclaim."*

* "NOTE.— . . . The pursuers sue simply as creditors under their bond

No. 174.

June 29, 1892.
Lucas' Trustees v. Beresford's Trustees.

The defenders reclaimed, and argued;—The authorities on which the Lord Ordinary relied did not support the title of the pursuers. In the *Bon-Accord* case the question of title was not raised, and further, the defenders were the executors of the truster. Their position was therefore quite different from that of the present defenders, who were trustees under an *inter vivos* trust granted for family purposes, and, as such, were answerable only to the truster.

The pursuers argued;—The defenders were specially authorised by the truster to make the estate and its proceeds forthcoming to any persons to whom they had incurred liability. They were therefore liable to account to the pursuers for their intromissions. In any view, the pursuers were entitled to know what the trustees' intromissions had been with the estate of their debtor.

LORD PRESIDENT.—This is an action of count, reckoning, and payment, directed against the trustees under a deed of trust. The defenders plead that the pursuers have no title to sue, but the Lord Ordinary has repelled that plea, and he rests his judgment on the case mentioned in his note. The action is by creditors of these trustees, and they found their right to call the trustees to account upon the provision contained in the second purpose of the trust-deed, and claim that they are entitled to enforce that provision. By that provision the trustees are directed to apply the produce of the trust-estate in payment of the sums which may be borrowed by them upon the security of the estate, and the interest which may accrue thereon. Now, the pursuers are creditors in a bond and disposition in security granted by the trustees for money borrowed by them, and the question is whether they are entitled to call on these trustees to account for their intromissions with the estate which they administer, on account of their being persons mentioned in the second purpose of the deed. This trust is a trust *inter vivos* for the management and administration of the estate of Ballachulish, and the trustees are liable for the fulfilment of their duties to the truster, who could at any time recall the trust and resume possession of the estate.

It appears to me that the case of the *Bon-Accord Company* cited by the Lord Ordinary does not at all support the contention necessary to sustain the position of the pursuers, and that for these reasons: In the first place, because in that case there was no discussion on the question of title at all. It seems to have been assumed that the pursuers had a title, and there is no decision by the Court on that subject. In the second place, it appears that the creditors were creditors of the deceased suing his trustees, who were his executors; and probably no objection was taken to the pursuers' title for the best of reasons, that the creditors were suing the executors on their legal obligation to make the deceased's estate forthcoming to his creditors. But the trustees under this

and disposition in security, and the motion made on their behalf was that the trustees should be ordered to produce the trust accounts. In support of their title to sue they referred to the *Bon-Accord Company v. Souter's Trustees*, June 13, 1850, 12 D. 1010, and Dec. 11, 1850, 13 D. 295, and to *McLaren on Wills* ii. 499. The defenders did not, I think, refer to any authority in support of their plea against the pursuers' title. The case seems somewhat unusual, seeing that the pursuers are merely postponed heritable creditors, with a somewhat remote prospect of ultimate benefit, whether they make out their objections or not. But in the face of the authorities quoted by the pursuers, I am not prepared to sustain the plea against their title. I think that without the trustees' accounts I am not in a position to dispose safely of any of the other pleas."

deed are merely administrators appointed by living people for their own convenience—they are accountable to them only, and have no duty to their creditors directly at all, although one of their duties to their trusters is to pay their debts as set out in the second purpose. The defenders therefore are in quite a different position from executors or trustees under a trust for creditors where the trustees and the creditors have a direct relation.

No. 174.
June 20, 1892.
Innes v. Beresford's Trustees.

LORD ADAM.—I agree that the trust under which the defenders are acting is very clearly not a trust for creditors at all. It is a family trust for the benefit of the truster's wife and daughter. A creditor has no *jus crediti* under such a trust, nor is he entitled to call the trustees under such a trust to account. The pursuers therefore in my opinion have no title to sue.

LORD M'LAREN.—I agree with your Lordships. I only wish to add with reference to the passage quoted by the Lord Ordinary from my book on Wills, that while it is possible that the statement with regard to the title of a truster may be expressed in too general terms, it is plain enough from the context that the trusts which are there in view are trusts of the *universitas* of an estate—either trusts of a testamentary nature or trusts for behoof of creditors—because the creditors who are there said to have a title to sue are creditors of the trust-estate. That was the position of matters in the case of the *Bon-Accord Company* to which reference has been made, and while in that case the question of title was not raised, the Court did in effect sustain action at the instance of creditors against trustees who were trustees and executors of a testamentary estate. I can hardly doubt that in such a case the creditors had an excellent title to sue, because there by the first purpose of the trust they had a right over the trust-estate which was preferable to all other rights, and if the estate proved insufficient, it was on them that the loss would fall. They accordingly had an interest to diminish that loss by taking objection to unauthorised acts of administration on the part of the trustees. In the present case the pursuers have no interest whatever. Their right is to obtain payment from their debtor or out of his estate, and that right is in no way affected by a trust which the debtor constitutes for his own benefit or that of his family, because it is a universal rule that no man by creating a trust for behoof of himself can place his estate beyond the diligence of his creditors.

On these grounds I am of opinion that the action falls to be dismissed.

LORD KINNEAR.—I am of the same opinion. It is clear that trustees in the position of the defenders are no more directly accountable to creditors, except in so far as they attach the trust-estate, than any factor or manager or other person, who may exercise delegated powers. They are trustees for private family purposes, and there is nothing in the nature of the trust to protect the estate of the truster from direct action by creditors.

THE COURT recalled the interlocutor of the Lord Ordinary, sustained the first plea in law for the defenders, and dismissed the action.

A. P. PURVES & AITKEN, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 175. THE REV. JOHN ERSKINE CAMPBELL COLQUHOUN, Pursuer (Respondent).

Johnston—P. J. Blair.

June 30, 1892.
Colquhoun v.
Colquhoun's
Trustees.

THE REV. JOHN ERSKINE CAMPBELL COLQUHOUN AND OTHERS (Colquhoun's Trustees), Defenders (Reclaimers).—*C. J. Guthrie—W. K. Dickson.*

Succession—Accumulation—Thellusson Act (39 and 40 Geo. III. cap. 98)—Effect of Thellusson Act in accelerating period of distribution.—In a trust-disposition and settlement the testator set forth the following trust purpose:—“*Quarto*, considering that there are now belonging to me valuable mineral properties . . . and that it is my wish that the rents” thereof “shall not at first be at the disposal of the heir in possession of my other Scotch estates, but shall for a certain time be reserved by my said trustees for the purposes after mentioned, therefore I hereby direct” the trustees to carry the proceeds of these properties “to an account which shall be called the ‘Garscadden Trust Fund Account,’ and to apply the balance standing at the credit of that account from time to time as follows.” He then directed the trustees to pay certain debts and provisions, “and lastly, after satisfying all the preceding purposes they shall accumulate the rents and proceeds of my said mines and minerals until the same shall amount to the sum of £25,000, but they shall not accumulate the interest . . . but shall pay the interest, dividends, or annual profits of the said accumulated fund . . . yearly to the heir who shall be in possession of my landed estates for the time . . . and though there appears to me at present to be no reason to doubt that the proceeds of my said mines and minerals will be amply sufficient to meet all the burdens which I have thus laid upon them, and to admit of an accumulation to the extent of £25,000, after paying all the burdens which I have thus laid upon them, but in case, from any unforeseen contingency, the said mines and minerals shall either cease to be worked, or the proceeds thereof be much diminished, yet the said ‘Garscadden Trust Fund Account’ shall still be kept up during the lifetime of my two sons and also during the lifetime of the first heir descending from either of them who shall be in existence at the time of my death and who shall have succeeded to my lands and estates, and in case any other mines and minerals are subsequently discovered, the proceeds of these shall, in like manner, be entered in the said account, and accumulated till the total free balance at the credit thereof shall amount to the sum of £25,000, and this being accomplished, I authorise and direct my said trustees to close the said account and pay over the accumulated fund to the heir then in possession of my said lands and estate, to whom my said trustees shall then also convey the said mines and minerals themselves in the form of an entail, in like manner as is hereinafter directed in reference to my landed estates: And in like manner the said account shall be closed at the death of the last survivor of my said two sons and of the first heir descending from either of them who shall have been in existence at the time of my death, and shall have succeeded to my said lands and estates, although the accumulated sum should not then amount to the foresaid sum of £25,000, and the amount then at the credit of the said account, whatever it may be, shall in like manner be paid to the heir then in possession of my said lands.”

The testator died on 17th April 1870, and was survived by his two sons and by the eldest son of his second son. The trustees had paid off the whole debts and provisions directed to be paid from the fund, and had accumulated £12,138, when, on 17th April 1891, the Thellusson Act prevented further accumulation.

The testator's eldest son having died unmarried, the second son, the heir in possession of the testator's estates, raised an action against the trustees for declarator that from 17th April 1891 the direction to accumulate had become void, and that the pursuer had right to the accumulated fund.

The trustees pleaded that they were entitled to hold the fund till the death of the pursuer and of the first heir descending from him who was in existence at the time of the testator's death and who should succeed to the testator's said lands, and then to dispose of it as directed by the settlement.

Held (1) that the testator's sole purpose in postponing payment of the fund

was accumulation ; and (2) that further accumulation being impossible the purchaser was entitled to the fund. No. 175.

JOHN CAMPBELL COLQUHOUN of Killermont and Garscadden died on 17th April 1870, leaving a trust-disposition and settlement, whereby he disposed his whole heritable estate in Scotland to trustees. He directed these trustees, *inter alia*, as soon as they thought fit after paying his debts, other than certain provisions and debts secured on his landed estates, to convey his whole landed estates, excepting his mines and minerals, by a deed of entail to his eldest son, Archibald Campbell Colquhoun, and the heirs-male of his body, whom failing, to his second son, John Erskine Campbell Colquhoun, and the heirs-male of his body, whom failing, to certain other heirs-substitute.

June 30, 1892.

Colquhoun v.
Trustees.

1ST DIVISION.

Lord Kin-
cairney.

The 4th purpose of the trust-deed was as follows:—"Considering that there are now belonging to me valuable mineral properties, . . . which are now yielding a considerable amount of rent annually ; and other mines may be hereafter opened and worked either in my own lifetime or after my decease, and that it is my wish that the rents or lordship in excess of fixed rents, as the case may be, to be received from my mines and minerals shall not at first be at the disposal of the heir in possession of my other Scotch estates, but shall for a certain time be reserved by my said trustees, for the purposes after mentioned, therefore I hereby direct my said trustees, after paying out of the proceeds of the said mines and minerals all the necessary expenses attending the same, to carry the whole residue and remainder thereof, from time to time as the same may come into their hands, to an account which shall be called the 'Garscadden Trust Fund Account,' and to apply the balance standing at the credit of that account from time to time as follows." The testator here directed payment of certain debts and provisions. "And lastly, after satisfying all the preceding purposes, they shall accumulate the rents and proceeds of my said mines and minerals until the same shall amount to the sum of £25,000, but they shall not accumulate the interest, dividends, or annual proceeds thereof, but shall pay the interest, dividends, or annual profits of the said accumulated fund as the same shall from time to time arise yearly to the heir who shall be in possession of my landed estates for the time. . . . And though there appears to me at present to be no reason to doubt that the proceeds of my said mines and minerals will be amply sufficient to meet all the burdens which I have thus laid upon them, and to admit of an accumulation to the extent of £25,000, after paying all the burdens which I have thus laid upon them, but in case, from any unforeseen contingency, the said mines and minerals shall either cease to be worked, or the proceeds thereof be much diminished, yet the said 'Garscadden Trust Fund Account' shall still be kept up during the lifetime of my two sons and also during the lifetime of the first heir descending from either of them who shall be in existence at the time of my death and who shall have succeeded to my lands and estates, and in case any other mines and minerals are subsequently discovered, the proceeds of these shall, in like manner, be entered in the said account, and accumulated till the total free balance at the credit thereof shall amount to the sum of £25,000 ; and this being accomplished, I authorise and direct my said trustees to close the said account and pay over the accumulated fund to the heir then in possession of my said lands and estate, to whom my said trustees shall then also convey the said mines and minerals themselves in the form of an entail, in like manner as is hereinafter directed in reference to my landed estates: And in like manner the said account shall be closed at the death of the last survivor of my said two sons and of the first heir descending from either of them

No. 175.

June 30, 1892.
Colquhoun v.
Colquhoun's
Trustees.

who shall have been in existence at the time of my death, and shall have succeeded to my said lands and estates, although the accumulated sum should not then amount to the foresaid sum of £25,000, and the amount then at the credit of the said account, whatever it may be, shall in like manner be paid to the heir then in possession of my said lands and estates, to whom the said mines and minerals themselves shall be conveyed in the form of an entail as aforesaid. . . ."

The truster was survived by his two sons, Archibald Campbell Colquhoun, who died unmarried in 1872, and the Rev. John Erskine Campbell Colquhoun, whose eldest son was born in 1866.

After the truster's death his trustees, after paying the debts and provisions mentioned in the fourth purpose of the settlement, accumulated the mineral rents as therein directed.

In 1873 the trustees executed a deed of entail of the testator's estates, other than his mines and minerals, in favour of the Rev. John Erskine Campbell Colquhoun, and the other heirs of entail mentioned in the trust-deed.

On 17th April 1891, twenty-one years after the testator's decease, the mineral rents accumulated in the hands of the trustees amounted to £12,138, 6s. 5d.

In December 1891 the Rev. John Erskine Campbell Colquhoun brought an action against his father's trustees for declarator (1) that in virtue of the Thellusson Act the direction to accumulate had from 17th April 1891 become void; (2) that the pursuer was entitled to the accumulated fund, and the rents which had accrued since 17th April 1891; and (3) that the defenders were bound to convey the mines and minerals to him in the form of the entail directed by the trust-deed. The pursuer further concluded for decree ordaining the defenders to execute the conveyance of the minerals, and to pay over to him the rents accumulated in their hands at 17th April 1891, and the rents which had since accrued.

The defenders pleaded, *inter alia*;—(5) In the event of any accumulation subsequent to 17th April 1891 being held illegal, the defenders, as trustees aforesaid, are entitled to hold the sum accumulated prior to that date, together with the said mines and minerals themselves, till the death of the pursuer and of the first heir descending from him who was in existence at the time of the testator's death, and who shall succeed to the testator's said lands and estates, and then to dispose of them as directed by the said trust-disposition and settlement.

On 29th March 1892 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that John Campbell Colquhoun of Killermont and Garscadden died on 17th April 1870, leaving a trust-disposition and settlement directing that the rents of the mines and minerals on his estate should be retained and carried to an account called the Garscadden Trust Fund Account for the purpose of paying therefrom certain debts and provisions, and that they should be accumulated thereafter until the accumulated sum should amount to £25,000; (2) that the said debts and provisions have been paid; (3) that at 17th April 1891 there had accumulated in the hands of the trustees the sum of £12,138, 6s. 5d.; (4) that the provisions of the Thellusson Act apply, and that in respect thereof the direction to accumulate the rents after said date became null and void; (5) that the provision in the trust-deed whereby the truster directed that in the events therein mentioned the Garscadden Trust Fund Account should be kept up during the life of the truster's two sons, and of the heir descending from either as therein specified, does not apply to the circumstances which have happened; (6) that under the provisions of

the deed, the pursuer being the truster's only son, is entitled to payment of the accumulated fund and to a conveyance of the mines and minerals in the manner directed by the trust-deed; therefore decerns and declares in terms of the first, second, and third conclusions of the summons; decerns and ordains in terms of the fourth conclusion of the summons; and *quoad ultra*, appoints the cause to be enrolled in order to adjust the terms in which decree shall pass under the fifth conclusion thereof: Finds that the expenses of the defenders are payable out of the trust-estate: Grants leave to reclaim."*

No. 175.

June 30, 1892.
Colquhoun v.
Trustees.

* "OPINION.— . . . The action is defended by the trustees, who have argued that the Thellusson Act does not apply, but that the case falls under the exception specified in the second section of the Act, which provides, *inter alia*, that nothing in the Act should apply to a provision for payment of the granter's debts, or for raising portions for any child or children of the granter.

"I understood the argument to be that because the primary purpose of the fourth purpose is to provide for payment of the truster's debts, and for the provision to his second son, the Act does not apply. If the debts and provision had not been paid that argument might have been sound, and probably accumulations might have been sustained until they were paid. But it is clear that the second section does not apply to directions to accumulate after the debts and provisions had been paid, but that the primary provision of the Act then applies. I think that is obvious without further explanation, and no authority to the contrary was adduced.

"If the argument was that the accumulated sum was itself a provision, and that on that account the second section applied, the answer is that that argument has been conclusively negatived,—Jarman on Wills, i. 308, and cases there quoted; and besides, the provision is not expressly to a child of the truster, or of any person taking interest under the deed, which are the only provisions mentioned in the Act.

"The rents have not been in fact accumulated for twenty-one years, seeing that they have been employed in payment of debts and provisions. But that circumstance does not prevent the application of the statute, as was decided in the recent case of *Campbell's Trustees v. Campbell*, 30th June 1891, 18 R. 992, where the Act was held to apply, although there had been no accumulations at all prior to the lapse of the twenty-one years. I am therefore of opinion that the Thellusson Act applies, and so far the case presents no difficulty.

"If the deed had contained no provision as to accumulation except the direction to accumulate until the sum amounted to £25,000, the pursuer's claim would probably not have been resisted, for then the provision would have merely amounted to a direction to pay to the heir in possession of the other estates, and to execute a deed of entail in his favour subject to a condition which had by operation of the statute become impossible, and which must therefore be held *pro non scripto*, which is the view which the pursuer takes, and is, I think, the sound view; and it is less favourable to him than the only alternative, viz., that a direction to pay at a time which could never arrive might be held to be no direction at all, and to leave the estate to which it referred in the position of intestacy.

"The defenders did not seriously maintain that the pursuer's claim could have been resisted if the deed had contained no other direction as to the accumulation.

"The defenders' case truly depends, and indeed was rested by them, almost entirely upon the other or subsidiary provision in the last part of the fourth clause, which has been quoted, and which requires careful consideration.

"The provision is introduced by the truster's explanation that 'there appears to me at present to be no reason to doubt that the proceeds of my said mines and minerals will be amply sufficient to meet all the burdens which I have thus laid upon them, and to admit of an accumulation to the extent of £25,000 after paying all the burdens which I have thus laid upon them,' and then the clause

No. 175. The defenders reclaimed, and argued;—Where a testator directed accumulations to be made, and appointed a date at which the accumulated

June 30, 1892.
Colquhoun v.
Colquhoun's
Trustees.

proceeds that in case, from the causes stated, it should not amount to that sum, still the fund should be kept up until the events mentioned.

"The defenders maintain that this clause means simply that so long as the accumulated fund did not amount to £25,000 it should not be paid until the death of the truster's two sons, and of the heir of either who might have taken the estates. It is argued that what the testator had in his view was the cessation or diminution of the annual accumulation, and not the circumstances by which that was brought about. The defenders therefore maintain that that is the provision which applies to the present circumstances; and that, if that be so, it follows from the judgment of the majority in the case of *Campbell's Trustees v. Campbell*, 18 R. 992, that the pursuer cannot be entitled to the accumulated fund or to the estate of mines and minerals. They maintain that the postponement of the term of payment is clearer in this case than it was in the case of *Campbell's Trustees*, because of the provision that even if the working of the minerals should cease altogether and the accumulation be thereby brought to an end (as it would be, seeing that under the provision of the deed the trustees are directed not to accumulate the interest on the accumulated rents), the trust should still be kept up, and that that shews that the desire to accumulate was not the sole reason for postponing the payment.

"If the defenders' construction of the clause be sound, and if they are right in saying that it applies to the circumstances which have occurred, then I think the case of *Campbell's Trustees* affords a very strong ground for the conclusion which they seek to deduce from it.

"While sensible of the force of the defenders' argument, I have found myself on consideration unable to adopt it.

"The clause on which they found is singularly obscure, for not only is the object of the postponement (at least if it were not the hope of accumulation) utterly unintelligible, but the words of the clause present great difficulties. For it does not appear what period of time the truster had in view when he speculated on the adequacy of the mineral rents to produce £25,000; nor, except very vaguely, the modification of the mineral workings which he contemplated as sufficient to bring the clause into operation.

"Suppose the pursuer had died and his son had inherited the estates and had also died before the lapse of twenty-one years after the truster's death, I apprehend that the account could not have been closed and the fund and estates conveyed unless the sum of £25,000 had been reached, or unless it could be shewn that there had been such a considerable alteration on the state of the mineral workings as would make the subsidiary provision applicable.

"It is to be observed that the clause in question is only a part, and a subordinate part, of a clause the primary object of which is the accumulation of rents, so that when it speaks of the contingency of the minerals ceasing to be worked, that is not to be read as indicating that payment was to be postponed without any reference to accumulation. I think that what was meant was that any temporary cessation of the workings should not operate the closing of the account, but that it should be kept open in the expectation of accumulations.

"There is no averment that the working of the minerals has ceased or that the produce of them has diminished. There would be no ground, but for the interference of the Act, for suggesting that the subsidiary clause had come into operation.

"Matters have been going on, so far as the record discloses, in the manner which the truster expected and provided for by his primary provision. The Thellusson Act intervenes and puts a stop not to the working of the minerals but to the accumulation of the rents; and it is said that that fact warrants the introduction of the subsidiary provision of the deed.

"I am not able to hold that. I think it would be perilous to do so. It was not *ex hypothesi* within the view of the truster. I consider that the

fund was to be paid over, the period of payment was not accelerated by the operation of the Thellusson Act.¹ Further, the truster had contemplated the possibility of the process of accumulation being interrupted by "unforeseen contingencies," and the operation of the Thellusson Act must be held to fall under that description. The defenders were accordingly bound to retain the accumulated fund and the minerals until the death of the pursuer's son.

Counsel for the pursuer were not called on.

LORD PRESIDENT.—The effect of the deed is, I think, too clear for us to require further argument upon it. The Thellusson Act prevents effect being given to the object which the testator has in view in the leading part of the clause which has been the subject of discussion, and the question accordingly comes to be, as Mr Dickson candidly admitted, whether the event which has now happened, viz., the failure of the testator's main purpose in consequence of the operation of the statute, can be deemed an "unforeseen contingency," which will bring into operation the subordinate directions given by the testator in the latter part of the clause. It appears to me that that part of the deed is very clear, and points out, with no ambiguity, the event against which it is intended to provide, and the way in which the estate is to be dealt with, notwithstanding the occurrence of an impediment to the carrying out of the primary purpose of the testator. The deed provides that "in case from any unforeseen contin-

is a special necessity for following closely the very words when construing a trust-deed which is rendered partly inoperative by the Thellusson Act, and this especially, which is an important consideration, when the result and object of extending the provisions beyond the letter of the deed is to operate a partial disinherison of the heir-at-law.

"For these reasons I am of opinion that the circumstances have not occurred to which the provision on which the defenders found was meant to apply, and that for the reasons already stated the pursuer is entitled to decree.

"There is another reason of a simpler nature which would lead to the same result, and which I will merely notice in a word. In the absence of authority I would hardly be prepared to rest my judgment on it. It was not argued, and has never been argued, so far as I know, in any of the many cases which have occurred about the Thellusson Act. It is this: I do not see clearly why in cases of this kind it should be assumed that neither the truster nor his law-agents had ever heard of the Thellusson Act, and why there should not rather be imputed to them a knowledge of the Act, and an intention to make the provisions of the trust-deed in accordance with it. If that were assumed, and the assumption might well be in accordance with the fact, there would be implied, in every direction to accumulate, this qualification that it should be subject to the restrictions of the Thellusson Act.

"I do not see that such an implied condition would conflict with the provisions of the deed in this case. In that view, the directions of the truster as to accumulation would be read as being that the conveyance of the accumulated fund or estate should in no case be postponed for more than twenty-one years after the truster's death, but should take place sooner if, before that time, a sum of £25,000 should be accumulated, or (in the event of the partial or total failure of the mineral rents) if the death of the two sons and of the first heir descending from either should occur.

"My judgment, however, is independent of that view, which no doubt is not supported by any authority so far as I am aware."

¹ *Campbell's Trustees v. Campbell*, June 30, 1891, 18 R. 992; *Nettleton v. Stephenson*, March 12, 1849, 3 De G. and Sm. 366; *Eyre v. Marsden*, July 10, 1838, 2 Keen, 564, per M. R. (Langdale), p. 574; *Muirhead v. Muirhead*, May 12, 1890, 17 R. (H. L.) 45, per Lord Watson, p. 48.

No. 175.
June 30, 1892.
Colquhoun v.
Colquhoun's
Trustees.

gency the said mines and minerals shall either cease to be worked, or the proceeds thereof be much diminished,"—that is the occurrence to be provided against,—and the testator goes on to say, "yet the said 'Garscadden Trust Fund Account' shall still be kept up during the lifetime of my two sons, and also during the lifetime of the first heir descending from either of them who shall be in existence at the time of my death, and who shall have succeeded to my lands and estates; and in case any other mines and minerals are subsequently discovered the proceeds of them shall, in like manner, be entered in the said account, and accumulated till the total free balance at the credit thereof shall amount to the sum of £25,000." We find, therefore, in the first place, that the testator contemplates and deals with the case of a going mine, which he expects will supply an amount of minerals sufficient to yield the sum of £25,000 by the system of annual accumulations which he prescribes. But if his expectation should not be realised he directs the trustees to keep the account open in the hope that the discovery of other minerals may enable the process of accumulation to be resumed, and that his minerals may yet yield the sum of £25,000. Now, however, the Thellusson Act having come into operation, and no further accumulation being possible, this hope can never be realised, and the contention that the operation of the Thellusson Act falls under the "unforeseen contingencies," mentioned in the deed, is, in my opinion, a hopeless contention. I think therefore that the pursuer, who is the truster's only son, is entitled to a conveyance of the mines and minerals, and to payment of the accumulated fund.

LORD ADAM concurred.

LORD M'LAREN.—We have in this case to consider a somewhat interesting development of case law on the effect of the Thellusson Act. Most of the cases bearing on this Act have had to do with the rents or proceeds of estate, which according to the testator's directions were to be accumulated, but were unappropriated through the operation of the Act of Parliament. The statute expresses in general terms what is to be done with the rents or income of estate in such cases, but the provision is expressed in terms so general that it is often matter of difficulty to find out who is entitled to the income. Here the difficulty is of a different kind. There is no question as to the disposal of future income. The question is, who is entitled to the capital of the sum of money accumulated during the twenty-one years that are past? The testator has directed that the income of this fund is to be paid to the heir in possession of his other landed estate, until the proceeds of his mines and minerals reach a specified sum, and the question is whether we can, contrary to the form of words used by the testator, give the accumulated sum to the heir, notwithstanding that it does not amount to the sum of £25,000 which the testator contemplated. I think if this had been a case in which the testator had directed the process of accumulation to go on for a definite number of years, and had pointed out who was then to take the accumulated fund, the question which we have now to decide would not have been left open, because the trustees would have had to keep the fund in their hands until the expiration of the appointed time. But the term of division appointed in this case is generally speaking the time when the sum of £25,000 shall be accumulated. No doubt the period of accumulation is limited to the lifetime of the testator's two sons and of the first heir descending from either of them, but subject to that limitation the period of

division is postponed until the accumulated sum has reached £25,000. Now No. 175. that sum never can be raised, because further accumulations are rendered im-
possible by the operation of the Thellusson Act, and it seems to me that the
accumulated fund should, in these circumstances, be treated as having already
attained its maximum amount, and should be given to the person designated in
the instrument as the person to whom payment was to be made at the end of
the period of accumulation.

June 30, 1892.
Colquhoun v.
Trustees.

LORD KINNEAR.—I am of the same opinion. If a testator postpones the period of payment or conveyance of his estate so as to suspend or exclude vesting, and in the meantime directs that the rents and proceeds of his estate shall be accumulated, the interruption of the accumulation by the operation of the Thellusson Act will not accelerate the period of vesting. But in the present case, it appears to be quite plain that the conveyance of the estate is postponed solely for the purpose of effecting the desired accumulation, and accordingly when that purpose is served, he directs that his mines and the accumulated fund shall be handed over to the heir in possession of his other landed estate. Now, it appears to me that the purpose for which the period of payment was postponed has now been served, so far as it is possible to attain it, for the accumulation is now at an end; and, although the intention of the testator has not been entirely fulfilled, it has been fulfilled within the limits which the law prescribes. It therefore appears to me to be clear that, but for the special provision upon which the argument addressed to us was founded, there could have been no question that the period of conveyance had arrived.

It is said, however, that the conveyance should still be postponed, because the provisions of the deed vest the trust-estate not in the heir who is now in possession of the testator's landed estate, but in the heir who will be in possession at a subsequent date. As your Lordship has pointed out, these provisions were made not for the purpose of postponing payment, but for the purpose of accelerating the conveyance of the estate, even though the purpose of accumulation was not served. The testator contemplates the possibility of his trustees failing to accumulate the sum of £25,000, and directs that, if they fail, they are still to pay over the trust-estate to the third heir in possession of his landed estate. That is a provision for putting a stop to further accumulations, and certainly not for postponing vesting. I agree that the sole purpose of the postponement of payment was to enable the desired accumulation to be effected, and that further accumulations having been stopped the estate must be dealt with as if the period of distribution had arrived.

THE COURT adhered.

STRATHERN & BLAIR, W.S.—LIVINGSTON & DICKSON, W.S.—Agents.

ANDREW MACFARLANE, Pursuer.—*Rhind*.
WILLIAM BEATTIE & SONS, Defenders.—*Clyde*.

No. 176.

Process—Jury trial—Failure to proceed—A. S., 16th Feb. 1841, sec. 46.—The Act of Sederunt, 16th February 1841, sec. 46, provides,—“ . . . If the pursuer or party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shewn for the delay to the satisfaction of the Court.”

July 1, 1892.
The Macfarlane v.
Beattie &
Sons.

Held that this provision does not apply in a case where a trial has taken

No. 176. place, a verdict been returned for the pursuer, and that verdict set aside, and the pursuer for twelve months thereafter has failed to take any further step in the action.

July 1, 1892.
Macfarlane v.
Beattie &
Sons.

2D DIVISION.

ANDREW MACFARLANE raised an action to recover damages for personal injury against William Beattie & Sons, contractors.

The case was tried on 26th and 27th May 1891 before Lord Kincairney and a jury, when the jury found for the pursuer, assessing the damages at £130.

The defenders moved for a new trial, and on 25th June 1891 the Second Division of the Court set aside the verdict and granted a new trial.

The defenders now moved that the action should be dismissed, in respect of the pursuer's failure to move in the case for twelve months. They founded on the Act of Sederunt of 16th February 1841, section 46, and maintained that the spirit of that Act applied, although the words did not in terms.

The pursuer maintained that the Act did not apply, and cited the case of *Baird v. Cornelius*,¹—arguing that the defenders having now a right, in respect of the provisions of the Court of Session Act, 1850 (13 and 14 Vict. cap. 36), sec. 40, themselves to move in the action, the reason of the Act of Sederunt did not apply.

THE COURT, without pronouncing any interlocutor, refused the motion, on the ground that the defenders had the remedy in their own hands by applying to have a day fixed for the trial.

D. HOWARD SMITH, Solicitor—DRUMMOND & REID, S.S.C.—Agents.

No. 177. JAMES HENDERSON, Pursuer (Appellant).—*Lees—A. S. D. Thomson.*
JOHN WATSON, LIMITED, Defenders (Respondents).—*W. Campbell.*

July 2, 1892.
Henderson v.
John Watson,
Limited.

Process—Issue—Action at common law and under the Employers Liability Act, 1880 (42 and 43 Vict. cap. 42)—Reparation—Master and Servant—Company.—In an action of damages at common law and under the Employers Liability Act, 1880, brought by a coal miner against his employers, a limited company, for damages in consequence of his having been injured by a bogie which had broken loose on an inclined plane in the mine, the pursuer averred that the bogie had broken loose through a defective system of working it which had become the practice in the mine, and that this practice was known to and authorised by the defenders, their manager, underground manager, and overman, and he proposed an issue in general terms, with a schedule, claiming as damages the amount sued for at common law. The defenders moved that the sum stated in the schedule should be restricted to the amount sued for under the Employers Liability Act, 1880, on the ground that the action was irrelevant at common law, in respect that the pursuer had not averred that the defenders, acting through persons entitled to represent them, had authorised the practice complained of.

The Court, without deciding the relevancy of the action at common law, refused the motion, and allowed the issue as proposed by the pursuer.

1ST DIVISION.
Sheriff of
Lanarkshire.

IN March 1892 James Henderson, miner, Hamilton, brought an action in the Sheriff Court at Glasgow against John Watson, Limited, coal-masters, Glasgow, for £500 as damages for personal injury at common law, and alternatively for £210, 12s., as damages under the Employers Liability Act, 1880.

¹ July 16, 1881, 8 R. 982.

The defenders did not dispute the relevancy of the pursuer's case in so far as founded on the Employers Liability Act, but pleaded;—(1) The pursuer's statements are irrelevant in so far as the action is founded upon common law.

No. 177.

July 2, 1892.
Henderson v.
John Watson
Limited.

The pursuer averred that, on 30th September 1891, when employed as a mineral pointsman at the foot of an inclined plane in the main coal seam of the defenders' Earnock Colliery, he had sustained severe injuries through being crushed against a wall by a runaway bogie which had dashed down the inclined plane,—(Cond. 4) Pursuer met with these injuries "through the gross fault and negligence of the defenders, and of their manager, Thomas Moodie, their underground manager, Thomas Gray, of their oversman in the said main coal seam, named William Smith, and also of the roadsmen in said main coal seam, whose names are to the pursuer unknown, all in the manner narrated in the following articles of the condescendence." (Cond. 5) "The said inclined plane is several hundred yards long, and is worked by a system of engine haulage, which is known as the 'endless rope' system, established by defenders in said main coal seam. When a rake of empty hutches has to be taken down the inclined plane, a bogie is coupled on to the front of the hutchea. To the bogie itself is attached a mechanical contrivance called 'shears,' the purpose of which shears is to lay hold of the haulage rope, and through the medium of which the load is dragged along a level or up an incline, and through the medium of which also the speed of the hutches descending the incline is controlled and regulated. At the other end of a descending 'rake,' and attached to the last hutch thereof, there is another mechanical contrivance or brake which acts as an auxiliary to the shears, and by means of which the speed of the descending rake is also controlled." (Cond. 7) "The bogiemen and others who attended to the haulage on the said incline mentioned in article 3 were in the practice (and defenders knew and authorised the practice) of what is termed by the miners 'skiting the rope,' which means this, that by the application of a screw the hold of the shears is somewhat relaxed and the rope is allowed to 'skite' or run in the groove of the shears. This practice is highly dangerous to the miners who are necessarily engaged in or about the said inclined plane, and there have been many accidents at this place in consequence. . . ." (Cond. 8) "On the day in question, after the bogieman had started a rake, he uncoupled the bogie from the rake of hutches behind it, and began to 'skite the rope,'—that is to say, by means of the relative screw he loosened the catch of the shears upon the rope, with the object of letting the bogie run down the hill faster than the hutches, which were kept going behind it at a slower rate by the brake attached to the last hutch. In some way or other the rope had fallen altogether out of the shears, and the bogie, being now subject to no control, brake, or regulator whatever, dashed down the hill and injured the pursuer, as mentioned in article 3, by jamming him against the wall. The defenders' manager, Thomas Moodie, their sub-manager, Thomas Gray, and their oversman, William Smith, were well aware of this practice of 'skiting the rope,' and for a long time prior to the accident had often stood by while it was being put into force. The said practice gave additional expedition to the work, and pursuer believes and avers that it was for this purpose that it was encouraged by defenders, or those for whom they are responsible. A short time prior to the said 30th September the defenders and their superintendents herein mentioned had, with what was in the circumstances gross disregard for the safety of their workmen, increased the number of hutches in each rake on said incline from twelve to eighteen, and this so increased the difficulty of 'scutching

No. 177.

July 2, 1892.
Henderson v.
John Watson,
Limited.

back' and otherwise dealing with the hutches at the bottom of the incline, that the practice of uncoupling the bogie and 'skiting the rope' with it was, on the special instructions of the said superintendents, but particularly of the sub-manager Gray and the oversman Smith, resorted to to obviate the difficulty. Prior to the said date, too, the said superintendents were constantly complaining to the haulage men and others of the haulage engine being stopped to permit of the manipulation of the hutches on the incline, and the said superintendents gave instructions that in order to obviate the stopping of the engine the bogie should be uncoupled and the foresaid practice of 'skiting the rope' with it resorted to. After the said date the number of hutches was again reduced to twelve." (Cond. 9) ". . . On account of the practice of 'skiting' the rope above mentioned, the shears become rapidly worn, because the rope is allowed to 'skite' or run in the groove of the shears, and the pursuer believes, and now avers, that his injuries were caused, or at all events materially contributed to, by the worn-out state of the shears, which were on that account unable to maintain any grasp whatever on the rope, and allowed it to fall out. Defenders and their officials foresaid were well aware, or ought to have been aware, of the defective state of the shears in question, and pursuer believes and avers that there was no sufficient system of inspection of the shears to see that they were kept in good and sufficient working order. . . ."

The defenders, in answer, stated that they did not know of or authorise the practice complained of, and that if such a practice existed, it was a practice which their men followed without any authority from them.

On 20th May 1892 the Sheriff-substitute (Guthrie) allowed a proof.

The pursuer appealed for jury trial, and proposed the following issue for the trial of the cause,—“Whether on or about the 30th day of September 1891, and within or near the Earnock Colliery, Hamilton, belonging to the defenders, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to his loss, injury, and damage?” In the schedule to the issue the damages claimed were stated at £500.

The defenders objected to the issue, in so far as the sum claimed as damages in the schedule was stated at £500, and maintained that it ought to be limited to £210, 12s., the amount sued for under the Employers Liability Act.

Argued for the defenders;—The action was irrelevant at common law. It was not alleged that the appliances for working the hutches as originally provided by the defenders were defective, or that their manager was unfit for his duties. What was alleged was that a practice had grown up of working the hutches in a way not originally intended, which was alleged to be unsafe, and to have been the cause of the pursuer's injuries. Now, a coalmaster was not bound personally to superintend the working of his mine, and if he employed a competent manager he would be free from responsibility for injuries to his workmen arising from the defective working of a system in itself unexceptionable, unless he was himself personally cognisant of the defective method of working.¹ Here plainly the defenders could not have been personally cognisant, in the sense that they had personally superintended the working, for they were a limited company. Hence a bare averment of knowledge on the part of the defenders was not sufficient; it was necessary to aver that they, acting

¹ Wilson v. Merry & Cuninghame, May 28, 1868, 6 Macph. (H. L.) 81, 40 Scot. Jur. 486; Sneddon v. Mossend Iron Co., June 23, 1876, 3 R. 868; Stewart v. Coltness Iron Co., June, 23, 1877, 4 R. 952.

through some one entitled to bind them as a corporation, knew and approved of the practice complained of. The only officials, however, who were said to have known of the practice were the manager, the underground manager, and certain officers subordinate to him; but these were not officials entitled to represent the company in such a matter. There was thus no relevant case at common law, and accordingly the issue ought to be limited to the case under the Act.¹

No. 177.
July 2, 1892.
Henderson v.
John Watson,
Limited.

The argument for the pursuer sufficiently appears from the opinions of the Court.

At advising,—

LORD M'LAREN.—It is admitted by the defenders that there is stated on record a relevant case for the pursuer, because under the Employers Liability Act, even if it were proved that the accident happened because of the negligence of the persons responsible for the mode of working, that would not exempt the defenders from responsibility. But it is argued that where such facts are averred as shew that the pursuer has no claim at common law but only a claim under the Employers Liability Act, we should in some way qualify the issue, so as to make it clear that it is an issue to try a case arising under the statute, and that only.

But I do not read the Employers Liability Act as setting up a new and independent code of liability distinct from the liability which attaches at common law to employers under the principle *respondet superior*. What the Act has done is in the cases there enumerated to relax certain of the rules at law which had come to operate prejudicially to the reasonable claim of the workman, who might suffer through a fault of the kind described in the statute. I should for myself be against a system of sending separate issues to a jury for the trial of such a case, one at common law and one under the statute. It is really all one claim, one ground of liability, only the statute steps in and limits the damages in certain cases in which it defines the employers' liability.

Now, there are no doubt cases where the fault alleged consists of a single act, and in which it is impossible to state the case without at the same time disclosing who the person is that is alleged to be at fault. In such cases I think the statements on record should be so specific that a judge or a jury could decide whether the case was one depending on common law or one which fell under the scope of the statute. But where the fault alleged is a continuing one, it may be through the use of a defective system, or of defective plant, or it might be the systematic abuse of a system excellent and unexceptionable in itself, then I do not conceive that it is incumbent on the injured man or his representatives before coming into Court to find out who the individual is who is responsible for this continuing error, or, to use a popular expression, "to lay the saddle on the right horse."

I say so, because the general provision of the Employers Liability Act is that in all cases arising under it the workman or the person entitled to compensation in case of death has the same right for compensation and damages against the employer "as if he had not been a workman of nor in the service of the employer nor engaged in his work." Now, if this had been an accident to an outside person, lawfully on the ground, it would have been relevant to aver a defective system, and to say that this was the fault of the employers or those for whom they were responsible, and I see no reason why such an averment

¹ Robertson v. Linlithgow Oil Co., Limited, July 18, 1891, 18 R. 1221.

No. 177. (relevant as it would be in the case supposed) should not be so in the case which has actually happened of the injury being to a person who is by statute in the same position as if he had not been a workman.

July 2, 1892.
Henderson v.
John Watson,
Limited.

On this ground, in my opinion, the issue proposed is a proper one, and ought to be allowed.

LORD KINNEAR.—I am of the same opinion. If it were perfectly clear upon record that there was a relevant case alleged under the Employers Liability Act and no relevant case at common law, I should, for my part, be disposed to follow the course which Mr Campbell says should be taken here, and sustain the defenders' first plea in law, but in this case I think it is quite impossible to take that course.

If it be at all doubtful whether a relevant case may not be made out on one of these two grounds in law, and it be perfectly clear at the same time that there is a relevant averment on the other, then I think it a very dangerous proceeding to decide *ab ante* that the pursuer should not be allowed to lay both before the jury. But it seems to me that this case is perfectly relevant at common law. On the one hand, the pursuer says he was injured in consequence of the defenders' men following a dangerous practice, and he alleges that the defenders knew it to be dangerous and authorised it. The defenders, on the other hand, reply that they did not know of or authorise the practice, and that if what the pursuer complains of was done by their men it was a culpable practice which the men followed of their own authority. Now, surely that raises a question of fact which it would be impossible for us to withhold from a jury.

Mr Campbell's argument comes to this, that in a case of this character in order to make a relevant case against the employers the pursuer must make a specific statement as to the method in which the works of the defenders were managed, so as to shew what direct authority was given by the defenders to the dangerous practice. I think that would put far too heavy a burden on the pursuer, who is quite unable to make an averment of this kind until the case comes to trial.

Therefore I think we must grant an issue in the usual terms.

LORD ADAM.—I do not understand that Mr Campbell has any objection to the body of the issue, but he objects to the schedule of the issue where the damages are put at £500, and he says that that should be limited to the sum of £210, 12s.

The conclusions of the action are to recover either £500 at common law, or alternatively £210, 12s. under the Employers Liability Act. No doubt Mr Campbell does not dispute that an issue with a schedule where £500 is set out as damages, as in this issue, can try both cases, because of course if the jury were directed by the Judge that they could go only under the statute, it would follow that the maximum sum they could award as damages would be the smaller sum stated here. If the £500 is allowed to remain, there would therefore be no practical difficulty to the amount being limited to £210, 12s. in the course of the trial.

But the way in which Mr Campbell proposes to attain this end is to ask us to sustain the first plea in law for the defenders, and no doubt if we sustain that plea in law it will follow as a necessary consequence that we must alter the schedule of damages to the smaller sum.

It must be kept in view that the defenders do not dispute the relevancy of

the pursuer's case under the Employers Liability Act. The case must therefore go to a jury. The only question before us is, whether at this stage we are to alter the schedule by deleting the amount of the claim at common law and inserting the lesser sum claimed under the statute. I agree that we ought not to do so.

No. 177.
July 2, 1892.
Henderson v.
John Watson,
Limited.

The fault averred against these defenders is that they allowed a defective system, or rather that they allowed a system to which no objection could be taken if properly worked to be defectively worked, and, as Lord Kinnear has pointed out, there is a distinct averment on record that this defective system, or rather this abuse of the proper system, was directly authorised by the defenders. But it is said that there should have been more specification, so as to shew how and in what manner the directors of the company or the secretary or managing director of the company had directly authorised the abuse, or at anyrate to shew that they had knowledge of the abuse.

I agree that as the case has to go to a jury at anyrate we should leave the facts to come out before them, and accordingly I concur with your Lordships in approving of the issue.

The LORD PRESIDENT was absent.

THE COURT approved of the issue proposed by the pursuer.

A. B. CARTWRIGHT WOOD, W.S.—GILL & FRINGLE, W.S.—Agents.

KNIGHT & COMPANY, Pursuers (Reclaimers).—*Dickson—Crabb Watt.* No. 178.
J. STOTT, Defender (Respondent).—*Johnston—Dewar.*

Contract—Sponsio ludica—Betting—Agent and Principal.—The plea of *Sponsio ludica* does not apply to an action by a betting commission-agent against his principal for recovery of sums disbursed by him for behoof of his principal on account of bets lost.

July 6, 1892.
Knight & Co.
v. Stott.

Process—Relevancy—Specification—Principal and Agent.—In an action by a betting commission-agent against his principal for recovery of the amount disbursed by the pursuer on account of the defender for bets lost the pursuer averred that certain of the bets in question had been laid with "a bookmaker." Held that the pursuers' averments were not irrelevant for want of the specification of the names of the bookmakers with whom the bets had been laid.

In September 1891 Knight & Company, designing themselves as commission-agents, 109 Argyle Street, Glasgow, brought an action against Captain Stott, Netherwood, Dumfries, for payment of £170, 10s.

The pursuers averred;—(Cond. 4) "In the beginning of July 1891, at Carlisle races, the defender instructed the pursuers to act as agents for him, and as such to make the bets, in their own name, but on his behalf, detailed in the statement herewith produced, and on the horses therein named. The statement shews (1) the dates on which the different bets were made; (2) the amounts which the defender instructed the pursuers to lay on the said horses; (3) the names of the different horses backed; (4) that of the different bets only one was successful, the rest being unsuccessful; and (5) the different dates when the unsuccessful bets were paid by the pursuers, and the date on which the successful bet was paid to them. On account of these bets, the pursuers had to pay for the defender the sum of £190, 10s., and they received on his behalf, in respect of the successful bet, the sum of £20. The difference between these two sums is £170, 10s., which is the sum sued for."

The defender answered;—(Ans. 4) "Denied that the defender ever

No. 178.

July 6, 1892.
Knight & Co.
v. Stott.

instructed pursuers to act as his agents. Explained that whatever bets defender made at said races were direct gambling transactions."

The pursuers pleaded;—The defender being due and resting owing to the pursuers the sum herein sued for, decree should be granted against him, with expenses, all as concluded for.

The defender pleaded;—(1) No title to sue. (2) The pursuers' statements are irrelevant. (3) The pursuers' statements being unfounded in fact and wanting in specification, the defender ought to be assoilized, with expenses. (4) The alleged transactions are null and void, in respect that they are *sponsiones ludicrae*.

On 3d December 1891 the Lord Ordinary (Wellwood) found that the pursuers' averments were irrelevant from want of specification, and dismissed the action.*

The pursuers reclaimed, and, at the hearing, moved to be allowed to amend their record. The following were the proposed amendments (the original cond. 4 being deleted), with relative answers for the defender:—(Cond. 4) "At Carlisle race-course, on or about the 30th day of July 1891 and the 1st day of July 1891, the defender employed the pursuers as his agents to make, and if lost to pay, the following bets for him, and the pursuers did accordingly make the following bets and pay for him the following sums, viz. :—

Race.	Horse.	Sums laid.	Odds.	Persons with whom laid.
1. Corby Stakes, .	Bonnie Colleen,	£4 0	5 to 4	John Schiller.
2. Do., .	Do., .	4 0	5 to 4	A bookmaker.
3. Cumberland Plate, Alice, . . .	. . .	10 0	10 to 5	John Schiller.
4. Do., .	Do., . .	10 0	10 to 5	A bookmaker."

Other eighteen similar entries followed, the person with whom the bet was laid being in every case either "John Schiller" or "a bookmaker." (Ans. 4) "Denied." (Cond. 5) "The engagements Nos. 1 to 10 inclusive of the above list were made on 30th June 1891, and Nos. 11 to 22 inclusive were made on the following day. They were made by the authority and instructions and for behoof of the defender, and with his knowledge, consent, and approval. The names and addresses of the bookmakers, other than the said John Schiller, referred to in said list, are not known to the pursuers. It is the custom at race meetings for agents such as the pursuers, acting on such instructions as the defender gave the pursuers, to bet with bookmakers, although their names and addresses are unknown, and to pay in the event of the bet being lost, without the

* "OPINION.— . . . While the defender denies employment, his counsel at the debate declined to maintain that the contract alleged, if proved is illegal and not enforceable in a Court of law. But he maintained that the pursuers' averments are irrelevant from want of specification, in respect that they have not furnished the names of the parties with whom the bets were made. I think that this objection is well founded. The pursuers profess to make bets on commission as a regular business, and the account No. 6 of process shews that the business is conducted with ostensible regularity. It is true that, according to the laws both of England and Scotland the bets could not have been recovered in a Court of law. But the pursuers are suing in the capacity of agents authorised to disburse, and who have disbursed, money for their principal, and I am of opinion that they are just as much bound, in question with him, to furnish the names of the persons to whom the payments are said to have been made, as they would be in a less speculative business transaction. The pursuers maintain that this is simply a matter of proof, and that they are not bound at this stage to make any such disclosure. I think otherwise; and as the pursuers do not propose to amend their record, by giving the necessary information, I shall dismiss the action. . . ."

name of the payee being noted. This custom was well known to the No. 178.
 defender, and he acquiesced in the pursuers conforming to it on his behalf,
 and instructed them to make and pay said bets on the footing that said
 custom would be followed. In each of the instances above referred to, July 6, 1892.
Knight & Co.
v. Stott.
 where no name is given, the bet was made with and paid to a bookmaker
 whose name is unknown to the pursuers, and in doing so and acting they
 relied on the custom foresaid. The said John Schiller's address is No. 85
 Buchanan Street, Glasgow." (Ans. 5) "The alleged customs at race
 meetings are not known, and not admitted; *quoad ultra* denied." (Cond.
 6) "With the exception of Nos. 3 and 4 in said list, the sums thus staked
 by the pursuers, on the defender's instructions and for his behoof, were
 lost and paid by them on his account. The various sums thus lost were
 paid by the pursuers to the defender's creditors, or the winners from the
 defender, as his agents, and in accordance with his instructions, shortly
 after the running of each of the said races. The payments thus made
 by the pursuers, as agents and for behoof of the defender, after crediting
 the £20 applicable to Nos. 3 and 4 of the above list, which sum of £20
 was paid to the pursuers on defender's account, amount to £170, 10s. A
 detailed statement bringing out this balance has been produced, and is
 here specially referred to. Said sum of £170, 10s. is due and resting
 owing by the defender to the pursuers." (Ans. 6) "Admitted that pur-
 suers have now produced statement referred to; *quoad ultra* denied."

Argued for the pursuers;—The pursuers had now stated a case which
 was not open to the objection of irrelevancy from want of specification.
 It certainly was not so as regarded the bets alleged to have been laid with
 Schiller; while as regarded the other bets the averment of custom was
 relevant, although it might perhaps be difficult for the pursuers to prove
 these bets. Nor was the objection of *sponsio ludicra* well founded. The
 Court would not sustain action as between the principals to recover
 the amount of a bet lost, nor probably would an action be allowed to
 determine which horse had won, or to determine any trial of skill, the
 purpose of Courts of law being the settlement of serious questions of
 right, not mere trials of skill or strength. But there was nothing *ipso*
facto illegal in betting or in contests of strength or skill, and conse-
 quently the Court would determine and enforce incidental transactions
 arising out of such matters, subject only to the proviso that the Court
 was not asked, as a medium towards such determination, to settle
 whether the bet or the game had been won or lost.¹ The present case
 fell within this principle. If the pursuers established their averments
 in point of fact, they had, as the agents of the defender, advanced money
 on his behoof, and were entitled to recover it from him. No question
 was raised as to which horse had won.

Argued for the defender;—Even as amended, the pursuer's averments
 were irrelevant, at all events as regarded the bets said to have been laid
 with "a bookmaker." If the pursuers had made the bets alleged, it was
 their duty to preserve the names of those with whom they had betted.
 The Court would not allow an inquiry into the custom of the turf on
 such a matter. Further, the objection of *sponsio ludicra* was well
 founded. By the common law of England the amount of a bet might be

¹ Foulds v. Thomson, June 10, 1857, 19 D. 803, 29 Scot. Jur. 372; Graham
 v. Pollok, Feb. 5, 1848, 10 D. 646, 20 Scot. Jur. 200; Calder v. Stevens, July
 20, 1871, 9 Macph. 1074, 43 Scot. Jur. 543; Molleson v. Noltie, Jan. 24, 1889,
 16 R. 350; Knight v. Cambers, 1855, 1 Eng. Jur. (N. S.) 525; Thacker v.
 Hardy, 1878, L. R., 4 Q. B. Div. 685; Read v. Anderson, 1882, L. R., 10 Q. B.
 Div. 100, aff. 1884, L. R., 13 Q. B. Div. 779; Bridger v. Savage, 1885, L. R., 15
 Q. B. Div. 363.

No. 178.

July 6, 1892.
Knight & Co.
v. Stott.

enforced in a Court of law, in many cases at all events, and the Act 8 and 9 Vict. cap. 109, was passed to remedy that. Whether that Act applied to Scotland or not, it certainly did not abrogate the Scots common law, by which the amount of a bet lost could in no case be recovered in a Court of law.¹ Hence the English decisions, that a commission-agent might recover on establishing his employment, being merely decisions that such cases did not fall within the Act, were erroneous according to the principles of Scots law.² The present case was nothing else than an action for the amount of a bet lost, and therefore was bad at common law.

At advising,—

LORD PRESIDENT.—The Lord Ordinary dismissed this action on the ground of insufficient specification in the condescendence. Recognising the weakness of their record the pursuers have tendered a minute of amendment which gives adequate particulars, and I think we should open the record, allow the amendments of the pursuers and the relative amendments of the defender to be made, but on condition of payment by the pursuers of all expenses from the date of closing the record.

On the assumption that this is done, and the record of new closed, we have to deal with the question whether the action is not open to the objection that its subject-matter is *sponsio ludicra*. I think this plea is ill founded.

The pursuers seek reimbursement of moneys expended by them on the instructions of the defender. They say that on his instructions they engaged to pay, and did pay, certain sums to certain persons in the event which happened, of certain horses not winning at Carlisle Races. They do not ask us to try the question which horse won in the races in question; the plea would then have application. No dispute of this kind arises on the record, the averment that the horses named lost meaning that they were not declared winners.

I regard it in the same way as I should if the pursuers' case had been that on the instructions of the defender they had given a couple of sovereigns to each jockey for a winning mount, or as a consolation for losing. In this view it is no legal objection to the action that it is connected with, or arises out of, horse racing. Horse racing is not illegal. Nor is betting illegal in the sense of being prohibited or punishable. It is true that the Courts in Scotland do not entertain actions to determine wagers; it is also true that by the cautious provisions of the Act 1621, cap. 14, which is directed against excess in wagering, kirk-sessions were given right to the surplus over 100 merks of every racing bet, and by more modern statutes it is an offence to keep a house for betting. But there is no such legal taint in betting as to infect all the contracts which are in any way related to it, and the action now before us is not open to any other objection.

I think therefore that the case must go to proof.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT allowed the amendments to be added to the record, and remitted the cause to the Lord Ordinary.

MILLER & MURRAY, S.S.C.—WILLIAM WHITE, S.S.C.—Agents.

¹ Foulds v. Thomson, *supra*; O'Connell v. Russell, *infra*; Calder v. Stevens, *supra*.

² O'Connell v. Russell, Nov. 25, 1864, 3 Macph. 89, 37 Scot. Jur. 50.

MARY MACKENZIE, Pursuer (Respondent).—*Burnet.*

No. 179.

ALEXANDER KEILLOR, Defender (Appellant).—*A. S. D. Thomson.*

July 6, 1892.

Parent and Child—Bastard—Custody.—The mother of a bastard child about a month old placed it in the care of a married couple, who undertook the care of it, it being agreed that she should make certain payments for its support. They took care of it for more than six years, during which she paid in part the stipulated sums for its support. Thereafter she raised an action in the Sheriff Court to have it restored to her, and obtained decree until a permanent arrangement should be made by a competent Court. It appeared from a report of the Sheriff-substitute, in the course of an appeal to the Court of Session, that the mother was a factory worker, who had had two other illegitimate children, that the child appeared afraid of her, that the couple with whom it had been placed had cared for it well, and that in its interests it was better in their custody than in the mother's. The Court recalled the decree, and dismissed the petition.

Sheriff—Jurisdiction—Custody of Children Act, 1891 (54 and 55 Vict. cap. 3), sec. 1.—The Custody of Children Act, 1891, enacts that "where the parent of a child applies to . . . the Court of Session for . . . an order for the production of the child, and the Court is of opinion that the parent has . . . so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to . . . make the order." *Question*, whether the Act applied to the case of an application made to the Sheriff and afterwards brought by appeal before the Court of Session.

In November 1891 Mary Mackenzie, factory worker, Brechin, raised an action in the Sheriff Court at Forfar against Alexander Keillor, bleachfield worker, Friockheim, for decree ordaining the defender "to restore and deliver up to the pursuer the illegitimate female child, Jane Mackenzie, of which she was delivered on the 7th day of March 1885 . . . and also to interdict, prohibit, and discharge the defender . . . from interfering with the pursuer's possession and custody of the said child."

It was admitted that the pursuer was the mother of the child, and that she had in April 1885 placed it in the care of the defender and his wife.

The pursuer stated that for some years she had been anxious to regain the custody of the child, and had often requested the defender to restore her, but that the defender had refused to do so.

The defender denied this statement, and averred that under the arrangement by which the child was placed in his custody the pursuer was to pay him 5s. per week, and to supply the child's clothing; that about eighteen months after that arrangement, and after a dispute about the child's baptism, the pursuer had said she would have nothing more to do with the child, and had never re-claimed it till 11th September 1891. He further stated;—(Stat. 3) "Prior to the event above referred to, the defender pressed the pursuer to pay as arranged for the support of the child, but she always pleaded poverty, and he only got the sums recovered from the father, less expenses. After said event, and the pursuer's statements, the defender never asked her to pay the sums arranged for, nor to supply clothing, and was content to take what the pursuer called the 'bairn's money,' being the sums paid by the father, less expenses. . . ." (Stat. 5) "From 6th April 1885 to 11th September 1891 the defender has supported and clothed said child, during which period the pursuer made no demand for it, but, on the contrary, declined to have anything to do with it, and plainly indicated in conversations that the defender could keep the child as his own. . . ." The defender admitted that during the six and a-half years prior to 11th September 1891 he had received £48, 6s. 6d. from the pursuer, which being deducted from £83, 16s. due to him under the arrangement left due to him £35, 9s. 6d., or adding £13 for clothing, £48, 9s. 6d.

2D DIVISION.
Sheriff of Forfarshire.

No. 179.

July 6, 1892.
Mackenzie v.
Keillor.

(Stat. 6) "In the course of the period above mentioned, the defender and his wife and family have got much attached to said child and the child to them, and they fully understood that they were bringing up the child as a member of their own family. The defender, in view of the pursuer's refusal to have anything to do with the child, and her statement that he must keep it as his own, made no demands against her for any contribution towards its support, and he is still willing to forego his said claim, provided he is allowed to keep the child." (Ans. 6) "Denied that pursuer ever stated or intended that defender should keep the child as his own. Explained that pursuer is suffering great distress of mind in consequence of the child being forcibly and unwarrantably kept from her custody. The whole statement is irrelevant." (Stat. 7) "The pursuer is an outworker on a farm, and earns very small wages. She occupies a one-roomed house, is out all day, and there is no one in charge to look after the child. She is therefore not in a position to properly care for, support, and upbring said child. The child has all along been well kept and cared for, and it would suffer greatly by being removed. . . ."

The pursuer pleaded;—(1) The pursuer being entitled to re-delivery of her said child, warrant and decree should be granted as craved; and (2) that defender's statements were irrelevant.

The defender pleaded, *inter alia*;—(2) The pursuer not being in a position to properly care for, support, and upbring said child, she is not a fit person to have the custody of it. (3) The pursuer having allowed her child to be brought up by the defender, and having been unmindful of her parental duties, she is not entitled to have the custody of the child. (4) The action is not competent in the Sheriff Court, and ought to be dismissed, with expenses.

On 16th December 1891 the Sheriff-substitute (Robertson) pronounced this interlocutor:—"Finds that the present petition, being one for the permanent custody of a bastard, is incompetent in the Sheriff Court: Dismisses the petition."

On appeal the Sheriff (Comrie Thomson), on 26th January 1892, recalled the interlocutor of the Sheriff-substitute, repelled the defender's fourth plea in law, and remitted to the Sheriff-substitute to proceed.

On 5th February 1892 the Sheriff-substitute pronounced this interlocutor:—"Finds that the question of the unfitness of the pursuer to have the permanent custody of her child is not one which is competent in the Sheriff Court: Refuses the motion for proof; and meantime, and until a permanent arrangement is made by a competent Court, grants the prayer of the petition."

The defender appealed to the Court of Session, and argued;—The application was incompetent. Viewed as an application at common law it craved the permanent custody of the child. Viewed as an application under the Custody of Children Act, 1891, it was an application to the wrong Court, for the only proper Court to which to apply under that Act was in Scotland (section 1) the Court of Session.* This could not be

* The Custody of Children Act, 1891 (54 and 55 Vict. cap. 3), which came into force upon 26th March 1891, enacts (sec. 1),—"Where the parent of a child applies to the High Court or to the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order."

Sec. 3.—"Where a parent has (a) abandoned or deserted his child, or (b) allowed his child to be brought up by another person at that person's expense . . . for such a length of time and under such circumstances as to satisfy

remedied by saying that the case was now in that Court under appeal. No. 179. The case appeared to have been brought in the Sheriff Court merely to exclude the statute and prevent the defender stating such matters as under the statute would be a good answer to the prayer. The paramount consideration was the child's good. Assuming that the Court held the application competent, the defender was entitled to proof of his averments as to the mother's unfitness for the custody, and as to the benefit to the child of refusing the application.

July 6, 1892.
Mackenzie v.
Keillor.

Argued for the pursuer;—The Act of 1891 did not apply to the case. The question was whether the Sheriff was right. The Act left untouched the Sheriff's power to regulate interim custody. As between the petitioner, who gave the child to the defender to keep for her, and the defender, the Sheriff Court was competent.¹

After argument the Court, on 12th May 1892, of consent remitted to the Sheriff-substitute to inquire into the circumstances, and report.

The Sheriff-substitute on 20th June made the report which is given below.*

On 6th July 1892 parties were heard on the report.

LORD JUSTICE-CLERK.—On the last occasion when the case was before us we heard a very full argument, and at that time the petitioner was not able to give us such information as could aid us.

We find that state of matters still exists. We have got none of the information pointed at in the Act of Parliament which ought to have been ready. She now admits that she allowed the child to be brought up at another person's expense, and by the Act it is declared in section 3 that in such circumstances the Court shall not make an order unless satisfied that having regard to the welfare of the child the parent is a fit person to have its custody.

We of consent made a remit to the Sheriff-substitute. He saw the parties, and his account of the petitioner is not satisfactory. He is unable to say whether the mother belongs to or attends any church, and he reports that she

the Court that the parent has been unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

Sec. 4.—" . . . Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made or diminish the right which any child now possesses to the exercise of its own free choice."

¹ Brand v. Shaw, Feb. 24, 1888, 15 R. 449.

* "I beg to report that I have seen the parties to the action, and have conversed privately with them, and with the child.

"The mother, Mary Mackenzie, is a factory worker in Brechin, she is unmarried, and has had three illegitimate children. I did not make out from her to what church denomination, if any, she belonged.

"The child is a sweet looking timid girl, well educated, and evidently much attached to the Keillors. She is quite happy with them, and has no wish to be with her mother; indeed, when I mentioned the mother's name the child only cried.

"I also visited the Keillors at their house in Friockheim. I first called on Mr Nicoll, Free Church clergyman there, who kindly went with me. He gave a most satisfactory account of them. This was corroborated by all I saw during my visit, which was quite a surprise visit.

"So that, apart from any legal difficulty, I have no doubt the child is better where she is than with the mother."

No. 179. has had three illegitimate children, that the child cries whenever her mother's name is mentioned, and is quite happy where she is. The petitioner's counsel
July 6, 1892. was unable to inform the Court of any facts which were favourable to his client,
Mackenzie v. Keillor. although the case has been repeatedly delayed.

In these circumstances, I think we must hold that the case of this mother falls within section 3, subsection (b), of the Custody of Children Act, 1891, and that accordingly we ought not to make an order for the child's delivery unless the petitioner satisfies us that she is a fit person. I hold she is not, and therefore I am for recalling the Sheriff-substitute's judgment and for dismissing the petition.

LORD YOUNG.—I think it is best to dismiss the petition, and that without reference to the statute.

My opinion is that it is applicable notwithstanding that the application originated in the Sheriff Court, and came to us by way of appeal.

But apart from that, at common law the Court has always power to do what is best for the child. It is a matter in the discretion of the Court, and the cases are numerous in which there appear strong predominating reasons to withhold the custody of a child from its parent.

Now, the parent asking custody here is a woman of immoral character, and we know nothing about her home or wages, and she has allowed the child to remain in the custody of another person for more than six years.

Irrespective of any statute, I think it is in the discretion of the Court to refuse an order for delivery.

Putting the matter then, not on the statute or on the common law, but generally, I think we should recall the judgment.

LORD RUTHERFURD CLARK.—It is a question whether the statute applies to a petition raised in the Sheriff Court when it is brought here on appeal. The pursuer maintains that it does not apply, and I am willing to dispose of the case on that footing.

I am of opinion that the pursuer cannot by raising her petition in the Sheriff Court obtain more than she could obtain on an application to this Court. I think therefore that the petition must be dismissed; for the question—if there be a question—must be tried in a petition to this Court. As the question has been fully argued, I may say that if such a petition had been presented, in my opinion, it must have been refused.

LORD TRAYNER.—If the Act is applicable I should have no hesitation in refusing the pursuer's application.

But if it is not I reach the same conclusion on the ground that pursuer has not satisfied us that she is entitled to the custody. I think therefore we should recall the judgment of the Sheriff-substitute, and dismiss the petition.

• **LORD JUSTICE-CLERK.**—I should like to add that I agree with Lord Young in thinking that the Act does apply, but I think we should simply dismiss the petition.

THE COURT recalled the interlocutor of the Sheriff-substitute, and dismissed the petition.

HENRY & SCOTT, S.S.C.—HUTTON & JACK, Solicitors—Agents.

nieces; and second, out of the benefit so conferred on his nephew and niece, No. 182. James and Jane, to make a special provision in favour of their issue, *i.e.* the issue of their marriage. The third parties cannot claim to be the issue of James Whittet's and Jane Whittet, and if they cannot claim that character I think they are not the parties, or among the parties, that the provision in the codicil intended to favour. There are various considerations which go to support the view that the provision in the codicil was intended only to favour or confer benefit on the children of the marriage between James and Jane. The testator was not here providing for the issue of his nephews and nieces generally, nor was he providing for the possible issue of nephews and nieces yet unmarried. He was dealing, and dealing in an exceptional manner, with the interests of a nephew and niece, then married, and having issue. In these circumstances the natural construction to put upon the testator's expression is one which is appropriate to the existing facts, and accordingly when the testator speaks of "their children," it seems much more probable that he is speaking of the children of a marriage then existing rather than children of another marriage, which he had then no reason to anticipate would ever be entered into. Farther, it is difficult to suppose that the truster, who, in the distribution of the residue of his estate, had shewn equal favour for all his nephews and nieces, should have directed a part of Jane's share to be retained from her and given to any extent among the children of her husband and another wife to the detriment and disadvantage of her own children. But it is quite intelligible that he should have directed the retention of a part of the share of each of James and Jane for the purpose of giving it to their joint issue, for that was merely retaining from the parents what he gave to their children.

The case of *Buchan* was referred to as an authority in favour of the contention of the third parties. That case, however, cannot be regarded as an authority conclusive of the question here. The question in that case, as in the present, was, what was the intention of the truster. The answer to such a question must depend on the particular facts and circumstances which each case presents. The present judgment does not conflict in the least with the decision pronounced in *Buchan's* case.

LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT answered the question in the affirmative.

ALEX. MORISON, S.S.C., Agent for the Parties.

THE SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED,
Pursuers (Reclaimers).—*Asher—Dickson.*

THE GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED,
Defenders (Respondents).—*D.-F. Balfour—Ure.*

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

Insurance—Insurance of tramway company against loss by accident—Double insurance—Contribution—Title to sue.—An insurance company, after paying to a tramway company a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance company for contribution on the ground that it had insured the same risk. Held by Lord Low, Ordinary, that the pursuers had a title to sue.

Insurance—Agreement to insure from fixed date on payment of premium—Insurance "from" a certain day.—An insurance company entered into an agreement

No. 180. per acre per annum during their leases, and to pay them for all other damages which they can claim under their said leases: . . . And the proprietor hereby assigns and makes over to the tenants under this lease all rights, reservations, and conditions as to working minerals contained in the agricultural leases of the lands hereby let.”

July 8, 1892.
Robertson v.
Ross & Co.

In 1889 and 1890 Ross & Company constructed a railway across several of the fields belonging to the farm of Gateside, taking possession thereby of about $2\frac{1}{2}$ acres of land.

In consequence Robertson, the tenant of the farm, brought an action in the Sheriff Court at Linlithgow in which he claimed payment not merely for the ground resumed at the average rent, and 20s. per acre in addition, as stipulated in the mineral lease, but also a sum of about £70 in name of severance damage.

Ross & Company in defence pleaded, *inter alia*, (3) that on a sound construction of the leases they were liable to the pursuer for nothing more than payment for the ground resumed at the average rent, and 20s. per acre in addition.

After a variety of procedure before the Sheriff-substitute (Melville) and the Sheriff (Blair), the Sheriff-substitute, on 13th May 1892, decerned against the defenders for £31, 3s. as the sum payable to the pursuer in name of severance damage.

The defenders appealed to the Court of Session, and argued;—The measure of the pursuer's rights when land was taken for the purpose of working the minerals was to be found in the leases, which specified a fixed rate of compensation, and so excluded any claim for severance damage.

Argued for the pursuer;—The clause fixing the compensation to be paid for land resumed did not apply where the resumption was for mining purposes, but only where the resumption was for the purposes specified in the immediately preceding clause. But assuming the contrary, the clause fixing the compensation to be paid for land resumed could not reasonably be construed as excluding the pursuer's claim for damages, which was founded on the defenders' delict or *quasi delict*. Such an exclusion must either be express or very clearly to be implied from the language used.

At advising,—

LORD PRESIDENT.—The pursuer in this case is the agricultural tenant of the farm of Gateside, in Linlithgowshire, the landlord being the Earl of Hopetoun, and he holds the farm under a nineteen years' lease from Martinmas 1874. A portion of the farm has been taken possession of by the defenders, who hold a lease from the Earl of Hopetoun of the minerals lying under the farm, and in so taking possession the defenders found their right upon their grant from Lord Hopetoun in their lease of the minerals, and on an assignation of the rights which he reserved in his lease with the pursuer. The mineral lease stipulates for a payment to the agricultural tenant of £1 per annum per acre of resumed land which he would not have had under his own lease, and it is not disputed that he must get this. The question between the parties therefore falls to be determined by the terms of the agricultural lease primarily, because the defenders claim to have acted under the rights therein reserved to the landlord. In that lease the landlord reserved the whole mines and minerals, with full power to search for, work, win, and carry away the same, and to sink pits and make roads and railroads, “and to resume the land they may think necessary for these purposes.” That is the clause of reservation now founded on, and the present question is whether

the tenant is limited to recovering such payment only as is specified in the lease No. 180.
as the consideration which he is to receive for any land which may be resumed, July 8, 1892.
or whether the tenant is entitled, in addition to such consideration, to a sum in Robertson v.
name of severance damages. The answer made by the defenders—and it appears Ross & Co.
to me to be conclusive—is that the tenant is only entitled to the consideration
specified in his lease, and inasmuch as the lease contains no stipulation for pay-
ment of severance damage, he cannot receive severance damage in addition
thereto. Now, the view on which a claim of severance damage is based is, that
in addition to the value of the land taken something is due for the decreased
value of the rest of the farm. But the scheme of the lease in question is to
provide a rate of compensation for the resumption of land, and when we look
at the reasons on which a claim of severance damage is based, we see that it is
nothing else than a claim for the proper value of the land taken. That may be
illustrated in this way,—The occupant of a farm, when land is taken from him,
is entitled to have the land taken valued as a part of the farm, and not as a
separate subject. If the land taken is valuable not only for the crops it yields,
but also as an access to the rest of the farm, then the value of such access is
part of the aggregate value of that part of the farm, and is necessarily an
important element in its value in addition to its agricultural value. Now, Mr
Dundas said very frankly and properly, I think, that the words of the lease are
substantially the same as if the stipulation was that the tenant was to receive
the specified compensation for the resumption of land. That seems to me to
settle the question, because the lease purports to give the whole consideration
which the tenant is to receive for the land resumed, and therefore excludes any
further recompense than the compensation which it provides shall be paid for
the area taken.

In what I have said I have proceeded upon the assumption that the part of
the clause which provides for compensation to the tenant applies to the act of
resumption in question. As this was disputed, it may be right to say that I
cannot accede to the suggested limitation of that part of the clause to the opera-
tions of planting, feuing, &c., and to the resumption necessary for these pur-
poses. It appears to me to be quite clear that the clause beginning with the
word “declaring” applies to resumption of land, which is incidental to mining
as well as the other operations. In the first place, the language employed is of
sufficient latitude to cover the operation of mining, and in the second, it is
clear that the possession which binds the landlord to keep the land which may
be resumed properly enclosed applies just as much to the case of resumption for
the proposed mining as for any of the other purposes named in the deed.

The Sheriff accordingly appears to me to have come to a wrong conclusion,
and I think we should recall his interlocutor, sustain the third plea in law for
the defenders, and give decree for the sum ascertained to represent the undis-
puted items as the whole amount to which the pursuer is entitled.

LORD ADAM.—Under the mineral lease the landlord granted to the defenders
the powers reserved by him as to working minerals in the agricultural lease.
Turning to the latter lease, we find that the landlord reserved the whole minerals,
with full power to work the same, to make pits, roads, and railroads, and to
resume the land necessary for these purposes; and it was declared that the land-
lord should allow the tenant an abatement on his rent in proportion to the
extent of ground resumed. I agree with your Lordship that that declaration

No. 180.

July 8, 1892.
Robertson v.
Ross & Co.

clearly applied as much to the resumption of land for mining purposes as to the other purposes mentioned. What the landlord has to pay for under the conditions of the lease is the resumption of land, and this therefore being made matter of compensation, it appears to me that all claims of damages for the consequences of such resumption are excluded. On that ground I concur with your Lordship. But this does not altogether exhaust the case, for in the mineral lease the landlord assigns to the defenders "all rights, reservations, and conditions as to working minerals contained in the agricultural leases of the lands hereby let"; that is to say, the landlord puts the mineral tenants in the same position as he had held in all questions with the agricultural tenant. Therefore, unless the agricultural tenant can shew that he had a claim against his landlord, he can have no claim against the defenders. It is difficult, indeed, to see what claim could be made at common law by the pursuer against the defenders, there being no privity of contract between them, and no wrong done by the defenders. But under the mineral lease the agricultural tenant gets more than under the ordinary lease to the extent of £1 per annum for every acre of ground resumed. If it were not for that clause I do not see what claim the pursuer could have had against the defenders under his own lease.

LORD M'LAREN.—I understand that the only question which we are called upon to decide is, whether the pursuer is entitled to a sum in name of severance damage in addition to the abatement on his rent, and the other compensation to which he is entitled for the land taken. I agree that the provision in the agricultural lease with regard to compensation applies to the resumption of land by the mineral tenants as well as to the case of resumption by the landlord himself for the purposes enumerated in the clause immediately preceding the clause of compensation, and that therefore the pursuer is only entitled to the compensation stipulated for under his lease, and the additional compensation which the defenders are bound to pay under their lease. I must say, however, that I have grave doubts whether a claim of severance damage should be considered as a claim for part of the value of the land taken, or whether it should not be regarded rather as a claim of damages for injury done to the adjoining lands which suffer from the severance, and if the claim falls under the latter category the tenant might have a claim on the same ground as if injury were done by bringing down the surface or in some other similar way. However, after hearing your Lordship's views, I am not prepared to differ. I think it is a perfectly admissible view that the sum to be allowed to the tenant in this case includes all claims whatever either against the landlord or his assignees the mineral tenants. It is difficult to believe that a tenant would have agreed to a railway being constructed across his farm merely on receiving an abatement on his rent; nevertheless that the tenant did so agree in this case seems to be the fairest and truest reading of the clause. We are bound accordingly to give effect to the clause, and to consider the claim of severance damage as included in the stipulated compensation.

LORD KINNEAR.—I am of the same opinion. I think that if the question was between the landlord and the agricultural tenant, resting on the agricultural lease alone, the pursuer would have no claim whatever for damages, because the landlord has done nothing whatever to give rise to such a claim, but has merely put in exercise the rights reserved to him by contract, and for the exercise of which the contract stipulated he should allow the tenant a certain abatement on his rent. I agree that the claim for compensation and the claim for damages

cannot stand together, and that, if the thing which has been done was done under the contract, the compensation fixed by the contract is the only measure of the tenant's right. If the lease had provided in general terms that the landlord might resume land on payment of compensation, the agricultural tenant might very well have been entitled to say that the compensation must include the value of the land both as a producing subject and also as an access from one part of the farm to the other, but then the provision of the lease is not for a payment of general compensation, but for an abatement of the tenant's rent in proportion to the extent of the ground resumed. It is therefore not necessary to consider how far the claim for severance damage might in other circumstances be admissible.

Now, in the mineral lease the landlord authorises the mineral tenants to exercise all his own rights as regards the minerals, and binds them to pay to the agricultural tenant something in addition to the compensation stipulated for in the agricultural lease. It appears to me that that is the extent of the mineral tenants' obligation under their lease, and that it is only on the two contracts that the agricultural tenant can have any claim against the mineral tenants. It by no means follows that the mineral tenants would be entitled to damage the farm through their operations, and give no more compensation than what is stipulated for in the lease, and that, I think, does not enter into the grounds of judgment which we are prepared to give.

THE COURT recalled the interlocutors of the Sheriff and Sheriff-substitute since the date of closing the record, sustained the defenders' third plea in law, and of consent decerned against them for a specified sum as the amount for which they did not dispute liability.

THOMAS LIDDLE, S.S.C.—G. MUNRO THOMSON, W.S.—Agents.

MARY M'KECHNIE OR ROBB AND OTHERS, Pursuers (Appellants).—*Burnet*. No. 181.
BULLOCH, LADE, & COMPANY, Defenders (Respondents).—*Ure—Wilton*.

Reparation—Master and Servant—Unfenced machinery—Factory and Workshop Act, 1878 (41 Vict. c. 16).—The representatives of a workman who had been killed by an accident in a distillery raised an action of damages against the distillers, his employers, in respect of his death. They averred that he had been many years in the defenders' employment, and that it had been part of his duty to assist in the mash-house and, *inter alia*, to clear out a spout by which mash was brought into the mash-tun; that part of the steam driven machinery for stirring the mash travelled round the edge of the mash-tun; that an iron rod to fence the machinery ran part of the way round the mash-tun; that on the day of the accident the deceased was standing upon a wooden box and reaching over the tun to clear out the spout, when the box slipped, and as the iron rod did not protect this part of the tun, he was caught between the moving machinery, which he could not see owing to the steam, and the end of the rod and killed. They averred that the defenders were in fault, and in breach of the *Factory and Workshop Act, 1878*,* in not securely fencing the machinery, which was part of the mill-gearing, and that this fault was the cause of the death of the deceased. *Held* that the defenders were not bound to fence the place in question, and that no relevant averment of fault had been made, and action dismissed.

* The Act 41 Vict. c. 16, enacts, sec. 5, subsec. (3).—"Every part of the mill-gearing shall either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory, as it would be if it were securely fenced."

No. 181.

July 9, 1892.

Robb v.

Bulloch, Lade,
& Co.

2D DIVISION.

Sheriff of
Lanarkshire.

MRS MARY M'KECHNIE AND OTHERS, widow and children of William Robb, raised an action in the Sheriff Court at Glasgow against Bulloch, Lade, & Company, distillers there, in whose service Robb was at the time of his death on 15th June 1891, to recover damages for his death, which the pursuers alleged to have taken place through the fault of the defenders.

The pursuers averred that the deceased William Robb was for "a good many years before his death" in the defenders' employment as engineman and fireman in their distillery, and that as his time was not fully occupied in that work, he had in his spare time to give assistance in the mash-house. The manner in which he met his death was thus described;—(Cond. 5) "On or about Monday, the 15th June 1891, the said deceased William Robb was assisting in the mash-house. He was engaged clearing the spout through which the mash passes from the mashing-box in an adjoining compartment into the mash-tun in the mash-house, which spout had become choked or obstructed. The spout is fixed in, and comes through the wall between the mashing-box and mash-house, and extends about two feet or so over the mouth of the mash-tun, which is circular in form, so as to run the mash into it. To enable him to clear the spout he had to stand upon a wooden box or stool, and lean or reach over the mouth of the mash-tun to get a wooden shovel or spoon used for the purpose into the spout, to clear away the choking or obstruction. A carriage or piece of machinery connected with a horizontal shaft from the centre of the mash-tun, and worked by steam power, travels along the top of the mash-tun on a pinion-wheel, and sets certain revolving rakes in motion in the interior of the mash-tun to stir up and mix the mash. The said carriage or machinery comprises a cast-iron sole plate, carried on two wheels (the one a pinion and the other a roller), running on a rack and plain rail forming the top of the mash-tun, and is set in motion by said wheels—which wheels are duplicated and fitted with a clutch, to enable the carriage to be run in either direction, and they are moved by said shaft coming from the centre of the mash-tun, which in its turn receives its motion from a vertical shaft driven by a steam-engine. There are in all four pinion wheels and two roller wheels in said carriage or machinery. Running round the outside mouth of the mash-tun a strong iron rod has been placed, so as to fence the said carriage or machinery, and protect the workmen employed in the mash-house from being injured by it. This iron rod does not extend the whole length of the mash-tun. There was no protecting rod or fence of any description at the place where the said deceased William Robb required to work when he was employed in clearing the said spout. While he was leaning or reaching over the top of the mash-tun and clearing the said spout, the said carriage or machinery came round on the opposite side of the spout, and caught and jammed and crushed him against the end of the iron rod where it stopped short. . . . He was so severely injured that he died the same evening. The deceased was unable to see the said carriage or machinery approaching owing to the said spout coming in the line of vision between him and it, and owing to a dense steam which rises from the mash-tun during the time the mashing process is going on. It is believed and averred that the box or stool on which deceased was standing when he was injured accidentally shifted and caused him to stumble in the way of the carriage or machinery where it was unfenced, and the danger of such an accident, or of any accident, was not obvious to or avoidable by the deceased." (Cond. 6) "The said carriage or machinery which travelled round the top of the mash-tun was part of the mill-gearing used in the said distillery. It was driven by a steam-engine of 30-horse

power, and as required by the Factory and Workshop Act, 1878,* it should either have been securely fenced, or in such position, or of such construction as to be equally safe to every person employed in the distillery as it would have been if it had been securely fenced." (Cond. 7) "The defenders were requested by Mr Maitland, Inspector of Factories, to fence the said carriage and machinery about two years ago, which they agreed to do, but while doing so, they culpably and recklessly left it unfenced and unprotected at a most important place where their workmen required occasionally to be employed in clearing the said spout on its becoming obstructed, which sometimes happened when the said carriage or machinery was in motion." (Cond. 8) "The want of fencing of the said carriage or machinery was a defect in the condition of the works, machinery, or plant used in the defenders' business, known to the defenders, and also to Mr Campbell, the manager of their distillery, who was a person entrusted with superintendence, and with the duty of seeing that the works, machinery, and plant in said distillery were in proper condition, and who was never engaged in manual labour, and they all culpably and recklessly failed to have the said defects remedied." (Cond. 9) "It was the duty of the defenders, under the Factory and Workshop Act, 1878, to securely fence the said carriage or machinery so as to protect their workmen, who, by reason of the dense steam which arose from the mash-tun during the progress of the mashing process, could not see it in its motion round the top of the tun, and were also prevented from seeing it by the before-mentioned spout coming in the line of vision between them and the carriage or machinery, when it was approaching them from the opposite side of the spout. The defenders carelessly and negligently failed in this duty, and it was owing to their carelessness and negligence in not securely fencing the said carriage or machinery that the said deceased William Robb received the injuries which were the cause of his death."

No. 181.
July 9, 1892.
Robb v.
Bulloch, Lade,
& Co.

The defenders pleaded, *inter alia*;—(4) The pursuers' averments are irrelevant, and insufficient to support the conclusions of the action. (6) The defenders not having committed any breach of the statutes founded on, the pursuers' claim, so far as resting on such alleged breach, falls to be dismissed. (8) The said William Robb having been working in the knowledge of all risks incident to his employment, and the said accident being one of such risks, the defenders are not liable to his representatives, and fall to be assoilzied.

On 25th August 1891 the Sheriff-substitute (Balfour) allowed a proof.†

On appeal the Sheriff (Berry) adhered.

The pursuers appealed for jury trial, and proposed an issue.¹

* Quoted in note, p. 971, *supra*.

† "NOTE.—It appears to me that according to recent English authorities the plea of contributory negligence is not available to the defenders. They had a statutory duty to perform in fencing the machinery, and the defence arising from the *maxim volenti non fit injuria* is not applicable in cases where the injury arises from the breach of such duty. See the cases of *Holmes v. Clark*, 7 J. N. S. p. 397; *Britton v. Great Western Cotton Co.*, 7 L. R. Exch. p. 130; and *Baddeley v. Earl Granville*, 19 Q. B. D. p. 423.

"It was maintained that the provisions of the Factory Act did not apply to the machinery in question, but there is no such plea on record, and the greater portion of the machinery is in point of fact fenced."

¹ *Smith v. Baker*, L. R., A. C. 1891, 325; *Thomas v. Quartermaine*, 1887, L. R., 18 Q. B. D. 685; *Blamire v. Lancashire and Yorkshire Railway Co.*, 1873, L. R., 8 Exch. 283; *Murray v. Merry & Cuninghame*, May 30, 1890,

No. 181.

The defenders maintained that the action was irrelevant.

At advising,—

July 8, 1892.

Robb v.

Bulloch, Lade,
& Co.

LORD JUSTICE-CLERK.—This case has been anxiously debated, and has been considered carefully. The material averments of the pursuer are these. The late William Robb, her husband, had been for many years in the employment of the firm of Bulloch, Lade, & Company, the defenders, as an engineman and fireman. It was part of his duty when not fully occupied at the engine to assist in the mash-house of the distillery. In that mash-house there is a mash-tun which is built up to a certain height, and round which there is for a certain distance an iron rod. The mash passes into the tun through a spout, and a piece of machinery (part of which is a long arm for stirring the mash) works round and round in the mash-tun. The iron rod which I have mentioned does not go completely round the mash-tun, but is only in front where people not engaged in working at the mash-tun may require to pass. It was part of Robb's duty to clear out when necessary, owing to its becoming clogged, the spout through which the mash came. When doing so he was in the practice of standing up upon a wooden box or stool, and reaching over part of the top of the mash-tun in order to get the mash out. It is averred that while he was engaged at that work in the same manner in which he had been in the practice of doing it for some years the box slipped from its position, that as that part of the mash-tun was unfenced by the iron rod, the place was unprotected, and that he was caught by the revolving arm of the stirring machinery, carried round against the end of the iron rod, and so lost his life. It is alleged that this accident arose from the defenders' fault.

The Sheriff-substitute decided that a proof must be allowed. His interlocutor gives as the main reason for allowing a proof that the Factory and Workshop Act, 1878, is founded on and requires or may require such machinery to be fenced. I have carefully considered that Act, and am unable to hold that any of the provisions requiring the fencing of machinery can be applied to the case. That which comes most near to the case in hand seems to be the 3d subsection of section 5, which enacts that "every part of the mill-gearing shall either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." I cannot, however, look upon this moving arm of the mash-tun as falling within that requirement.

X I see no ground for holding that this point of the machinery ought to have been fenced. The fence which existed seems to have been intended not for workers at the place, who did not require it, but for persons who passed by in the course of their duty. So far as is averred, the pursuer had carried on his work in the same way for many years without danger if ordinary care were taken. The mere fact that there will be danger in such a place if reasonable care be not taken by the workers does not involve the necessity of fencing. It seems that this poor man on the occasion in question, when he was cleaning the spout in the same way in which he had so often done it before, did something which was not according to his ordinary practice, or else some accident happened which could not have been foreseen by him or by anyone else. In

either case the defenders are not responsible. It is not said that there was any defect in the box or stool, or that the deceased had asked for, and the defenders refused, anything to make the simple work he was doing more safe. I am not speaking of a case of seen danger. I only mean that this man was quite capable, according to the pursuers' own averments, of seeing how to carry on his work, and does not seem to have thought it to be unsafe in any way. I cannot hold it to be a relevant action, the averments in which amount merely to a statement that the box or stool slipped away from him, and that in consequence he fell in front of the machinery. I am of opinion that no relevant case has been stated. Lord Young, who is absent, authorises me to state that he concurs in the judgment which I propose.

LORD RUTHERFURD CLARK.—I have found this a difficult case, and was disposed to allow inquiry. I do not, however, dissent from the judgment proposed.

LORD TRAYNER.—I agree with your Lordship. I think the pursuer has not stated a relevant case. I think that there was no duty to fence. The pursuer's husband seems to have met, according to her own averments, with some untoward incident for which the defenders are not to blame, while he was doing work which he had done for years.

THE COURT dismissed the action as irrelevant.

CARMICHAEL & MILLER, W.S.—EMSLIE & GUTHRIE, S.S.C.—Agents.

JAMES MITCHELL AND OTHERS (Whittet's Testamentary Trustees),
First Parties.—*Morison.*

No. 182.

MRS CECILIA MITCHELL AND OTHERS, Second Parties.—*Dewar.*

MISS EMILY CATHERINE NEWCOMBE MURRAY WHITTET AND OTHERS,
Third Parties.—*Graham Stewart.*

July 9, 1892.
Whittet's
Trustees v.
Whittet.

Succession—Description of class—Parent and Child—“Their children.”—A trustor appointed his trustees on the lapse of a liferent to divide the residue of his estate equally among a number of nephews and nieces, the children of any who should predecease him coming into their parent's place. By a codicil he directed his trustees to retain out of the shares falling to one of his nephews, James Whittet, and one of his nieces, Mrs Jane Whittet, £200, and to divide this sum “among their children equally.” James and Jane Whittet were spouses, and at the date of the trust-settlement had two children. After the trustor's death, but before the expiration of the liferent, Mrs Jane Whittet died, and Mr Whittet married a second time, and had, when the liferent expired, six children by this second marriage. *Held* that the children of the second marriage were not entitled to participate in the sum of £200.

JAMES WHITTET, merchant in Perth, died in November 1876, leaving a 2^d Division. trust-disposition dated in 1870 and a codicil dated in 1873. He left the liferent of his estate to his three sisters and the survivor of them. He then provided,—“Upon the death of the last survivor of my said sisters to divide the residue of my said estate, heritable and moveable, equally among my nephews and nieces, share and share alike; declaring that in case any one or more of my nephews or nieces shall happen to predecease me or die without having received payment of his or her or their share of my said estate, then such share or shares of the nephew or niece so dying shall accrue to the survivor or survivors equally among them, share and share alike; providing, nevertheless, that if such nephew or niece so dying shall have left lawful issue, then such issue shall have right to the share or respective shares of my estate, which their deceased parent or parents would have been entitled to if living.”

No. 182.

July 9, 1892.
Whittet's
Trustees v.
Whittet.

By a codicil dated in 1873 he appointed his trustees "to retain out of the shares falling to my nephew, James Murray Whittet, and my niece, Mrs Jane Whittet, the sum of £200, and to pay and divide the same among their children equally, share and share alike."

At the date of the settlement James Murray Whittet and Mrs Jane Whittet were married to each other and had two children. Mrs Whittet died in 1874.

After the truster's death the liferent of his estate was paid to his sisters till the death of the last survivor in 1890.

James Murray Whittet married a second time in 1879, and had six children by that marriage.

The trustees paid him his share of residue under deduction of £100; they also paid the children of the first marriage their mother's share under deduction of £100.

To determine questions as to the disposal of the sum of £200 the trustees of the first part, Mrs Cecilia Whittet or Mitchell (and husband) and Jeannie Mary Whittet, the children of the first marriage, of the second part, and Miss E. C. Whittet and others, the children of the second marriage, of the third part, presented this special case to the Court.

The second parties maintained that, being the only children of the marriage of the said James Murray Whittet and the said Jane Whittet, they were entitled, first, to payment equally between them of the whole of said sum of £200; or second, to payment equally between them of the whole of said sum of £100, retained from the share bequeathed by the deceased to their mother, and also to a share with the children of the said second marriage of the sum of £100 retained from the share of their father, the said James Murray Whittet. The third parties maintained that the true interpretation of the direction by the deceased to retain £200 out of the shares falling to his nephew, James Murray Whittet, and his niece, Mrs Jane Whittet, and to pay and divide the same "among their children equally, share and share alike," was to vest said sum of £200 in the whole children of the truster's nephew, the said James Murray Whittet, whether of his first or his second marriage, and that *per capita*. They referred to the case of *Buchan v. Porteous, &c.*, Nov. 13, 1879, 7 R. 211.

The following question was submitted:—" (1) Are the second parties, being the only children of the marriage between the said James Murray Whittet and Jane Whittet, entitled to payment equally between them of the sum of £200 in question?"

At advising,—

LORD TRAYNER.—The question now to be determined relates to the construction to be put upon the words "their children," used in the direction contained in the codicil. For the second parties (the two children of the marriage between James and Jane Whittet) it is contended that these words directly designate them, and them alone, as being the only persons who are the children of James and Jane Whittet. It is maintained, on the other hand, by the third parties (the children of James by his second marriage), that the words under construction are to be read as designating any children descended from James and Jane, or either of them.

I do not think this question attended with any difficulty, and I am of opinion that the contention of the second parties is sound.

It appears to me from the terms of the trust-disposition and codicil, taken together, that the intention of the testator was first to benefit his nephews and

nieces; and second, out of the benefit so conferred on his nephew and niece, No. 182. James and Jane, to make a special provision in favour of their issue, i.e. the July 9, 1892. issue of their marriage. The third parties cannot claim to be the issue of James Whittet's and Jane Whittet, and if they cannot claim that character I think they are not Trustees v. Whittet. the parties, or among the parties, that the provision in the codicil intended to favour. There are various considerations which go to support the view that the provision in the codicil was intended only to favour or confer benefit on the children of the marriage between James and Jane. The testator was not here providing for the issue of his nephews and nieces generally, nor was he providing for the possible issue of nephews and nieces yet unmarried. He was dealing, and dealing in an exceptional manner, with the interests of a nephew and niece, then married, and having issue. In these circumstances the natural construction to put upon the testator's expression is one which is appropriate to the existing facts, and accordingly when the testator speaks of "their children," it seems much more probable that he is speaking of the children of a marriage then existing rather than children of another marriage, which he had then no reason to anticipate would ever be entered into. Farther, it is difficult to suppose that the truster, who, in the distribution of the residue of his estate, had shewn equal favour for all his nephews and nieces, should have directed a part of Jane's share to be retained from her and given to any extent among the children of her husband and another wife to the detriment and disadvantage of her own children. But it is quite intelligible that he should have directed the retention of a part of the share of each of James and Jane for the purpose of giving it to their joint issue, for that was merely retaining from the parents what he gave to their children.

The case of *Buchan* was referred to as an authority in favour of the contention of the third parties. That case, however, cannot be regarded as an authority conclusive of the question here. The question in that case, as in the present, was, what was the intention of the truster. The answer to such a question must depend on the particular facts and circumstances which each case presents. The present judgment does not conflict in the least with the decision pronounced in *Buchan's* case.

LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT answered the question in the affirmative.

ALEX. MORISON, S.S.C., Agent for the Parties.

THE SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED,
Pursuers (Reclaimers).—*Asher—Dickson.*

THE GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED,
Defenders (Respondents).—*D.-F. Balfour—Ure.*

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

Insurance—Insurance of tramway company against loss by accident—Double insurance—Contribution—Title to sue.—An insurance company, after paying to a tramway company a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance company for contribution on the ground that it had insured the same risk. Held by Lord Low, Ordinary, that the pursuers had a title to sue.

Insurance—Agreement to insure from fixed date on payment of premium—Insurance "from" a certain day.—An insurance company entered into an agreement

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

to insure a tramway company against accidents caused by their vehicles to third parties for twelve months from 24th November 1888 inclusive, subject to the condition that no insurance should be effected until the premium was paid. An accident occurred on 24th November before the policy had been issued or the premium paid, and immediately the representatives of the insurance company informed the representative of the tramway company that they would take care not to accept the premium "except from 24th November in consequence of the accident." On 26th November the premium was paid, and the insurance company acknowledged receipt of it as premium for the risk "from the 24th inst."

In an action raised against the insurance company by another insurance company, which had paid the loss, for contribution, the Lord Ordinary (Low) assailed the defenders, holding (1) that the defenders were bound, notwithstanding the accident, to grant a policy in the terms contracted for (covering 24th November) on payment of the premium; but (2) that by the terms of the policy contracted for their liability as insurers only commenced when the premium was paid.

On a reclaiming note the Court *adhered*, on the grounds (1) that the preliminary contract to grant an insurance to cover risk of accident on 24th November on payment of the premium was no longer binding after the accident had happened; and (2) that the terms of the receipt did not import liability except for accidents occurring after the lapse of that day.

Canning v. Farquhar, 1886, L. R., 16 Q. B. D. 727, *followed*.

Observed (per Lord M'Laren) that if the preliminary contract be for a running account according to the practice in relation to marine policies, the occurrence of a casualty before the issue of a formal document does not entitle the underwriter to resile.

1st DIVISION.
Lord Low.

ON 16th November 1888 the General Accident Assurance Corporation, whose registered office was in Perth, issued to the South Staffordshire and Birmingham District Steam Tramway Company, signed and sealed, a policy of insurance, whereby they agreed, in consideration of a premium of £240, to indemnify the insured up to a specific amount against claims for compensation for personal injury or injury to property caused by the vehicles of the assured for the period from 17th November 1888 to 17th November 1889. The policy contained this clause:—"No insurance shall be held to be effected until the premium due thereon shall have been paid."

The tramway company were insured by a policy with the Sickness and Accident Assurance Company for the twelve months from 24th November 1887 to 24th November 1888, and as they did not wish to be doubly insured from the 17th to the 24th November, the secretary of the tramway company, Mr Hatchett, on 19th November 1888, wrote to Mr Mizon, the London manager of the General Accident Assurance Corporation as follows,— "I am duly in receipt of this policy, and will send you a cheque for the premium in the course of a few days. There are one or two points upon which I must confer with my directors. The date from which I desire to be covered is from the 24th inst. inclusive, and not the 17th inst. as stated therein. There is one other important point which I trust you have kept in mind, and that is that our solicitors, Messrs Joseph Smith & Co., of Wednesbury, should have the conduct of all legal business bearing upon this policy. This is of the utmost importance, and my directors would not consent to any other arrangement." On the 20th Mr Mizon replied,— "I shall be pleased to make the alteration in policy required by your directors, and also to allow Messrs Joseph Smith & Co. to conduct all legal business bearing upon this policy." On the same day Mr Mizon wrote to Mr Miller, the secretary of the General Accident Company (at the head office in Perth),—"There are one or two slight alterations in this

policy required to be put in order before the matter is finally completed, No. 183. viz. (1) as to date. The risk to commence from the 24th inst. (inclusive) and not the 17th inst. (2) The other point, and which is the most important of the two, is that Messrs Joseph Smith & Co. should have the conduct of all legal business bearing upon this policy." On the 21st Mr Miller replied,—“I note this risk commences from the 24th, agreeing on the other point.”

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

At 10.30 P.M. of the 24th November 1888, before the premium had been paid or a new policy issued, one of the tramway company's vehicles was overturned and about forty persons were injured.

On 26th November Mr Hatchett wrote to Mr Mizon enclosing a cheque for £240, “by premium on policy for third party risk.”

On 29th November Mr Mizon replied,—“I am much obliged for your favour enclosing cheque value £240 for the third party risk of the South Staffordshire, &c. Tramway Company from the 24th inst. Please return policy for necessary alterations.” The policy was never returned.

The amount of damages payable by the tramway company in respect of the accident was £833, 4s. 9d., and after litigation in the High Court of Justice in England they recovered that sum from the Sickness and Accident Assurance Association.

On 1st June 1891 the Sickness and Accident Assurance Association brought an action against the General Accident Assurance Corporation for payment of one-half of that sum on the ground, generally stated, that the pursuers were entitled to relief to that extent from the defenders as both policies were contracts of indemnity with the same person, covering the same risk, and both in force when the accident occurred.

The pursuers pleaded;—(1) The South Staffordshire Company having entered into contracts of indemnity, and held two policies of insurance for the same amount from the pursuers and the General Accident and Employers Liability Company respectively, covering the same risk, at the date in question, and the pursuers having been compelled to pay the amount due under their policy, they are entitled to relief to the extent of one-half from the defenders as concluded for.

The defenders pleaded;—(1) No title to sue. (2) The pursuers' statements are irrelevant and insufficient to support their pleas. (4) In respect that the policy of insurance issued by the defenders to the tramway company did not at the date of the accident cover the same risk as was covered by the policy issued by the pursuers to the tramway company, the defenders are entitled to absolvitor.

On 10th November 1891 the Lord Ordinary (Low) repelled the first plea in law for the defenders, and appointed the cause to be put to the roll for further procedure.*

* “OPINION.—Both the pursuers and the defenders in this action are insurance companies, and they undertake, *inter alia*, to indemnify the owners of vehicles against claims for compensation for personal injury, or injury to property caused by the assured's vehicles.

“The South Staffordshire and Birmingham Tramways Company effected policies of insurance of that nature with both the pursuers and defenders.

“It is averred by the pursuers (and at this stage of the case I must assume the averment to be true) that the policies covered the same risk, and were both in force when the accident out of which this action arose occurred.

“In November 1888 one of the tramway company's cars was overturned, and they had to pay damages to the extent of £833, 4s. 9d. For that sum they made a claim against the pursuers under their policy, and after litigation judgment was given in the High Court of Justice in England in favour of the tramways company, and the pursuers paid to the tramways company the sum of

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

Proof was led. In addition to the above facts it appeared that on 26th November Mr Hatchett, Mr Mizon, and Mr Miller met in Birmingham in regard to the accident which had occurred on the 24th. Mr Miller

£833, 4s. 9d. The pursuers now sue the defenders for one-half of that sum, on the ground that as they have paid the full amount of the loss, they are entitled to relief to the extent of one-half from the defenders, both policies being contracts of indemnity made with the same person in regard to the same risk.

"The defenders' first plea is, 'No title to sue.' They maintain that there being no contract or privity of contract between them and the pursuers, the latter have no direct claim against them, and cannot sue the present action in their own right, whatever they might be able to do if they were suing in name, or as assignees, of the tramways company.

"I am of opinion that the contention of the defenders is not well founded.

"In marine insurance a rule which has been long recognised is that when the insured has recovered to the full extent of his loss under one policy, the insurer under that policy can recover from other underwriters who have insured the same interest against the same risks a rateable sum by way of contribution. The foundation of the rule is that a contract of marine insurance is one of indemnity, and that the insured, whatever the amount of his insurance or the number of the underwriters with whom he has contracted, can never recover more than is required to indemnify him. The different policies being all with the same person, and against the same risk, are therefore regarded as truly one insurance, and if one of the underwriters is compelled to meet the whole claim, he is entitled to claim contribution from the other underwriters, just as a surety or cautioner who pays the whole debt is entitled to claim rateable relief against his co-sureties or co-cautioners. There is no reason in principle in my opinion why the same rule should not be applied to other classes of insurance which are also contracts of indemnity, and this has been recognised by high authority in cases of fire insurance—*North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company*, 5 Ch. Div., p. 569.

"The defenders contended that if the pursuers have any claim at all it must be on the ground that having indemnified the tramways company they are entitled to succeed to all the means whereby the tramways company could have reimbursed themselves for their loss, and that accordingly the claim must be made in name or as assignees of the tramways company. In support of this view, the defenders appealed to the judgment of the House of Lords, and especially to the opinion of Lord Cairns in *Simpson & Co. v. Thomson*, 5 R. (H. L.), p. 40. In that case William Burrell was owner of the ships 'The Dunluce Castle' and 'The Fitzmaurice.' These ships came into collision, and 'The Dunluce Castle' was sunk, the fault being entirely on the part of 'The Fitzmaurice.' Mr Burrell presented a petition under the Merchant Shipping Acts for limitation of his liability as owner of the delinquent vessel, and for ranking claimants on the fund. The underwriters of 'The Dunluce Castle,' who had paid insurance as for a total loss, claimed to be ranked on the fund. The House of Lords repelled the claim in respect that the owner himself could not have done so, and that they were no more than his assignees. That case, however, appears to me to belong to a totally different branch of law from the present case. It exemplified an application of the doctrine that where the insured has a primary right against third parties who have been the authors of the loss, the insurers on making good the loss are entitled to be put in his place, and to enforce the remedies which he would have had against these third parties. That, however, is not the doctrine which lies at the root of the rule of marine insurance to which I have referred, but is a doctrine which would be destructive of that rule. The right of an underwriter who has indemnified the insured to claim contribution from the other underwriters cannot be founded upon the doctrine of subrogation, because an assignee can have no higher right than his cedent, and a shipowner who has received full indemnity from one underwriter can never make any claim against another underwriter. The answer, therefore, to the claim of an underwriter who had paid, if made only in the right and as assignee of

and Mr Mizon deponed that the former then intimated that the premium No. 183. not having been paid the defenders' company was not in the risk.* Mr Hatchett deponed that he did not remember the matter being mentioned. July 12, 1892.
Sickness and

On 10th March 1892 the Lord Ordinary sustained the defenders' fourth Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited. plea in law, and assolizied them from the conclusions of the summons.†

the insured, would be that the contract was one of indemnity, and that the insurer had already been indemnified.

"I am therefore of opinion that the first plea in law for the defenders must be repelled."

* Mr Miller deponed,—“I was in Birmingham on 26th November, and had an interview with Mr Hatchett. I had heard about the accident in the morning. Mr Mizon was not present during the interview; he came in later. Mr Hatchett said the accident was a very serious one, and that he had a little anxiety and difficulty about the case. I told him from seeing the policy of the Sickness and Accident Company he was covered by that policy, and was not covered by ours. He said he was very anxious there should be no interregnum between the two, as it had been put into his mind that the other policy might expire at four o'clock on the previous day. I told him I was sure it did not expire till twelve o'clock on the night of the 24th. I said,—‘It is fortunate for us you have not paid the premium.’ He said that if he had not had to send the cheque to one of his directors for signature it would have been duly paid. I said that it not having been paid I did not consider we ran the risk. I referred him to the stipulation in our policy as to the payment of premium, and I said that now we should take care not to accept the premium except from the 24th, in consequence of the accident. . . . I told Mr Hatchett on the 26th that we could not take a risk to include the 24th. I had instructions from my board to accept the premium as from the 24th, so as to exclude the 24th. They were anxious to exclude the 24th in consequence of the accident. They met on the morning of the 28th and discussed the matter, and it was agreed we should retain the premium and send a new policy, and also a letter stating that we accepted the premium as from the 24th.”

† “OPINION.—It is admitted that the question which I have now to decide is not different from what it would have been if the claim had been made against the defenders by the Birmingham Tramway Company, and not by the pursuers; the question being whether the tramway company had effected an insurance with the defenders which rendered them liable to indemnify the company for the loss which they sustained through an accident which happened on the 24th of November 1888.”

(His Lordship then narrated the facts of the case.)

“The result is that prior to the 24th November there was a concluded contract between the tramway company and the defenders, whereby the latter agreed to insure the former against the risks specified in the policy from the 24th of November inclusive, subject to the suspensive condition in the policy in regard to the non-payment of the premium.

“On the 23d of November Mr Hatchett drew out a cheque for the premium of £240 in favour of the defenders. He required, however, to get it signed by one of the directors of the company, and for that purpose he on the same day dispatched it to London.

“Why Mr Hatchett did not take steps to pay the premium until the evening preceding the day on which the assurance was to commence is not very clear.

Mr Hatchett indicates that in practice insurance companies do not press strictly the stipulation as to there being no insurance until the premium is paid, if it is paid within a reasonable time, but I think that he was anxious to have the premium sent off at all events on the 24th (which was a Saturday), because he says that he remained late in his office upon that day in the expectation that he would receive the cheque back from London. The cheque, however, did not reach Mr Hatchett until the morning of Monday the 26th, and in the meantime a serious accident had occurred late on the night of the 24th.

“So far it seems to me that the case is clear enough. A contract was con-

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

The pursuers reclaimed, and argued :—Under the policy as altered by the subsequent negotiations the insurance ran from the 24th of Novem-

cluded for an insurance to cover the 24th, subject, however, to the suspensive condition that no insurance should be held to be effected until the premium was paid. Now, on the 24th the premium was not paid, and in my judgment the defenders were entitled to take advantage of the suspensive condition in the contract unless they chose to waive their right to do so. I have already said that Mr Hatchett received back the cheque from London on the morning of Monday the 26th November, and he immediately sent it to Mr Mizon with a letter, in which he said that he enclosed the cheque, 'being premium on policy for third party risk.' On the same day Mr Hatchett, Mr Mizon, and Mr Miller, the manager of the defenders' company, met in Birmingham in regard to the accident which had occurred on the 24th. The accounts which these three gentlemen give of what passed at the meeting do not altogether agree, but Mr Miller and Mr Mizon both say that the former intimated that the premium not having been paid, the defenders' company was not on the risk, while Mr Hatchett does not remember Mr Miller saying anything about the premium not being paid. Mr Miller appeared to me to be an absolutely trustworthy witness, and Mr Hatchett did not contradict him, but only said that he did not remember the matter being mentioned. In these circumstances, I have no doubt that Mr Miller took up the position that the premium not having been paid, his company was not liable in regard to the accident of the 24th. It is, at all events, quite certain that he did not in any way admit liability. Mr Mizon, upon receipt of the cheque on the 27th November, appears to have sent it on with Mr Hatchett's letter to the head office. Some instructions appear to have been given by the head office to Mr Mizon as to the terms in which he should grant a receipt for the premium, but I do not think that it is necessary to consider what these instructions were, as private communications between the head office and their agent cannot affect the position of the pursuers.

"On the 29th of November Mr Mizon sent a receipt to Mr Hatchett in the following terms :—'I am much obliged for your favour enclosing cheque, value £240, for the third party risk of the South Staffordshire, &c. Tramway Company from the 24th inst. Please return policy for necessary alterations.'

"The pursuers contend that this receipt amounted to a waiver by the defenders of their right to found upon non-payment of the premium, because the terms of the receipt were quite consistent with the contract which had been made, viz., for an insurance from the 24th inclusive. If, the pursuers argued, the defenders intended to stand upon the condition in regard to the payment of premium, the proper course was to refuse to accept payment when it was tendered.

"In my opinion there was no duty on the defenders' part, nor were they entitled to refuse to accept payment of the premium. The present case appears to me to be entirely different from a case of, for example, life assurance. In the latter case the death of the insured is the one event contemplated, and if it is stipulated that there is to be no insurance until the premium is paid, and the insured dies before payment, it may well be that the insurers must either refuse to accept the premium if tendered by the representatives of the deceased, or be held to have waived their right to found upon the stipulation. In such a case as the present, on the other hand, the insurance is against loss sustained in consequence of any accident, and all the accidents which may happen, during the period covered by the policy. The contract was to insure against accidents for the period from 24th November 1888, inclusive, to the 24th November 1889, subject to the condition that the defenders should not be liable in regard to an accident happening before the premium was paid. If therefore the tramway company chose not to pay the premium until the second day of the period, they could not claim for an accident happening on the first day, but the fact that an accident happened on the first day would not, in my judgment, have entitled the defenders to refuse to accept the premium when tendered upon the second day, because they had contracted to indemnify the company against loss

ber inclusive. There was nothing whatever in the policy to prevent its being in operation from that date inclusive, except the stipulation that

No. 183.

July 12, 1892.

from an accident occurring at any time during the period specified, provided that the premium had been paid before the accident had happened. Any other view would be most unjust to the tramway company. If the fact that the premium was not paid until the second day, coupled with the fact that an accident happened on the first day, entitled the defenders to refuse to accept the premium, that, I think, must mean that it entitled them to renege from their contract altogether, with the result that, although they had contracted to insure the tramway company for every day of the twelve months after the premium was paid, that company would have been left without any insurance at all during the period required to negotiate a fresh contract. The position of matters therefore was, in my opinion, this—the defenders undertook to insure the tramway company for the period of twelve months from and including the 24th November, subject to condition that no insurance should be held to be effected until the premium was paid. If therefore the tramway company wished to obtain the benefit of an effectual insurance for the whole period, it was necessary for them to pay the premium at or before the commencement of the period, and if they did not do so they took the risk of an accident happening before payment. On the other hand, from the moment payment was made the insurance became effectual and the defenders became liable for the remainder of the twelve months.

Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

"The question therefore is narrowed to this, whether the terms of the receipt granted by the defenders imported a waiver of the condition as to payment, and an acknowledgment of liability before payment.

"The defenders maintain that the terms of the receipt exclude the 24th November, and Mr Miller says that it was framed with that intention. The receipt acknowledges payment for the third party risk 'from the 24th current.' The defenders say that the usual and natural meaning of 'from' a certain day is 'from and after' that day. The pursuers, on the other hand, contend that the word 'from' in the receipt must be construed with reference to the contract, and that as the contract was for an insurance 'from and including' the 24th November, the receipt must bear the same meaning.

"It seems to me that it is impossible to lay down any inflexible rule as to the meaning of the word 'from' in such a case as this. I think that it may mean 'from and after' or 'from and including,' according to the context, and the circumstances of the particular case. In this case, the receipt being for the premium upon a policy running from the 24th November inclusive, I think that the word 'from' cannot be read as unequivocally expressing 'from and after.' Mr Miller no doubt says that it was intended to bear that meaning, but his intention cannot affect the legal construction of the document, and, if that was Mr Miller's intention, it is unfortunate that he did not instruct the use of words in regard to the meaning of which there could be no doubt. It is, however, certain that the defenders did not intend at any time to admit liability for what occurred on the 24th. Both before and after the date of the receipt they intimated to the tramway company that they were 'not in the risk,' and the question therefore is, whether the terms of the receipt import acknowledgment of a liability to which the defenders would not otherwise have been subject. It is therefore necessary carefully to consider the terms of the receipt.

" . . . The whole matter depends upon the meaning and effect of the words 'from the 24th inst.' The pursuers, as I have already said, maintain that 'from the 24th inst.' must be read as meaning 'from the 24th inst. inclusive.' I think that this view is right, but it by no means follows, in my judgment, that the pursuers are entitled to succeed. To accept the cheque as payment of the premium upon a policy of insurance against certain risks 'from the 24th November inclusive' would have been a perfectly correct way of describing the payment which had been made, and which, in my opinion, the defenders were bound to accept, because the policy was one running from the 24th November inclusive. Such a receipt, would not, however, amount to more

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

no insurance was to be held effectual till the premium was paid. That stipulation, however, only meant that after a year had expired unless something occurred to change the minds of the parties, the tramway company gave the defenders power to go on with the same contract for another year providing the premium was paid. By acceptance of the premium upon the 26th the insurance offered and accepted must be held to be from the 24th inclusive.¹ But further, the receipt was really conclusive of the matter. Its terms, construed by the previous correspondence, were consistent only with an insurance from the 24th inclusive, and by granting it the defenders must be held to have waived any right they might previously have had to repudiate liability for the accident.

Argued for the defenders ;—The Lord Ordinary's view as to the contract between the parties was correct. There was to be no insurance until the premium was paid. Accordingly there having been no payment made by the 24th, there was no risk insured against on that day. An agreement to insure against risks was not binding if prior to its fulfilment the events to be insured against had become certainties.² There was no waiver by the defenders of this term of the contract. The receipt upon which the pursuers founded to this end was merely an acknowledgment (which the defenders were bound to give) of payment of the premium under the contract. It simply identified the contract under which it was made by a short reference to the nature of the insurance, and the period for which it ran. The ordinary meaning of "from" the 24th inst. was after the lapse of that day, and it was quite clear upon the evidence that when they granted the receipt the defenders intended that it should be for a policy running from that period.

At advising,—

LORD PRESIDENT.—On 16th November 1888 there was issued by the defenders to the South Staffordshire and Birmingham District Steam Tramway Company, Limited, signed and sealed, a policy of insurance against accidents, for the period from 17th November 1888 to 17th November 1889. After the issue of the policy, there ensued a correspondence between insured and insurers, caused by the circumstance that the tramway company were covered by a policy with another office which expired on the 24th November. Not wishing to be doubly insured from the 17th to the 24th, they proposed that the defenders should, instead of insuring them from the 17th make their policy begin with the 24th. This was assented to, and I take the result of the correspondence to be that it was agreed that, in place of the policy already issued, the defenders

than an acknowledgment of the premium under the contract which had been made, that contract being for an insurance against certain risks for a period of twelve months from the 24th November inclusive, but subject to a suspensive condition as regards the defenders' liability. The premium must be held to have been paid and received under and in terms of the contract as a whole, and one of the terms of the contract was that no liability should attach until the premium was paid. I can see no waiver of that term of the contract. The receipt, in my opinion, does no more than acknowledge the payment, and identify the contract under which it was made by a short reference to the nature of the insurance and the period included in the policy.

"I am therefore of opinion that the defenders are entitled to absolvitor."

¹ Bunyon's Fire Insurance, 88; *Anderson v. Thornton*, L. R., 1853, 8 Exch. 425; *Porter's Law of Insurance*, 75.

² *Canning v. Farquhar*, L. R., 1886, 16 Q. B. D. 727.

should insure the tramway company for the year commencing the 24th November. This was the state of matters when that day arrived—no policy had been issued in terms of the new arrangement.

Now, on the 24th, there chanced to occur an accident to one of the tramway company's cars, of the kind provided against in the policy agreed for. Both parties were at once aware of the occurrence, and their representatives met. Thereafter the tramway company proceeded to send the cheque for the first premium of the proposed policy, and the defenders replied as follows on 29th November:—"Dear Sir,—I am much obliged for your favour enclosing cheque value £240 for the third party risk of the So. Staffo., &c., Tram Co. from the 24th inst. Please return policy for necessary alterations.—Yours faithfully.—(Written across receipt stamp)—FRANCIS MIZON, London Manager." These are the main facts, and the question is, are the defenders liable for the accident which occurred on the 24th?

Now, as regards the policy originally issued, it appears to me to be clear that the parties, by the correspondence agreed to depart from and abrogate the contract which that policy embodied, and to substitute for it a contract to be embodied in a policy to run from and including the 24th. The rights of parties therefore stood not on the policy, but on an agreement for another policy. But in this intermediate and provisional condition of matters an event proposed to be insured against occurred, and the question arises, what effect had this on the rights of parties? Now, on the authority and on the reason of *Canning v. Farquhar*, 16 Q. B. D. 727, I think that it set the insurance company free from the obligation to issue a policy for the period commencing with the 24th. An agreement to undertake to relieve against risks necessarily assumes that when it comes to be fulfilled by issuing the policy the events are still risks, and does not apply if, before fulfilment, and there being no delay for which the insurer is alone responsible, the events have been converted into certainties. Accordingly, I hold that with the occurrence of the accident, the agreement for a policy commencing with that day fell. Well then, on the 29th, the insurance company, having been free, undoubtedly became bound by the receipt, but the extent of the liability then undertaken must be ascertained by the terms of that document. Now, I consider the primary meaning of "from the 24th" to be from the expiry of the 24th. It was strenuously maintained indeed that the previous correspondence shewed that the defenders had used those very words "from the 24th" as including the 24th; and this is the case. But then this cannot be taken to stereotype a secondary meaning as applying to a common expression when used by a particular person, irrespective of all changes of circumstances and intervening meetings. In reading the receipt as excluding the 24th, I do not go upon the extreme improbability of the insurance company meaning to include it, but upon the primary meaning of the words; and I decline to adopt a secondary meaning upon the sole medium of the previous letters. It would be impossible to throw out of account the fact that in the interval the parties had met and discussed the accident, and that the defenders' representative had said to the tramway company's representatives that now his company would "take care not to accept the premium except from the 24th, in consequence of the accident," the words "from the 24th" being then unquestionably used in their primary sense.

Upon these grounds I am of opinion that the defenders are entitled to the absolvitor which the Lord Ordinary has granted them.

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

No. 183.

July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

LORD ADAM.—I do not think that this policy can be considered as a policy binding on the defenders, or that it was ever accepted by the tramway company as such.

The objection to the date from which the risk was to run was an objection *in essentialibus*. If, for example, an accident had occurred on the 18th, the tramway company could not possibly have recovered under the policy. It may be a question, if, after the acceptance by the defenders of the proposed alteration of the date, nothing material had occurred to alter the risk, they would have been bound on tender of the premium to issue a new policy giving effect to the alteration, *i.e.* making the risk run from the 24th November inclusive.

But a material circumstance did occur to alter the risk, *viz.*, the accident on the 24th, and I think the question for decision is whether after that accident the defenders were bound to complete the transaction by accepting the premium, and issuing a policy in the terms previously arranged. I think not. What the parties had been transacting about was the insurance of the risk of an accident on the 24th. But before the transaction was completed, that had ceased to be a risk merely, but had become a certainty, and was no longer the subject of insurance. Suppose an insurance company had agreed to insure the life of an individual, but that before the premium had been paid, or the policy issued, he had died, I do not think the company would have been bound to accept the premium and conclude the transaction. It seems to me that the whole basis of the transaction is gone. So here, what the defenders had agreed to do was to issue a policy against the risk of accident on the 24th, but they had not agreed to indemnify the tramway company for the consequences of an accident which had actually occurred. On these grounds therefore, and on the authority of the case of *Canning v. Farquhar*, 16 Q. B. D. 727, I think the defenders were not bound to complete the transaction and accept the premium on the terms arranged prior to the 24th.

What afterwards happened was that the tramway company on the 26th November sent a cheque for the amount of the premium to the defenders. This was accepted by them on the terms set forth in the receipt which they granted for it on the 29th. This receipt was in the following terms:—"I am much obliged for your favour enclosing cheque value £240 for the third party risk of the So. Staffo. Tram. Co. from the 24th inst." I do not think that, in the absence of any qualifying words, the terms of the receipt are ambiguous. I think that they exclude liability for risk on the 24th. But it was maintained by the pursuers that the terms of the receipt are ambiguous, and may be read as either excluding or including the 24th, and that when read in connection with the correspondence of 19th and 20th November they must be read as including that day.

But then I do not think that the receipt is to be construed by that correspondence. The subsequent accident had produced an entire change of circumstances. Mr Miller, defenders' secretary, and Mr Hatchett had a meeting on the 26th. What then passed was this: Mr Miller said,—"'It is fortunate for us you have not paid the premium.' He said, if he had not had to send the cheque to one of his directors for signature, it would have been duly paid. I said that it not having been paid I did not consider we ran the risk. I referred him to the stipulation in our policy as to the payment of premium, and I said that now we should take care not to accept the premium except from the 24th in consequence of the accident." The defenders accordingly instructed Mr

Mizon to accept receipt of the premium as from the 24th, so as to exclude liability for the 24th. Mr Mizon accepted receipt in the terms I have quoted. The receipt was accepted without objection by the tramway company. It was not granted in the terms it bears with reference to the previous correspondence, but with reference to the supervening accident. I think that the defenders accepted payment of the premium in terms of the receipt, and not otherwise. I think that these terms, unless they are to be construed with reference to the previous correspondence, exclude from the risk undertaken by the defenders liability for the accident on the 24th. But I think they are not to be so construed, and therefore that the Lord Ordinary's interlocutor ought to be adhered to.

No. 183.
July 12, 1892.
Sickness and
Accident
Assurance
Association,
Limited, v.
General
Accident
Assurance
Corporation,
Limited.

LORD M'LAREN.—I agree with the leading proposition of your Lordship in the chair, with one qualification or explanation which I have no doubt your Lordship will assent to. If the preliminary contract between the parties be for cash against the issue of a policy, then if the casualty occurs before the policy is issued and before the premium is paid, the nature of the risk is altered and the company is no longer bound to proceed in the execution of the preliminary contract. But if the contract be for a running account, according to the practice in relation to marine policies, the occurrence of a casualty before the issue of a formal document does not entitle the underwriter to resile, because the agreement is for a running account. I merely mention this in order that it may not appear that we have overlooked this distinction, or have decided anything contrary to the principles in the decided cases on marine policies. Now, it being once determined that the occurrence of a casualty while matters are entire does entitle the underwriter to resile, then I think all the rest follows plainly as set forth in your Lordship's opinion, and that in this case there was no obligation to issue a policy as from the date originally proposed. Accordingly, when the company agreed to issue a policy "from the 24th" they must be taken to have meant what their words primarily mean, and what is in accordance with their legal rights, a policy taking effect from the day after the casualty occurred.

LORD KINNEAR concurred.

THE COURT adhered.

RONALD & RITCHIE, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

RICHARD R. COLLARD, Pursuer (Reclaimers).—*Salvesen—Crole.*
MORRIS CARSWELL, Defender (Respondent).—*Dundas—R. L. Orr.*

No. 184.

July 12, 1892.

Contract—Ship—Charter-party—Delay in taking delivery—Rescission.—A steamship owner at Hastings, with the view of carrying on more effectually passenger traffic during the summer months between that and other ports in the south of England, entered into a charter-party with the owner of the steamship "Victoria," then being fitted out on the Clyde. By the charter-party (dated 3d July 1891) he agreed "to hire the said steamship till the 30th September 1891, she being placed at the disposal of the charterers in the port of Greenock or Port Glasgow, in such berth as charterers may direct, such orders to be given to owner's agents before arrival of the steamer." No date was fixed for delivery of the vessel. The charter-party bore that the charterer should pay the hire at a certain rate per month, "commencing the day of delivery in good order and ready for sea in the Clyde, notice whereof to be given to charterers." "Payment of said hire to be made in cash monthly, in advance, to owners in Glasgow, first month's hire to be

Carswell.
The "Vic-
toria."

No. 184. paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of hire-money, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers."

July 12, 1892.
Collard v.
Carswell.

The "Victoria."

On 13th July the charterer received a telegram that the vessel would be handed over at Glasgow on the 15th, "when banker's guarantee and month's hire must be forthcoming." The charterer, on the 15th, sent a telegram,—"Leave for Glasgow to-night; am prepared to take 'Victoria'." The charterer did not set out till the following night, but sent no explanation of his delay. He reached Glasgow on the morning of the 17th, and went to the vessel at 11.30 a.m. There was no one on board to give delivery. He endeavoured to communicate with the defender's brokers, but failed to do so till 4.30, when he was informed that the vessel had been let to another person about 12.30 of the same day.

In answer to an action of damages for breach of contract in failing to deliver the vessel, the owner pleaded (1) that time was of the essence of the contract, and that the pursuer's failure to take delivery on the 15th amounted to a breach of contract; and (2) that the pursuer's conduct prior to the 17th of July was such as to justify the defender in believing that he did not intend to fulfil the contract.

Held (1) that there had been no breach of contract on the pursuer's part; (2) that there was nothing to justify the defender in resiling from the contract; and (3) that the pursuer was entitled to damages for loss of profit.

1st Division. THIS action of damages for failing to deliver a vessel in terms of a Ld. Kyllachy charter-party was raised in the following circumstances:—

By charter-party, dated 3d July 1891, Richard R. Collard, steamship owner, Hastings, who carried on summer passenger traffic between Hastings and other ports in the south of England, agreed to hire from Morris Carswell, merchant, Glasgow, the paddle steamer "Victoria," of which the latter was registered owner. The charterer agreed to hire the vessel until 30th September 1891, "she being placed at the disposal of the charterers in the port of Greenock or Port-Glasgow, in such berth as charterers may direct." The vessel was intended for passenger traffic on the south coast of England.

The charter-party further provided,—“4. That charterers shall pay for the use and hire of the said vessel at the rate of £425 British sterling per calendar month, commencing the day of delivery in good order and ready for sea in the Clyde, notice whereof to be given to charterers or agents, and at and after the same rates for any part of a month; hire to continue from the time specified for commencing the charter and the vessel is placed at charterers' disposal, until her redelivery to owners at the expiry of this charter-party. . . . 5. Payment of said hire to be made in cash monthly, in advance, to owners in Glasgow without discount, first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of hire money, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers in pursuance of this charter. . . . Charterers to have the option of purchasing the steamer for the sum of £9000 cash. In the event of steamer being purchased by charterers, hire money to be credited as part payment of purchase money.”

At the date when the contract was signed the "Victoria" was not ready to be delivered, as certain repairs had to be made upon her. These repairs were executed, and on 10th July Collard received a telegram from Messrs Neil, Topping, & Company, shipbrokers, London, who acted for Carswell, that the "Victoria" would be tendered to him for delivery on

Saturday the 11th or Monday the 13th July, at which time they stated that the month's hire and bank guarantee must be in Glasgow. Collard was unwilling to proceed to Glasgow to take delivery until such time as he could be sure that the vessel would be ready, and he accordingly telegraphed to Neill, Topping, & Company in reply on same day (10th July) as follows:—"Get owners telegraph me direct guaranteed date of delivery 'Victoria' to avoid me unnecessary expense. Am prepared go to Glasgow and pay first month's hire on delivery, and produce bank guarantee according to charter. All fuss made unnecessary. Always intended fulfilling my legal obligations in due course." Collard thereafter received a telegram on the evening of Monday the 13th, saying that the "Victoria" would be handed over at noon on Wednesday the 15th, "when the bank guarantee and month's hire must be forthcoming."

No. 184.

July 12, 1892.

Collard v.
Carswell.The "Vic-
toria."

Collard was unwilling to go to Glasgow until he received certain information as to the vessel's readiness, and he accordingly telegraphed to Neil, Topping, & Company on the 15th stating that he was leaving for Glasgow that evening, that he was prepared to take delivery of the "Victoria," and expected her to be ready according to their telegram, but if she was not ready requesting them to say so in order to save unnecessary expense, and to wire where she was lying. To this he received an answer to the effect that the "Victoria" was now ready, and was lying at Glasgow in Henderson's private dock, and that the hire began from that day. This telegram was confirmed by a letter of same date.

Collard was prevented from starting on the evening of the 15th as a Mr Hempsted, a probable purchaser of the vessel, who was to accompany him, was detained in London, and he accordingly did not reach Glasgow until the morning of the 17th. He and Mr Hempsted went straight to the vessel, not knowing the address of the defender or his brokers, arriving on board about 11.30. The pursuer found no one on board to give delivery. He endeavoured to communicate with the brokers, but did not succeed in doing so until 4.30, when he was informed that a charter-party had been entered into with another person about 12.30 of the same day.

Collard thereafter brought this action of damages for breach of contract against Carswell. He claimed a sum of £3000 in respect of loss of an estimated profit upon a contemplated resale of the vessel in the event of a purchase which he intended to have made, following upon the option given to him under the charter-party. He made a further claim for the loss of the profits he would have made by the summer traffic in the south of England, for the working of which the "Victoria" had been chartered.

The defender stated that he had made it an express condition of the charter-party that before the contract contained in it was concluded the pursuer should give him a banker's guarantee for due payment of the hire, and that the first month's hire should be paid before the steamer left the Clyde, and that the pursuer had never tendered the guarantee or the first month's hire, and that when the pursuer did not come to Glasgow, as promised, and did not explain his absence on the 16th, he (the defender) was entitled to consider the contract at an end.

In answer the pursuer explained, "with reference to the clauses regarding the bank guarantee, that these do not bear the construction now put upon them by the defender, but were understood by the parties simply as obliging the charterer to produce a banker's guarantee for the due payment of the hire-money before the vessel left the Clyde, or at most before the pursuer obtained possession and delivery of said vessel. The correspondence between the parties was conducted on this footing, and the pursuer was led to understand that he was fulfilling his whole obliga-

No. 184.

July 12, 1892.
Collard v.
Carswell.

The "Victoria."

tions in this respect under the charter-party if he produced the banker's guarantee, as he was always willing to do, when the vessel was ready to be handed over to him."

The defender pleaded;—(3) The defender not having committed breach of contract, is entitled to absolvitor. (4) The pursuer having failed timeously to fulfil the stipulations of the charter-party, the defender was entitled to cancel the contract therein expressed.

At the proof the above facts were disclosed. The further particulars of the negotiations for the contract, and the correspondence which followed, sufficiently appear from the opinion of Lord Adam.

The Lord Ordinary (Kyllachy), on 18th February 1892, assolizied the defender.*

* "OPINION.— . . . The breach complained of is this—that the defender (the owner), on 17th July, cancelled the contract, and hired the steamer to another party, and did so, notwithstanding that the pursuer was, as he alleges, ready and willing to take delivery, and to pay the first month's hire and to grant a banker's guarantee for the remainder of the hire. The defence is that the vessel was ready to be delivered on 15th July, and that the pursuer had due notice of that fact, but that he did not appear to take delivery, or tender the hire, or a banker's guarantee; so that, after waiting for two days, the defender concluded, and was justified in concluding, that he did not intend performance, and was therefore justified in making a new charter, so as to preserve the benefit of the season's trade.

"The defender further pleaded that there had been an antecedent breach on the part of the pursuer in so far as he was bound under the charter-party to produce a banker's guarantee immediately upon the conclusion of the contract, and that he failed and declined to do so. I have not, however, found it necessary to consider how far such declinature constituted a breach of the contract, or justified the defender's ultimate action. In the course which events took I think the decision turns upon the effect to be attributed to the pursuer's delay to take delivery, and otherwise perform his contract prior to the re-hire of the vessel on the 17th July.

"I am of opinion, on the construction of the charter-party, that the pursuer's obligation was to take delivery on getting due notice of the vessel's readiness for sea,—that he was at the same time, if not earlier, bound to furnish a banker's guarantee for the hire,—and further, that he was also bound to pay the first month's hire so soon as, having got delivery, he was in a position to leave the Clyde. I am also of opinion that in the nature of the case time was of the essence of the contract, the season being far advanced, and both parties being well aware that, if the contract between them failed, the defender ran the risk of losing the whole benefit of the season's traffic.

"The question I have to decide is, therefore, I consider simply this, whether the pursuer was in default in taking delivery, and whether the default was of such a character as to justify a rescission of the contract. In my opinion both these questions must be answered in the affirmative.

"There can, I think, be no doubt that the pursuer was in default. He had notice on the 10th of July that the vessel would be ready to be handed over on the 11th or 13th. He replied that that was too indefinite, and that he must have a day of delivery fixed and guaranteed. He was then informed, by telegram received on the evening of the 13th, that 'the vessel will be handed over at noon on Wednesday (the 15th) when bank guarantee and month's hire must be forthcoming.' He received a further telegram to the same effect on the morning of the 14th. He did not appear on the 15th, but intimidated by telegram on that day that he was to go down to Glasgow that night. He did not, however, do so, being detained by the engagements of a friend who had arranged to accompany him. And both the 15th and 16th passed without any communication being received from him, or any explanation of his absence. Neither was any such communication received from him on the morning of the 17th, or until after the defender had, somewhere about noon of that day, concluded a

The pursuer reclaimed, and argued;—The Court must be satisfied (1) No. 184.
 that there had been a breach of contract on the part of the pursuer, and July 12, 1892.
 (2) that the breach was such as to warrant the contract being put an end Collard v.
 to by the defender. 1. There had been no breach. The cases referred to Carswell.
 by the Lord Ordinary shewed the circumstances under which a con- The "Vic-
 tract might be rescinded because of delay on the part of a purchaser or toria."
 hirer to take delivery. But time was not here of the essence of the con-
 tract, and in such circumstances a person in the position of a seller, like
 the defender here, was not entitled to rescind a contract without a refusal
 on the part of the purchaser to fulfil his part of it, or at least without such
 conduct on the part of the purchaser as would found the inference that
 implement was to be refused.¹ In none of the cases founded on had the
 party complaining been held entitled to put an end to the contract. In
 this case there was under the charter-party no obligation on the pursuer
 to take delivery whenever it was tendered; he was no doubt bound to
 pay hire from that date, but nothing further. 2. On the facts there was
 nothing to shew that he was not prepared to fulfil his part of the contract
 to the letter. He was therefore entitled to substantial damages at any-
 rate for the loss of the profits he would have earned from the charter of
 the "Victoria," less what he actually did make from the employment of
 his own old and much inferior vessel.

Argued for the respondent;—(1) The sound interpretation of the con-
 tract was that the pursuer was bound to produce his guarantee and tender
 the first month's hire at the date of delivery. (2) Due notice had been

new charter with another party. It then appeared that the pursuer had
 travelled down to Glasgow during the night of the 16th—had arrived there on
 the morning of the 17th—had gone to the vessel in the course of the forenoon,
 and had thence sought ineffectually to open communication by telephone with
 the defender's brokers. He had not, however, as he might have done, called on
 those brokers on his arrival in Glasgow, nor taken any means otherwise to com-
 municate with them, and the result was that when they did come to know of his
 arrival, the re-charter of the vessel had, as I have already said, been concluded.

"In this state of the facts, the defender asks naturally enough,—What was
 he to do? He had no desire to be off with the pursuer. On the contrary, the
 charter which he took was in all respects less desirable. But two days had
 passed, and he had heard nothing of or from the pursuer, except that having
 announced he was to leave London on the night of the 15th, he did not arrive
 on the following day. The defender knew, moreover, that although a respect-
 able man, the pursuer was not a man of means, and he knew also that if he
 waited longer he lost the only other offer which he had for the vessel, and ran
 the risk of losing its whole hire for the season. In my opinion, in such circum-
 stances, he was not unduly precipitate. I think he was justified in assuming
 that the pursuer had found himself unable to fulfil his contract, or that he did
 not intend to fulfil it; and if the circumstances justified that assumption, there
 can be no doubt in point of law that he was entitled to rescind the contract.
 Reference was made to various authorities—English and Scotch—on this
 matter, and I note them for reference—*Freeth v. Burr*, 9 C. P. 208; *Mersey
 Steel and Iron Company v. Naylor*, 9 Q. B. D. 648, 9 App. Ca. 434; *Reuter
 v. Sala*, 4 C. P. D. 739; *Turnbull v. M'Lean*, 1 R. 730; but none of them
 appear to me to throw any doubt upon the propositions—(1) That when
 the circumstances sufficiently indicate that one party to a contract does not
 intend to carry it out, the other party is entitled to resile; and (2) that, at
 all events, in the case of an entire contract like the present a breach in a
 material, and certainly in an essential part, justifies the conclusion that the con-
 tract is off.

"On the whole, therefore, I must assoilzie the defender, with expenses."

¹ *Green v. Sevin*, 1879, L. R., 13 Chanc. Div. 589; *Compton v. Baggalay*,
 1892, L. R., 1 Chanc. Div. 313.

No. 184.

July 12, 1892.
Collard v.
Carswell.

The "Vic-
toria."

given that delivery would be made on the 15th July, and the fact that the pursuer did not keep his undertaking to take it on that day entitled the defender to consider the contract at an end. If a party by his acts evinced a disposition to resile from his bargain, then the other party was freed. An overt breach was not necessary if there were circumstances which shewed an intention to rescind.¹ Time was clearly of the essence of this contract, as it was during the summer months that a vessel like the "Victoria" was worked to profit, and if a charter was delayed beyond July the best part of the summer had then passed. In most of the cases which had occurred the motive of the defender in committing a breach of contract was his personal interest in a rising or a falling market. But such considerations had no place in the present question, and the respondent's *bona fides* was not open to question. In any event the amount of damage sustained was small.

At advising,—

LORD ADAM.—By charter-party dated 3d July 1891 the defender agreed to let, and the pursuer agreed to hire the steamship "Victoria" till the 30th September 1891, she being placed at the disposal of the pursuer in the port of Greenock, or Port-Glasgow, as he might direct.

The conditions of the charter-party, so far as material to the present question, were that the charterer should pay for the use and hire of the vessel at the rate of £425 per month, commencing on the day of delivery, in good order and ready for sea in the Clyde, notice whereof was to be given to the charterer or agents, and at and after the same rates for any part of a month, hire to continue from the time specified for commencing the charter and the vessel is placed at the charterer's disposal until her re-delivery to owner.

It was further stipulated that payment of the hire was to be made in cash monthly, in advance, to owner in Glasgow, without discount, first month's hire to be paid before the steamer left the Clyde, and the charterers agreed to give a banker's guarantee for the due payment of hire-money, and, in default of payment as specified, the owner was to have the faculty of withdrawing the steamer from the service of the charterer.

On Monday 13th July the defender telegraphed to the pursuer that the "Victoria" would be handed over on Wednesday the 15th at Glasgow, when bank guarantee and a month's hire must be forthcoming.

The pursuer did not appear to take delivery on the 15th, the day named, but he appeared on Friday, the 17th. He did not, however, get delivery of the vessel, as the defender had chartered her to another person.

The pursuer now sues this action against the defender for damages for breach of contract, in respect of the defender's failure to give him delivery of the vessel in terms of the charter-party.

The defender pleads that, in this case, time was of the essence of the contract, that, consequently, the pursuer was bound to have taken delivery of the vessel on the 15th, the day named by the defender for delivery, and that his failure to take delivery was a breach of contract on his part, and entitled the defender to treat the charter-party as at an end.

It will be observed, however, that no particular day for delivery is specified in the charter-party, the reason being that the vessel was, at the time, being

¹ Freeth v. Barr, 1874, L. R., 9 C. P. 208; Turnbull v. M'Lean & Co. March 5, 1874, 1 R. 730, L. J.-C. Moncreiff, p. 738.

fitted out for the season, and the defender did not know when he would be ready to deliver her. Notice of the day of delivery was to be given to the charterer. It is not, however, made a condition of the charter-party that the charterer should take delivery on that day, and that, failing his doing so, the owner should be entitled to resile. What the charter-party does provide is that the charterer should be bound to pay hire from that day, although he may not have taken delivery, and I do not see how it can be implied that the pursuer's failure to take delivery on the day named should entitle the defender *de plano* to put an end to the contract.

No. 184.
July 12, 1892.
Collard v.
Carswell.
The "Victoria."

But the defender further pleads that the pursuer's acts and conduct prior to the 17th July were such as to justify him in believing that the pursuer did not intend to fulfil his part of the contract. If the defender has made out this in point of fact, then I think that in law he would be entitled to resile from the contract, and to let the vessel to a third party.

The charter-party was arranged between Messrs Thomas Reid & Company, the defender's brokers in Glasgow, Messrs Neill, Topping, & Company, brokers in London, and the pursuer. All the communications between the pursuer and defender passed through Neill, Topping, & Company, and a question is raised as to whether they acted for the pursuer or defender. They were employed by Thomas Reid & Company to assist them in getting the vessel chartered. The commission paid by the owner on the execution of the charter-party was divided between them. Mr Topping says they were the owner's brokers. I do not doubt that they were, and that the pursuer, who acted for himself in the matter, so regarded them, and was entitled so to regard them.

The first matter on which the defender founds to justify his conduct is the pursuer's failure to furnish the bank guarantee immediately after the charter-party was executed, and his failure to answer certain letters and telegrams asking for it.

By the charter-party the charterer was bound to give a guarantee for the due payment of the hire-money.

The defender had from the first entertained doubts as to whether the charterer had sufficient means to fulfil his obligations under the contract, and as the defender and his Glasgow brokers thought that under the contract the pursuer was bound to grant the guarantee at once, they telegraphed to Messrs Neill, Topping, & Company on the 4th July that unless the guarantee was in Glasgow on the 6th business would be off. Messrs Neill, Topping, & Company did not take the same view of the pursuer's obligations, and did not communicate this telegram to him, but wrote to Messrs Thomas Reid & Company, of the same date, that their proposal was simply absurd, that there was no proviso in the charter as to what hour or day charterer was to produce guarantee, but, to keep the owner's mind at ease, the writer was going down to see the pursuer, and no doubt the banker's guarantee would be posted to them on Monday or Tuesday.

Mr Topping had a meeting with the pursuer next day, who gives this account of what took place. "The question," he says, "of the bank guarantee was mooted by him (Mr Topping). In the first place, he asked, 'When are you going to send the bank guarantee and the first month's hire?' I said it was not necessary according to the wording of the charter to send it until the boat was ready to be handed over, and that I should be prepared to pay the first month's hire, and to give the bank guarantee. Mr Topping said the owners were continually worrying for it, and I said there was no need for that, as there was no stipula-

No. 184.
July 12, 1892.
Collard v.
Carswell.

The "Victoria."

tion in the charter that it was to be forthcoming until the boat was ready to be handed over. He said, 'Certainly not, but they keep worrying me, why don't you make some arrangement?' and I said, 'It is not necessary.' We had the charter before us at the time, and were discussing the matter, and going over the clauses. Mr Topping quite agreed with me that it was not necessary, and that it was unreasonable for them to ask for the money and the bank guarantee until the boat was handed over." Mr Topping confirms this. He says, "On that occasion I told the pursuer he was under no obligation to present the bank guarantee immediately, but that as I did not wish to have any unpleasantness with the people in Scotland, I would like him to meet them in some way or other."

Messrs Thomas Reid & Company, however, continued to press Messrs Neill, Topping, & Company to obtain the guarantee, and Messrs Neill, Topping, & Company between the 6th and the 10th July sent several letters and telegrams to the pursuer pressing him to send the guarantee at once. The pursuer did not answer these letters and telegrams. He gives the following reason for not doing so. "On the Sunday," he says, "after the charter was signed I stated to Mr Topping my view of the charter, and he agreed with me. That was the reason why I did not think it necessary to reply to the other telegrams. It was never intimated to me by Mr Topping, on behalf of the owners, in any telegram or letter, that the owners considered themselves entitled to withdraw the vessel unless I produced the bank guarantee there and then for the whole hire. If I thought I was bound to do so, I could have arranged for a bank guarantee."

I agree with the pursuer's construction of the charter on this point, and therefore that he was not in fault in not producing the bank guarantee before getting delivery of the vessel, and seeing that he was asked by the defender's agents, Neill, Topping, & Company, to produce the guarantee, not as a matter of obligation, but merely as an accommodation to them, I think that neither his failure to produce the guarantee or to answer the letters and telegrams can justify the defender in breaking the contract.

But, however that may be, the defender did not take that course at the time.

On the 10th July the pursuer received from Neill, Topping, & Company a telegram to the effect that the steamer would be tendered to him on the next day (Saturday) or Monday, in terms of the charter, when the month's hire and banker's guarantee must be in Glasgow.

The pursuer was naturally dissatisfied with the indefinite nature of this telegram, and telegraphed in reply, of the same date, in these terms,—“Get owners telegraph me direct guaranteed date of delivery ‘Victoria,’ to avoid unnecessary expense—am prepared to go to Glasgow, and pay first month's hire on delivery, and produce bank guarantee according to charter. All fuss made unnecessary; always intended fulfilling my legal obligations in due course.”

It farther appears that Mr Lucas, of Neill, Topping, & Company, had gone to see the pursuer about the matter, and on his return Neill, Topping, & Company wrote to Messrs Thomas Reid & Company as follows on 11th July,—“Mr Lucas saw Mr Collard yesterday, who seemed very much surprised indeed at all the fuss that had been made, as he had been prepared from the outset to carry out his legal obligations in due course. The hire-money is not due, when it is he will pay it, and produce the bank guarantee for balance of hire in accordance with charter. He naturally wishes to avoid having his men hanging on

for four or five days in Glasgow, and he therefore wishes to know guaranteed date of delivery in order that he may at once make his arrangements." No. 184.

So far it appears to me that there is nothing to suggest that the pursuer did not intend to fulfil his obligations.

July 12, 1892.
Collard v.
Carswell.

On 13th July Neill, Topping, & Company telegraphed to the pursuer that "Victoria" would be handed over at noon on Wednesday at Glasgow, when bank's guarantee and month's hire must be forthcoming. The "Victoria."

On the 14th they again telegraphed to him,—“Presume you leave to-night for Glasgow; telegraph,” to which he replied on the 15th,—“Leaving for Glasgow to-night; am prepared to take ‘Victoria’; expect her ready according to your telegram received Monday. If not ready say so to save unnecessary expense. Wire where ‘Victoria’ lying.” Neill, Topping, & Company replied on the same day,—“Owners say ‘Victoria’ now ready, lying Glasgow, Henderson’s Meadows Private Dock, waiting, hire begins to-day.” These were the last communications which took place between the parties before the 17th. What afterwards took place was this: The pursuer, as he had said he would do, left Hastings for Glasgow on Wednesday evening. He had by the charter-party a right to purchase the vessel at a fixed price, and he had arranged with a Mr Hempsted for a subsale of the vessel to him and some friends, subject to inspection, and Mr Hempsted was to have accompanied him to Glasgow for the purpose of inspection. The pursuer, however, found on his arrival in London that Mr Hempsted was unable to accompany him until next night. The pursuer thereupon resolved not to proceed to Glasgow that night but to wait for Mr Hempsted, and he returned to Hastings. He did not however inform the defender that he had postponed his journey for a day. He is asked if it did not occur to him to communicate with the owners or their agents? His answer is,—“They told me that the boat was ready, and that the hire commenced from that day, and I therefore thought there was no need for me to wire on the subject at all.”

Next day the pursuer and Mr Hempsted left for Glasgow, and arrived there on the morning of the 17th. They went straight to the vessel, not knowing the address either of the defender or of his Glasgow brokers, arriving on board about 11.30. The pursuer found no one there to give him delivery of the vessel. He endeavoured, without success, to communicate with the brokers, and it was not until about 4.30 on the same afternoon that he learnt that a second charter-party had been entered into. It appears that the defender had executed this charter about an hour after the pursuer’s arrival at the vessel.

The question is whether these facts are sufficient to justify the defender in breaking his contract with the pursuer.

The defender knew that the pursuer intended to leave Hastings on the 15th for the purpose of taking delivery of the vessel, and it appears to me that the mere fact that he did not appear on the morning of the 16th at Glasgow was not a sufficient reason to justify the defender in concluding that the pursuer did not intend to fulfil his contract. Many things might have occurred to delay the pursuer’s arrival without suggesting that conclusion. The defender did not take the trouble to communicate with the pursuer during the 16th. If he had he would have learnt the true cause of his non-arrival. If he had sent down to the vessel on the forenoon of the 17th, before signing, he would have found the pursuer there. I cannot assent to the conclusion that in these circumstances the defender was justified in putting an end to the contract.

No. 184.

July 12, 1892.
Collard v.
Carswell.

The "Victoria."

With reference to the question of damages, the pursuer claims on record damages in respect of his loss of profit on the subsale of the vessel to Mr Hempsted, but that claim was not pressed on us.

The pursuer, on failing to get possession of the vessel, seems to have done everything in his power to obtain another vessel in her place, but without success. He therefore now claims damages in respect of the loss of profits he would have made by her use.

The means which the pursuer has furnished to us for coming to a conclusion on this point are most meagre and unsatisfactory. He has produced an estimate of these profits, but it is most extravagant in my opinion. It appears, however, from the evidence of the defender's witness, Captain Campbell, who says he has knowledge and experience on the subject, that the pursuer would have made profits to a very considerable amount during the season from the use of the vessel. From these, however, would have to be deducted the profits made by the "Nelson." On the whole matter, I do not think we will do injustice if we award £500 of damages to the pursuer.

LORD M'LAREN.—I agree, and only desire to add a few words on the point where it seems to me the analogy on which the Lord Ordinary has proceeded breaks down, namely, where he comes to the conclusion that the defender was entitled to rescind the contract, on the ground that time was of the essence of the contract, and the pursuer had failed to perform his part of the contract at the expected time. It is indisputable that in all cases on contract there is an implied right to either party to rescind, where there is a failure of performance in a matter touching the essentials of the contract, and it is not necessary to give rise to the right of rescission that the failure should be total. The most familiar instances of the application of this rule are to be found in the contract of sale, where goods are delivered some of which are of defective quality, and the purchaser has a right to reject them, though in a sense there has been a partial though defective performance of the contract. In the same way, if there is any substantial failure on the part of the purchaser to implement the conditions as to payment of the price, the seller is entitled to hold the goods, or to stop them *in transitu* if he has already entrusted them to a carrier. This case, however, does not appear to me to be analogous to the illustrations I have given, because it was not a matter of vital importance,—I mean a matter touching the very existence of the contract of location,—that delivery of the ship should be taken on a particular day. If the pursuer was willing to take delivery, and had done nothing which could be interpreted as amounting to a repudiation of his obligation, the mere delay in taking delivery was an inconvenience to the lessor which could be made up to him by a money payment. But the action of the defender in treating the charter-party as cancelled and granting a lease of the ship to another person is defended on the ground that it was reasonable for the defender to conclude from the pursuer's conduct that he never intended to come forward and implement his contract. Suppose the same thing to occur in the case of goods—that a cargo is shipped, and that when the ship arrives at the port of delivery no consignee of the shipper comes forward to claim the goods. It would not, I think, in such a case occur to the seller or his representative to order an immediate resale of the goods at the best price he could get for them. Certainly, if he were to take such a course, he would be subject to a claim of damages on the part of the consignee. No doubt

he might be inconvenienced by the delay of a day or two, and no doubt time is always important in mercantile dealings, but I think that everyone would recognise that this was not a case in which time was of the essence of the contract, and that the delay of a day or two in taking delivery of the cargo was a breach of contract of the kind which might be compensated by demurrage or payment for the inconvenience, whatever it might be, which was caused thereby. In the present case, the defender might have remembered that it was just as important for the pursuer to get early delivery of the ship as it was for the owner to get his ship chartered when the summer season was running on. Accordingly, when the pursuer failed to appear on the day of delivery, having agreed to pay for the hire of the ship in advance, and there being no real question as to his solvency, there were no justifiable grounds for treating the contract as at an end, and it was the duty of the defender to wait a reasonable time, or at the least to communicate with the pursuer as to the cause of the delay. If he did not come forward at once, he would of course be liable in the expense and loss occasioned to the defender, and would not be released from his obligation to pay the hire of the ship.

If the defender had made every effort to communicate with the pursuer, and had got no answer, and the circumstances had been such as to make it reasonable for the defender to assume that the pursuer had no intention of fulfilling his contract, and was really evading performance, a very different case would be raised. But there was no reason for the defender's reaching that conclusion, and I am afraid he must suffer the consequences of the mistake he made in seeking to protect his interests.

LORD KINNEAR concurred.

LORD PRESIDENT.—After full consideration of this case, I have arrived at the conclusion that your Lordships' is the sound determination of this case. I do not doubt that the defender acted in good faith, and that he *bona fide* believed that the pursuer had defaulted; and the rather unbusinesslike conduct of the pursuer, in not telegraphing to explain his failure to appear on the 16th in accordance with his telegram of the 15th, goes so far to explain the action of the defender. But the defender was too hasty, and I do not think that we could decide in his favour without laying down a precedent dangerous to the stability of mercantile contracts.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, and gave decree for £500.

A. B. CARTWRIGHT WOOD, W.S.—SIMPSON & MARWICK, W.S.—Agents.

MISS ELIZA HARRIS SHAW AND OTHERS, Pursuers (Reclaimers).—
Young—J. J. Cook.

MRS CAROLINE MUIR (Muir's Executrix), Defender (Respondent).—*Ure*
—A. S. D. Thomson.

No. 185.

July 13, 1892.
Shaw v. Muir's
Executrix.

Donation—Donation inter vivos.—In an action for payment of £223 the pursuers averred that their father having executed a trust-deed for behoof of his creditors, the defender purchased their father's business from the trustee; that by a written agreement between the defender and their father the former took the latter into his service in connection with the business at a weekly wage, and, "without coming under any obligation on the subject which can be enforced by" the father, "records his intention to apply in such way and manner as he may think

No. 185.

July 13, 1892.
Shaw v. Muir's
Executrix.

most expedient to, or for the benefit of" the father "and his family a proportion equal to one-half, more or less, of the free profits, if any, that may be derived from the said business, so long as the said" father "remains in his service"; that thereafter the defender annually credited the father in the books of the business with one-half the profits; that the total sum so credited amounted at their father's death to £750; that on the death of their father the pursuers went to live with their grandmother, and that the defender arranged to pay her £100 a-year for their board, clothing, and education, until the sum then standing at the credit of their father's account in the firm's books was exhausted; that he subsequently sent a statement of his account with the pursuers, which opened with a credit of £750 in their favour; that thereafter he wrote to the grandmother in these terms:—"Regarding the money, that I from feelings of friendship at the time set aside for the benefit of your grandchildren, I shall continue to remit to you regularly every quarter the sum fixed on for their board, &c., until both the principal and interest are exhausted," but that he ultimately declined to pay the sum of £223 still remaining of the £750 originally credited. The pursuers pleaded that either by crediting the £750 in the books, or at all events by his subsequent actings and letters, the defender had come under obligation to pay that sum to them.

The defender pleaded that the pursuers' averments were irrelevant, in respect that they did not import that he had come under any legal obligation. He averred further, that £750 had been an overstatement of half the profits by the sum of £223 owing to an error induced by the carelessness of the pursuers' father, and he therefore pleaded that he was, in any event, entitled to rectify this error.

The Court *repelled* the defender's plea of irrelevancy, holding that the terms of the letters founded on, and their delivery, imported a legal obligation by defender to the pursuers.

Opinions that the special averments in defence were irrelevant.

1st DIVISION.
Ld. Stormonth
Darling.

ON 4th November 1891 Miss Eliza Harris Shaw and others, the children of the deceased William Shaw, sometime grocer and wine merchant in Helensburgh, brought an action for payment of £223, 2s. 9d. against Mrs Caroline Muir, widow and executrix of the late Robert Muir, draper, Helensburgh.

The pursuers averred (cond. 2) that in 1876 their father's "affairs became embarrassed and he found it necessary to grant a trust-deed for behoof of his creditors. It appeared to some friends of his family that it would be very desirable that an effort should be made to secure the business for behoof of Mrs Shaw and her children in order to provide them with a means of livelihood, and negotiations were opened with the trustee for that purpose. After some correspondence the said Robert Muir made an offer for the business, which was accepted by the trustee. Mr Muir arranged with Mrs Robb, the pursuers' grandmother, that he should provide the funds necessary for the purchase, charging five per cent interest upon his advances until repaid. In his offer for the business, a copy of which is herewith produced, he explains to the trustee that he is acting for friends 'who are most anxious for the sake of Mr Shaw's wife and young family to obtain the business.' A circular was afterwards issued by Mr Muir to the creditors of Mr Shaw explaining that owing to opposition he had been obliged to give a large sum for the goodwill of the business 'in order to secure it for Mrs Shaw and young family,' and requesting such of them as were willing to assist Mrs Shaw to authorise the trustee to retain from their respective dividends their proportion of the price received for goodwill. Several of the creditors complied with this request, and the money so retained was paid to Mr Muir." (Cond. 4) " . . . It was subsequently arranged that Mr Shaw should assume the management. Before he did so Mr Muir required that he and Mrs Shaw should sign the agreement of which a copy is produced

No. 185.

herewith. . . . By the third article of the said agreement, which is dated 23d December 1876, it is provided that 'the said Robert Muir, without coming under any obligation on the subject which can be enforced by the second party,* or by either of them or by their creditors, records his intention to apply, in such way and manner as he may think most expedient to or for the benefit of the second party or their family, a proportion equal to one-half, more or less, of the free profits, if any, that may be derived from the said business so long as the said William Shaw remains in his service.'" (Cond. 5) "After the execution of this agreement, Mr Shaw entered upon his office of manager of the business, which was continued under the name of Shaw & Company, while Mr Muir exercised a general supervision of its affairs, kept the books, and had the sole control of its financial arrangements. He visited the shop every evening, took possession of the cash, and inquired carefully as to each day's transactions. A balance was struck at November 1877, and an account which was opened in name of Mr Shaw was credited with one-half of the profits, the other half being credited to Mr Muir. In the same way in November 1878, 1879, and 1880, the profits were credited in the firm's books to Mr Shaw and Mr Muir in equal proportions. The business during Mr Shaw's management proved to be very prosperous, and considerable profits were earned, the sum standing at the credit of Mr Shaw's account in December 1880 being £750. The balance-sheets in each year were made up by Mr Muir, and copies were handed by him to Mr Shaw and to one or two friends of Mr Shaw's family. Mr Muir placed to the credit of Mr Shaw's account in the books of the firm the sum brought out in the balance-sheet each year as his share of profits in implement of the provisions of article third of the foresaid agreement. Mr Muir was aware that he was under no legal obligation to allow Mr Shaw or his family any share of the profits of the business, but he voluntarily set aside annually the said sums for their behoof by crediting them as aforesaid, and by so doing he completely divested himself thereof. These sums after being credited belonged absolutely either to Mr Shaw or to the pursuers, and were held by Mr Muir as a trustee or depository for their behoof." (Cond. 6) "Mrs Shaw died in March 1880, and on 31st August 1881 Mr Shaw died. The pursuers thereafter went to live with their grandmother, Mrs Robb, and Mr Muir then arranged with her to pay her £100 a-year for their board, clothing, and education, until the sum then standing at the credit of their father's account in the firm's books was exhausted. On 7th September 1882 Mr Muir wrote Mrs Robb a letter enclosing a cheque for the quarter's board and annexing a statement of his account with the pursuers. This statement opens with the balance of £750 standing at the credit of Mr Shaw's account in the firm's books in December 1880, and, after debiting various payments made on account of the pursuers, closes with a balance as due by Mr Muir to them of £532, 4s. 6d. A copy of said letter and statement is herewith produced and referred to. Mr Muir continued thereafter to make quarterly payments to Mrs Robb on

* The agreement produced was between Muir of the first part, and Shaw and his wife of the second part. The first article was in these terms:—"First, the said second party jointly and severally confess, acknowledge, and declare, that the said business of Shaw & Co., including the stock, lease, and goodwill, is the absolute and unlimited property of the said Robert Muir, free from any claim whatever to interference or control on their part either now or at any time hereafter." By the second article Muir agreed to take Shaw into his service in connection with the business at a weekly wage of £2.

July 13, 1892,
Shaw v. Muir's
Executrix.

No. 185.
July 13, 1892.
Shaw v. Muir's
Executrix.

account of board, &c., for the pursuers, and both verbally and by letter declared his intention of continuing these payments until both the principal and the interest of the sum which stood at the credit of their father's account at his death were exhausted.* (Cond. 7) "On 4th March 1885 Mr Muir wrote to Mrs Robb proposing to alter the balance brought out as standing at the credit of Mr Shaw's account in 1880 by deducting from it £223, 2s. 9d. in respect of losses which he alleged he had sustained subsequent to Mr Shaw's death on the realisation of book debts due to the firm. . . . A correspondence took place in which Mrs Robb protested on behalf of her grandchildren against the course which Mr Muir indicated he was to take. . . . Mr Muir however insisted on deducting the said sum of £223, 2s. 9d. from the amount held by him for behoof of the pursuers as aforesaid, and after paying off the balance so ascertained in instalments he refused to make any other payment or to admit any further liability. During his lifetime he was repeatedly applied to for payment of the said sum of £223, 2s. 9d., and the defender as his executrix has been applied to since his death, but liability has always been denied and payment refused."

In answer the defender referred to the correspondence for its terms, but made no specific admission regarding the letter of 21st January 1884, in part quoted in the note below.* She also made the following averment:—"After Mr Shaw's death it became necessary for Mr Muir to give closer attention to the business than he had been doing, and he ultimately got his brother-in-law, Mr James Alexander, to take the management of the shop. As a consequence it was discovered that Shaw had pursued a reckless system of giving credit to all and sundry, which had led to the accumulation of book debts of a worthless kind. Mr Muir accordingly in his balance of December 1884 made a thorough investigation into the matter, and made up a list of debts which had been incurred prior to Shaw's death, and which had proved irrecoverable. These amounted to £367, 3s. 4d., one half of which he wrote off against his own share of the profits and the other half against Shaw's share. The amount thus written off, with interest, was £223, 2s. 9d., and is the sum that is sued for in the present action."

The pursuers pleaded;—The defender, as executrix of her husband, being liable in payment to the pursuers of the sum sued for, they are entitled to decree therefor, with interest and expenses, as craved.

The defender pleaded;—(3) The pursuers' statements are irrelevant and insufficient in law to support the conclusions of the action. (6) The sum credited to Mr Shaw in the balance-sheet of December 1880, having been credited *ex gratia* by Mr Muir, and besides, being based on false information knowingly supplied by Mr Shaw to Mr Muir, who was thereby led into essential error, and in any case not having been correctly estimated, nor finally binding, fell to be corrected; and the correct sum having been paid by Mr Muir to Shaw or his children, the defender is due nothing in respect thereof.

On 4th March 1892 the Lord Ordinary (Stormonth Darling) sustained the third plea in law for the defender, and in respect thereof dismissed the action.†

* In support of this averment the pursuers produced a letter, dated 21st January 1884, which concluded thus:—"Regarding the money that I from feelings of friendship at the time set aside for the benefit of your grandchildren. I shall continue to remit to you regularly every quarter the sum fixed on for their board, &c., until both the principal and interest are exhausted.—I am, Madam, yours, &c., ROBERT MUIR."

† "OPINION.— . . . It is not maintained by the pursuers that under

The pursuers reclaimed, and argued;—The expression of an intention to give followed by an overt act by the donor in pursuance of that intention might constitute donation, although there was no actual delivery of the subject of the gift.¹ The present case was of that description. It might be that the agreement of 1876 did not *per se* constitute donation, but at the same time it was essential to keep in view the peculiar terms and nature of that agreement, and the whole circumstances connected with it, for it shewed that Mr Muir had put himself under a moral obligation to contribute to the support of the pursuers and their mother out of the profits of the business. The case therefore was not one of a purely gratuitous donation by one wholly unconnected with the alleged donees; it was the case of a donation by one who had, voluntarily it might be, come under a moral obligation to support the donees, and in the latter case comparatively little in the way of an overt act would be required to establish complete donation. It might well be that the entry in the books, which were not strictly Mr Muir's books, but the books kept by him in pursuance of the agreement, bound him in a question with the pursuers and their grandmother. It was not necessary for them, however, to rely on that only, for the averments in cond. 6 that Mr Muir had intimated to Mrs Robb that he had set aside £750 for the pursuers, and that he intended to pay that sum to her for their behoof quarterly until it was exhausted, were relevant and were established by Mr Muir's letters, particularly the letter of 21st January 1884.

No. 185.

July 13, 1892.
Shaw v. Muir's
Executrix.

Argued for the defender;—Delivery was essential to the constitution of any ordinary act of donation *inter vivos*,² and the present was nothing else than an ordinary case of donation, for Mr Muir's position towards the Shaw family was the result of a wholly gratuitous act of benevolence on his part. The agreement certainly placed him under no legal obligation towards them; and although he might have made himself their debtor in law by handing them a document conceived in terms of strict obligation, the letters here founded on could not be so construed. Fairly read, they added nothing to the agreement, but were mere expressions of the way in which, at the time of writing, he proposed to carry it out. At all events, the defender's averments regarding the bad debts were relevant, even if Mr Muir had bound himself, for the pursuers could not take benefit by their father's fault.

that agreement (of 23d December 1876) they or their late father derived any right as at law to a share in the profits. They admit that it was left entirely in the option of Mr Muir to apply for their behoof a portion of the profits or not as he saw fit, and also to decide in what way and manner that should be done. But they say that the moment he set aside in his books a certain share of the profits in name of Mr Shaw, there then arose a vested right in Mr Shaw to receive that share of the profits.

"I cannot assent to that view of the agreement. The defender says that after Mr Shaw's death he became satisfied that the profits had been over-estimated, and that, in order to make allowance for debts which had proved to be irrecoverable, the share of profits intended for the Shaws had to be reduced by the sum of £223, 2s. 9d. Now, it seems to me that under the agreement Mr Muir remained absolute master both of the question whether or not he should pay a share of the profits to the Shaws, and also of the question what these profits were, and I cannot think that, by the mere entry in his own books of a sum as appropriated to Mr Shaw, he in any way debarred himself from afterwards correcting that sum, or even from saying that he had changed his mind and would no longer make a gift of these profits—for it was a gift—in the only way in which such a gift could effectually be made, namely, by payment. . . ."

¹ Smith v. Smith's Trustees, Nov. 6, 1884, 12 R. 186.

² Thomson v. Dunlop, Jan. 23, 1884, 11 R. 453.

No. 185. LORD PRESIDENT.—The Lord Ordinary has dismissed this action on the ground that the averments are irrelevant. His Lordship's note shews very clearly that the view of the case present to his mind when he gave his decision was more limited than, and different from, that presented to us to-day. His Lordship treats the pursuers' averments as amounting to no more than this, that Mr Muir set aside in his books a certain sum in name of Mr Shaw; for, after stating that, his Lordship says,—“I cannot think that by the mere entry in his own books of a sum as appropriated to Mr Shaw, he in any way debarred himself from afterwards correcting that sum, or even of saying that he had changed his mind and would no longer make a gift of these profits.” In that observation I entirely concur.

July 13, 1892.
Shaw v. Muir's
Executrix.

It is necessary to turn to the agreement to see the precise position reserved by the agreement to Mr Muir, and the degree of control retained by Mr Muir over the business which had belonged to Mr Shaw. In the first place Mr Muir undoubtedly bought Shaw's business, and bought it to the exclusion of Shaw, but then the agreement provides,—“Third, The said Robert Muir, without coming under any obligation on the subject which can be enforced by the second party or by either of them, or by their creditors, records his intention to apply in such way and manner as he may think most expedient to or for the benefit of the second party or their family, a proportion equal to one-half, more or less, of the free profits, if any, that may be derived from the said business, so long as the said William Shaw remains in his service.” I take the result of the agreement to have been that Muir was master of the situation as to how much he would give to Shaw and his wife or their children. He might give to any or to none as he pleased, and he was the absolute dictator of the amount of the gift. The result accordingly was that Muir did not require to acquaint Shaw or his family with the mode in which he arrived at the determination of the amount of the profits. He could make up his mind in any way or by any method he pleased, and the books of the business being his, any entry made in them was an entry in his private books, and the sum entered was entirely in his own control.

At this stage I think we reach the point in the case which was not before the Lord Ordinary. It is not the entry in the defender's books that the pursuers now rely on. They allege that intimation was given by the defender to their grandmother, with whom and in whose care they were living, that he had made a statement setting forth the money which he had resolved to give them, and that he transmitted it to her for her information, and that following upon that “Mr Muir continued to make quarterly payments to Mrs Robb on account of board, &c., for the pursuers, and both verbally and by letter declared his intention of continuing these payments until both the principal and the interest of the sum which stood at the credit of their father's account at his death were exhausted.” In illustration of these averments the pursuers have produced the letter which is quoted, and I may say at once that I read the last paragraph of that letter as declaring that the sum set forth in the statement of account was the children's money, and that the writer (that is, Mr Muir) would pay it over by instalments until it was exhausted for their benefit. When I say I so regard the letter, I am taking it according to the averment on record, and I say that if the pursuers succeed in proving the genuineness of that letter, the paragraph I have referred to contains a declaration by Mr Muir that he was the debtor of Mr Shaw's children for the amount specified in the statement of account, and

precludes him from going back upon it. At present we are merely dealing with the averments of the pursuers on record; and the answer of the defenders to the averments which cover the letter in question is, "Denied." Accordingly, while defining my opinion on the meaning of the letter put before us by the pursuers, I think we must allow a proof.

At the same time, it would not, I think, be fair to the parties were I to reserve my opinion as to the relevancy of the statements made by the defender as to the loss suffered owing to bad debts. As I have said, Mr Muir was master of the situation as to the sum which was to be set aside. He fixed the amount of that sum, and he could have, and may have, provided for the chance of bad debts occurring. In my opinion he has turned himself into the children's debtor for the amount set aside by what he has done. The defence, therefore, which is founded on the occurrence of bad debts is, in my judgment, not relevant. It is necessary, in order that the pursuers may have an opportunity of proving the documents on which they rely, that the parties should be allowed a proof, but the defender will probably not deem it necessary to go through that procedure.

LORD ADAM.—I agree with your Lordship, and I also agree with the Lord Ordinary when he says "that under the agreement Mr Muir remained absolute master both of the question whether or not he should pay a share of the profits to the Shaws, and also of the question what these profits were," so long as matters remained entire. I think Mr Muir was in no way bound, and if anyone had come forward and said that the sums he had set aside as profits were less than the real profits I think that would have been entirely irrelevant; and so likewise I think that although Mr Muir might have stated a certain sum as the profits in the books, he would not have been precluded from saying that the amount of the profits had been erroneously so stated. But matters did not remain entire. Mr Muir fixed a certain sum as the profits, and he sends a letter to Mrs Robb, the pursuers' grandmother, with whom they were living, saying that he has done so, and intimating that he intends to pay that sum to them quarterly till it was exhausted. We are asked to say that these averments are irrelevant. I cannot come to that conclusion. I agree that there must be inquiry, and I also agree with your Lordship in thinking that no inquiry into the actual amount of the profits is now admissible.

LORD M'LAREN.—I agree in holding that by the two letters of 7th September 1882 and 21st January 1884 intimation was given by Mr Muir to the children of Mr Shaw, through their grandmother and natural guardian, that he had appropriated a certain sum as their share of the profits of their father's business which Mr Muir had purchased. He was under no obligation to make the appropriation, but when the business was purchased Mr Muir certainly held out the prospect that such an appropriation would be made, and be it that Mr Shaw could not have sued upon the terms of the agreement, I think it follows that after the sum had been fixed there was an irrevocable appropriation made for the benefit of Shaw's family in accordance with the intention expressed in the agreement. I should therefore deprecate any inquiry into the amount of the profits of the business, and undoubtedly there does not seem to be any subject for inquiry but the validity of the letters. But as the record is not in such a form as to raise this question very well, I think we may allow a proof in general terms in case anything may have been overlooked.

No. 185.

July 13, 1892.
Shaw v. Muir's
Executrix.

No. 185. LORD KINNEAR concurred.

July 13, 1892.
Shaw v. Muir's
Executrix.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the third plea in law for the defenders, and remitted the cause to the Lord Ordinary.

SANG & MOFFAT, S.S.C.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

No. 186.

July 14, 1892.
Patmore & Co.
v. B. Cannon
& Co., Limited.

PATMORE & COMPANY, Pursuers (Reclaimers).—*Johnston—G. W. Burnet.*

B. CANNON & COMPANY, LIMITED, Defenders (Respondents).—*Shaw—W. Campbell.*

Agent and Principal—Agency for a business during a fixed period—Obligation of principal to continue the business for the period—Recompense.—Where two parties contract the one to employ the other as his sole agent in a certain business at a certain place for a period named, it is an implied condition of the contract that it may be brought to an end by the business being discontinued.

Patmore & Company agreed with Cannon & Company to act as Cannon & Company's agents in Scotland for the sale of goods manufactured by Cannon & Company, consisting of leather goods, dips, and glues, at a certain rate of commission and other allowances for a period of five years, unless broken by mutual consent and with a reconsideration of terms for leather at the end of the first year. Before the end of the first year Cannon & Company intimated that they had given up their leather business. Patmore & Company in consequence sued Cannon & Company for breach of contract, and maintained also, alternatively, that Cannon & Company were bound to recompense them for certain outlay, with reference to which they averred that "when said agreement was entered into the pursuers, at the defenders' request, arranged to change their office in Glasgow and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business," and that this additional accommodation, and consequent increase of rent, had become unnecessary through the defenders' breach of contract.

The Court *dismissed* the action, holding (1) that there had been no breach of contract, it not being a condition of the contract that Cannon & Company should continue their leather business for a year; and (2) that the averments in support of the alternative claim for recompense were irrelevant.

1ST DIVISION.
Lord Low.

IN March 1892, Patmore & Company, warehousemen, agents, and merchants, Glasgow and Leith, brought an action against B. Cannon & Company, Limited, Lincoln, concluding, *inter alia*, (2) for payment of £500.

The pursuers' averments with reference to this conclusion were as follows:—(Cond. 2) "By agreement between the parties, constituted by letters passing between them during the period from the 7th to the 14th October 1891, the pursuers agreed to act as agents in Scotland for the sale of the goods manufactured by the defenders, consisting of leather goods, dip, and glue, for a period of five years from 1st October 1891, unless broken by mutual consent, and with a reconsideration of terms for leather at the end of the first year, the commission and other allowances to be as therein fixed. The defenders adopted this agreement, and the parties acted upon it. . . . The defenders were desirous, as appears from the correspondence, of developing their business in Scotland, and putting their agency there, the business of which had greatly declined and fallen into confusion, particularly in the leather goods department, upon a permanent and satisfactory footing; and they held out to the pursuers, as an inducement to them to accept the agency, that it would be permanent, or at least of many years' duration. The pursuers accepted the defenders' agency upon this representation and understanding, and,

accordingly, with the defenders' knowledge and approval, and at their special request, devoted much time, and incurred heavy responsibilities on account of the defenders, for the purpose of putting the affairs of the defenders in Scotland upon a satisfactory basis, and extricating them from the great confusion into which they had at that time fallen. *Inter alia* the pursuers removed to larger premises than were necessary for their own business, solely for the purpose of the defenders' agency, and the accommodation of the stock which the defenders proposed to send to Scotland for sale there. They did so with the full knowledge and approval of the defenders." (Cond. 4) "In the month of January of the present year [1892] the defenders intimated to pursuers that they intended to give up their fancy leather trade, and advised the pursuers to become agents for another firm in the same line of business, to whom they offered the pursuers an introduction. The defenders also intimated that in other respects they were prepared to adhere to the said agreement. The pursuers replied declining to depart from the agreement or to give up their rights thereunder, and intimated their willingness to continue to implement the same. . . . The defenders' actings amounted to a breach of the agreement above mentioned, and they still refuse to carry out or implement the same." (Cond. 5) "When the said agreement was entered into, the pursuers, at the defenders' request, arranged to change their office in Glasgow, and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business. The rent of their former office was £40 per annum, while that of the office to which they removed is £80 per annum, under a lease thereof for 5 years. In consequence of the defenders' foresaid breach of agreement, the said storage and show-room accommodation has become unnecessary. The pursuers have not succeeded in letting the premises, and in any event, they cannot do so at a rent which will save them from loss. They estimate the loss thus occasioned to them, and for which the defenders are liable, at £200, being the difference between the rents of the office and premises now held by them and of the office which they left on becoming agents of the defenders. The pursuers were also put to considerable expense in making their place of business suitable for the purposes of the agency, and in taking over stock, &c. They also visited Lincoln and incurred expenses by engaging two men to act as sub-agents or travellers. Besides this loss, the pursuers have sustained and will sustain loss, injury, and damage through the failure of the defenders to implement and fulfil the said agreement. This loss, injury, and damage the pursuers moderately estimate at the sum of £500, which is the sum second sued for."

The pursuers pleaded;—(2) The pursuers having, through the breach of contract by the defenders libelled, suffered the loss, injury, and damage condescended on, are entitled to decree in terms of the second conclusion of the summons.

The defenders pleaded;—(1) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the action. (2) Upon a sound construction of the agreement between the parties, the pursuers' appointment as agents for the sale of leather goods was only for the period of one year, and was conditional upon the defenders carrying on the business for that time.

On 28th June 1892 the Lord Ordinary (Low) pronounced an interlocutor which, *inter alia*, found that the pursuers' averments were not relevant or sufficient to support their conclusion for damages, and dismissed the same.*

* "OPINION.— . . . In my opinion the pursuers have not set forth a

No. 186.
July 14, 1892.
Patmore & Co.
v. B. Cannon
& Co., Limited.

No. 186. The pursuers reclaimed. At the hearing they intimated that they were prepared to move to be allowed to add a plea to the effect that they were entitled to damages upon the principle recognised in *Dobie v. Patmore & Co. v. B. Cannon & Co., Limited.* *Lauder's Trustees*, June 24, 1873, 11 Macph. 749, 45 Scot. Jur. 455.

LORD PRESIDENT.—I think that the Lord Ordinary is right. It appears to me that the case of *Rhodes v. Forwood*, L. R., 1 App. Ca. 256, applies, in so far as the action is founded on breach of contract. I think that there was no breach of contract, for I cannot read the contract as containing a stipulation that the defenders should continue in any particular branch of their business during the period named.

The pursuers also pointed to article 5 of their condescendence as raising a separate or alternative ground of action limited to a smaller pecuniary claim. They have not supported this claim by a plea in law, but they intimated that they were prepared to move that such a plea should be added. I think, however, that their averments on record are not such as to raise this question. It appears to me that their case depends on breach of contract, or nothing at all. What they say is, that when the agreement was entered into they, at the defenders' request, arranged to change their office in Glasgow, and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business, and they maintain that the defenders are in consequence liable to them in the sum of £200, which they state to be the difference between the higher rent of their new office and the rent of the office which they left on becoming the agents of the defenders. I think the fair reading of this averment is that they took the larger office because unless they had made the change they would not have got the contract. That just takes us back to the question, what was the contract? and, as I have said, it

relevant case of breach of contract. . . . They say that the defenders intimated that they intended to give up the fancy leather, but offered to continue the agreement in regard to other goods. If this constituted a breach of the agreement it must be because by entering into the agreement the defenders became bound to carry on all the branches of their business to which the agreement referred for the period specified in the agreement. There is no such obligation expressed, and in my judgment it cannot be implied. I do not think that the defenders bound themselves to carry on their business, or any branch of it, for five years, or for any other period, simply for the benefit of the pursuers. If the defenders found it expedient to give up any part of their business it seems to me that, so far as their agreement with the pursuers was concerned, they were perfectly entitled to do so. There is no allegation here of fraud, or that the defenders gave up the fancy leather trade for the purpose of injuring the pursuers. It is simply said that the defenders intimated that they intended to give up the fancy leather trade, but that in other respects they were willing to adhere to the agreement. In my opinion that averment does not necessarily imply, or even suggest, that the defenders did anything which they were not perfectly entitled to do. The view which I take seems to me to be consistent with the judgment of the House of Lords in the case of *Rhodes v. Forwood*, 1876, L. R., 1 App. Ca. 256. . . .

"There was some argument as to whether the pursuers might not have a claim for repayment of money disbursed by them upon the faith of the agency being of a continuous nature, upon the principle recognised in *Dobie v. Lauder's Trustees*, 11 Macph. 749. It is sufficient to say in regard to this argument that no such question is raised in the pleadings (the only case presented being one of damages for breach of contract), and the pursuers did not propose to amend the record."

was a contract which did not pledge the defenders to continue in the business which they have given up. No. 186.

July 14, 1892.
Patmore & Co.
v. B. Cannon
& Co., Limited.

LORD ADAM.—I am of the same opinion. To have any foundation for the alleged breach of contract the pursuers must make out that it was either an express or an implied condition of the contract that Cannon & Company, the defenders, should continue to carry on their leather business for at least a year. There is certainly no such condition expressed, and I cannot find it to be implied. All that the defenders undertake is to employ the pursuers as their agents for at least a year if they themselves continue in the business. I think the case, in so far as it is founded on breach of contract, is just *Rhodes v. Forwood*.

The pursuers however maintain this other ground of action, that they have incurred certain expenditure for which the defenders are bound to recompense them, on the footing that it has been incurred on the faith of the defenders continuing their business. The pursuers aver that "the defenders were desirous, as appears from the correspondence, of developing their business in Scotland, and putting their agency there, the business of which had greatly declined and fallen into confusion, particularly in the leather goods department, upon a permanent and satisfactory footing; and they held out to the pursuers, as an inducement to them to accept the agency, that it would be permanent, or at least of many years' duration. The pursuers accepted the defenders' agency upon this representation and understanding, and accordingly, with the defenders' knowledge and approval, and at their special request, devoted much time, and incurred heavy responsibilities on account of the defenders, for the purpose of putting the affairs of the defenders in Scotland upon a satisfactory basis, and extricating them from the great confusion into which they had at that time fallen. *Inter alia*, the pursuers removed to larger premises than were necessary for their own business, solely for the purpose of the defenders' agency, and the accommodation of the stock which the defenders proposed to send to Scotland for sale there. They did so with the full knowledge and approval of the defenders." Now, I cannot read this as anything else than the statement of what the pursuers actually did. They do not say that the defenders had any special knowledge of what they did, or gave them any special authority; all they say is that what they did had the full knowledge and approval of the defenders. The only other averment on this matter is at the beginning of condescendence 5, where the pursuers say that "when the said agreement was entered into the pursuers, at the defenders' request, arranged to change their office in Glasgow, and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business." The pursuers no doubt here say that they took the new office at the defenders' request, but I think that the averment means no more than this, that they took the office for their own benefit in the hope of making a profit, but at the same time taking the risk of the contract of the particular kind into which they had entered with the defenders. If I could have read this averment to mean that the pursuers took the new office upon special representations by the defenders as to the continuance of the business I might have had difficulty in throwing out the case upon relevancy, but I am unable so to read it. I am satisfied that the pursuers have stated no ground for damages on the principle of the case of *Dobie* referred to by the Lord Ordinary. On the whole matter I agree with your Lordship.

No. 186. LORD M'LAREN.—I agree with your Lordship and the Lord Ordinary. I think your Lordship rightly proposes to decide the case on relevancy.

July 14, 1892.
Patmore & Co.
v. B. Cannon
& Co., Limited.

LORD KINNEAR concurred.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—Agents.

No. 187.

BRITISH PUBLISHING COMPANY, LIMITED, Pursuers.—*Rhind—*

A. S. D. Thomson.

JAMES HEDDERWICK & SONS, Defenders.—*Kennedy.*

July 14, 1892.
British Pub-
lishing Co.,
Limited, v.
Hedderwick
& Sons.

Process—Proof—Diligence—Recovery of documents—Defenders' books.—A firm, carrying on business in Birmingham, raised an action of damages for slander against the publishers of a Glasgow newspaper. The pursuers applied for a diligence to recover excerpts from the defenders' books, to shew the number of copies of the newspaper containing the alleged slander sent to Birmingham. In supporting their application, they stated that they intended to prove that a large number of copies were sent to Birmingham. There was no averment to this effect on record. *Held (diss. Lord Rutherford Clark)* that the diligence must be refused.

2D DIVISION.
Ld. Kyllachy.

THE BRITISH PUBLISHING COMPANY, LIMITED, carried on business in Birmingham, where they had their registered office. They raised an action on 4th May 1892 against James Hedderwick & Sons, printers and publishers of the *Glasgow Evening Citizen*, for damages in respect of a paragraph published in the *Evening Citizen* of 1st April 1892, reporting an action in the Sheriff Court of Glasgow in which the Publishing Company were concerned.

The pursuers, after the issue had been adjusted by Lord Kyllachy, gave notice of trial for the sittings, and in anticipation of the trial moved the Court for a diligence to recover certain documents. The only head of the specification which the parties finally found it necessary to debate was the fourth, viz. :—"The defenders' books, in order that excerpts may be made therefrom of all entries shewing or tending to shew (1) the circulation of the various editions of the *Evening Citizen* of 1st April 1892," and (2) "the number of copies thereof sent to Birmingham."

To obviate the necessity of (1), the defenders agreed to admit on record that their newspaper circulated "to the extent of several thousands" in Glasgow and the west of Scotland. They declined to admit that any copies had been sent to Birmingham. The pursuers pressed for the documents specified in (2), and stated that they desired to prove that a large number of copies of the issue in question had been sent to Birmingham. There was no statement of the kind on record.

At advising,—

LORD JUSTICE-CLERK.—The only question now left for our decision is as to the second head of the fourth article of the specification. I do not find any averment in the record giving a basis for any such demand. I am for refusing it.

LORD YOUNG.—I agree, but I would be for disallowing the whole of this specification. The issues here have been adjusted for some time, the action was raised in May, and now, on the eve of the trial, it has occurred to the pursuer, not that it would be useful to himself—such an idea could never have occurred

to anyone—but that it would be tormenting to his adversary, if he were to get access to his adversary's books. No. 187.

The specification has been abandoned to a large extent, and has indeed been brought down to this, that the pursuer wants to know what the circulation in Birmingham was. That is altogether a preposterous proposal. Newspapers are glad to publish the fact that they have a large circulation; it is extravagant to suppose that any defence would be maintained on the ground that the circulation is small. July 14, 1892.
British Publishing Co.,
Limited, v.
Hedderwick & Sons.

We have been much too free in giving access under such specifications to defenders' books and papers. A pursuer has no right to see the defender's books and papers, or correspondence, be they the books of a newspaper or of any individual, unless it is shewn that the ends of truth and justice require that he should, *i.e.*, require that the ordinary rule of law should be set aside. If these ends cannot be otherwise satisfied, the Court will allow access.

These ends do not require access here; if the pursuer suffered from this paper being read in Birmingham, he knows that it was read there, and does not need the defenders' books to prove it. If he did not so suffer, he could not aver it, and the diligence he asks for would not profit him.

I am clearly of opinion that this application for a diligence should be refused.

LORD RUTHERFURD CLARK.—The sole question now is whether the pursuer is entitled to recover the defenders' books to shew the circulation of the newspaper in Birmingham. I think he is.

LORD TRAYNER.—I agree with your Lordship and Lord Young. The pursuer would not be entitled to prove anything as to the circulation in Birmingham, there being no averment on that head. If so, he cannot recover these books, which could prove nothing else.

THE COURT refused the motion for a diligence.

WILLIAM OFFICER, S.S.C.—GREGOR MACGREGOR, S.S.C.—Agents.

MISS DOROTHEA GORDON STEWART, Petitioner.—*Sym.*

REV. D. MORRISON AND ANOTHER.—*C. N. Johnston.*

JOHN HUNTER BOWIE AND ANOTHER.—*J. Wilson.*

No. 188.

July 14, 1892.
Stewart v.
Morrison.

Trust—Judicial factor—Administration of trust.—Where the administration of a testamentary trust could not be carried on in consequence of the trustees being equally divided in opinion, the Court, on the petition of the liferenter, sequestrated the trust-estate and appointed a judicial factor.

Judicial Factor—Trust—Appointment—Expenses.—Circumstances in which certain testamentary trustees, who had unsuccessfully opposed the appointment of a judicial factor, were found liable in expenses.

MISS AGNES DALGLEISH STEWART died on 28th January 1892. Her 1st Division estate consisted of a villa and grounds at Dunblane, and of moveable property worth about £6000.

Miss Stewart left a trust-disposition and settlement dated 1st March 1883, whereby she assigned and disposed her whole estate to Rev. D. Morrison, then minister of Dunblane, afterwards of the Tron Church, Edinburgh, John Hunter Bowie, William Hunter Bowie, and William Alexander, solicitor, Dunblane, as trustees. By this settlement she directed her trustees, after paying debts and legacies, to pay the income of the whole residue to her niece, Miss Dorothea Gordon Stewart, during her life, and "upon the death of the said Dorothea Gordon Stewart," to convey the

188.
July 14, 1892.
Stewart v.
Morrison.

capital to Mrs Margaret Stewart or Bowie, a sister of the testatrix, and to another sister, Mrs M'Laren, equally between them, "whom failing, to their respective children who may survive the liferentrix." The fee of the residue was declared to vest in the residuary legatees on the death of the liferentrix. Power was given to the trustees to appoint factors or law-agents, who might be of their own number, with the usual remuneration.

On 29th June 1892 Miss Stewart, the liferentrix, presented a petition praying the Court "to sequestrate the trust-estate, and, if necessary, to remove" all the trustees and to appoint a judicial factor.

The petitioner stated that all the trustees had accepted office, "but they have differed among themselves in regard to the appointment of a law-agent to the trust, with the result that although five months have elapsed since the truster's death, nothing has been done by them in the administration of the trust. No inventory of the deceased's personal estate has been given up, and confirmation has not been taken out in favour of the trustees and executors. The revenue accruing upon the trust-estate is not being uplifted, and the petitioner is being kept out of the enjoyment of the liferent conferred upon her by the said trust-disposition and settlement. The petitioner understands and avers that of the securities of the estate some are still in the hands of one of the trustees, Mr Alexander, who was formerly law-agent of the deceased, while others were removed from a safe in the deceased's house by the Messrs Bowie, and are in their possession. There is no one with whom the four trustees are agreed that the custody of the documents should be. The petitioner believes that there is no prospect of the deadlock in the administration of the trust being removed, and in these circumstances it is necessary that the said Rev. David Morrison, John Hunter Bowie, William Hunter Bowie, and William Alexander should be removed from the office of trustees, and that a judicial factor should be appointed to administer the trust-estate."

Separate answers were lodged by (1) Mr Morrison and Mr Alexander: (2) the Messrs Bowie, Mrs Bowie, and Mrs M'Laren, the presumptive fiars. From these and from the documents produced with them, the following appeared to be the facts:—

At the time of Miss Stewart's death Mr Morrison was absent from the country on a brief visit to the Continent. On the day of her funeral, 3d February 1892, Mr Alexander could not attend, but was represented at the meeting of relatives held after the funeral by a clerk, who took with him the settlement which Mr Alexander, the deceased's law-agent, had prepared. Mr W. H. Bowie being also absent, Mr J. H. Bowie was the only trustee present at this meeting. He intimated to the clerk that as the only executor present he had resolved to put the affairs into the hands of Messrs Jenkins, solicitors, Stirling.

On 4th February Mr Bowie directed Messrs Jenkins to apply to Mr Alexander for the will and all the papers of the deceased, and to call a meeting of trustees for the 9th "for general purposes, and also for the nomination of the following parties as trustees"—(Here followed certain names).

Messrs Jenkins having acted on this letter, Mr Alexander declined to admit that Mr Bowie was entitled so to proceed. He did not attend the meeting on the 9th, but he intimated to the trustees (as he maintained to be usual for the agent of the deceased in such circumstances) their appointment as trustees, and also that after having received notice of their acceptance of office, he would call them together for the election of an agent.

On 9th February the Messrs Bowie attended the meeting called by Messrs Jenkins. It had been intimated prior thereto that Mr Morrison

would return on 13th February. According to the minute of their meeting produced with their answers, it was "intimated that there had also been invited to this meeting the Reverend David Morrison, Edinburgh, formerly of Dunblane, and Mr William Alexander, writer, Dunblane, also nominated as trustees and executors, neither of whom had replied nor sent any explanation of absence. It was stated by Mr John Hunter Bowie that Mr Morrison is abroad. The said John Hunter Bowie and William Hunter Bowie accepted of the offices of trustee and executor conferred upon them, and, as a majority and quorum of the trustees and executors resident in Scotland for the time being, appointed Messrs A. & J. Jenkins, writers, Stirling, to be the law-agents in the trust. They authorised and instructed the agents to apply to Mr Alexander for delivery of the settlement, security, and other papers in his hands, and also to take possession of any important documents that may be found in deceased's house, and also to take the usual steps for procuring confirmation," &c.

No. 188.

July 14, 1892.
Stewart v.
Morrison.

Mr Morrison returned to Scotland on 13th February, and Mr Alexander called a meeting for 1st March to consider as to acceptance, and thereafter to appoint an agent. All the parties met on that day. Mr Morrison and Mr Alexander accepted office, and the former proposed the latter as agent, but the Bowies maintained that a meeting for these purposes had already been held. They left the meeting, and on the same day, maintaining that they were the only trustees, they took possession of certain of the trust securities, which were in a safe in Miss Stewart's house. The others, with the settlement, remained in Mr Alexander's possession.

On 7th March Mr Alexander wrote to Mr J. H. Bowie, stating that "with the view of removing" the "deadlock in the trust affairs, if possible, I have resolved with the Rev. Mr Morrison's acquiescence, not to accept, or rather to withdraw, my acceptance of the office of law-agent, to which I was appointed by two of the trustees, provided Messrs Jenkins are withdrawn as nominees for that office." He intimated that he and Mr Morrison were willing to concur in the appointment of a neutral law-agent. This proposal was rejected.

In their answers Messrs Morrison and Alexander stated that both the Messrs Bowie were undischarged bankrupts, and that in certain events their interests might conflict with the interests of the trust.

They further stated;—"In the whole circumstances Mr Morrison and Mr Alexander think that unless Messrs Bowie will adopt a more reasonable course of conduct in connection with the trust, the only alternatives left are either to appoint a judicial factor upon the estate or to remove Messrs Bowie (or Mr W. H. Bowie) from the office of trustee, leaving the remaining trustees free to proceed with the due administration of the trust. There has been no failure in duty on the part of the present respondents, and they are quite prepared to proceed with the administration of the trust as soon as they are permitted to do so."

The Messrs Bowie denied at the bar that there was any danger of a conflict between their interest and those of the trust. In their answers they stated that the responsibility for delay rested with Messrs Morrison and Alexander, and that the petition was unnecessary, further, that the presumptive fiars opposed it.

The petitioner argued;—"The admitted facts were that nothing had been done in the trust in consequence of a dispute between the trustees. No confirmation had been taken out, and no management existed. In such circumstances she was entitled to have a factor appointed.¹ It was

¹ Forbes v. Forbes, Feb. 14, 1852, 14 D. 498, 24 Scot. Jur. 248; Abbot v. Wyse, July 19, 1881, 8 R. 983.

No. 188.
July 14, 1892.
Stewart v.
Morrison.

worthy of notice that the expense would fall upon herself. Removal of the trustees was only prayed for "if necessary"; the petitioner did not press for that.

The argument for the other parties appears from their answers quoted above.

LORD PRESIDENT.—I think that we should sequester this estate, and appoint a factor. It is not necessary to enter into the merits of the dispute between the trustees with any minuteness. It is sufficient to say that there is a deadlock in the administration of this trust. I think that the liferenter—more especially as the cost will fall upon her—is well entitled to come to the Court and to say that this cannot longer go on, and that the Gordian knot must be cut.

I am constrained to say that I think that the responsibility rests with the Messrs Bowie. At the outset they acted precipitately, and in a manner which boded ill for the fair administration of a trust in which diverse interests are involved. I think the other two trustees, Messrs Morrison and Alexander, were right in not retiring, and in remaining in the trust to resist the course taken by the Bowies, which was arbitrary, and indicated a disposition which was not likely to inspire confidence. And I think further that they were justified in not leaving this estate, in which there are diverse interests, in the hands of gentlemen who are undischarged bankrupts, and whose interests are identified with those of the prospective fiars. I should not therefore contemplate the resignation of Messrs Morrison and Alexander as a satisfactory solution of the difficulty, and I am of opinion that the only satisfactory solution is to sequester the estate, and appoint a factor.

LORD ADAM.—I am of the same opinion, and on the same grounds.

LORD M'LAREN and **LORD KINNEAR** concurred.

The petitioner moved for expenses against the respondents Messrs Bowie, and Mrs Bowie and Mrs M'Laren.

LORD PRESIDENT.—If the Messrs Bowie had come here assenting to the proposition that a factor be appointed, and objecting only to their removal as involving some stigma upon them, I should not have been disposed to make any finding of expenses against them. It is to be observed that this remedy of removal is frequently demanded in such petitions, and I have sometimes thought that if that demand were not made persons who come forward to lodge answers would be less likely to do so, but would allow a factor to be appointed without objection. But the Bowies in the present case have come forward and maintained strenuously that they were in the right. They must be found liable in expenses.

THE COURT pronounced this interlocutor:—"Sequester the trust-estate of the deceased Miss Agnes Dalgleish Stewart . . . mentioned in the petition, and appoint Adam Davidson Smith, C.A., Edinburgh, to be judicial factor thereon . . . Find the petitioner entitled to expenses against the respondents John Hunter Bowie and William Hunter Bowie as individuals: Find the respondents Rev. David Morrison and William Alexander entitled to their expenses out of the trust-estate"; remit, &c.

CUMMING & DUFF, S.S.C.—J. FORSYTH, S.S.C.—Agents.

DAVID PEARSON (Miss Helen Harriot Reeve's Executor), First Party— No. 189.
Mackay—C. K. Mackenzie.

DAVID PEARSON (Thomas Reeve's Judicial Factor) AND OTHERS,
 Second Parties.—*C. J. Guthrie—J. M. Irvine.*

July 14, 1892.
 Reeve's Execu-
 tor v. Reeve's
 Judicial
 Factor.

Succession—Vesting—No gift apart from direction to pay—Legacy to daughter, whom failing, her issue.—A testator directed his trustees to pay the liferent of his estate to his widow, under burden of maintaining his unmarried daughters and such of his sons as should require assistance; after her death to pay an annual sum equally to his sons, and the balance of income equally among his unmarried daughters, while two remained unmarried; after the death of the widow, and the death or marriage of all the daughters but one, to dispose to his sons certain heritable subjects, but that under the burden of an annuity of £15 to the unmarried daughter so long as she should remain unmarried, and to pay "to each of my daughters, married and unmarried, without restriction, and not exclusive of the *jus mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one; and it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right equally among them to their mother's provisions." The sons were appointed residuary legatees.

The testator was survived by his widow, one son, and three daughters. After the death of the widow one daughter died leaving issue, and a second daughter, H., died unmarried; the third daughter, who survived, was unmarried.

In a question between the testamentary representatives of H. and her father's residuary legatee, *held* that a legacy or provision of £1500 had not vested in her, *diss.* Lord Young, who was of opinion that a legacy of £1500 vested in each of the daughters, subject only to the condition that if a daughter died before the period of payment, leaving issue, her legacy was to be paid to such issue.

THOMAS REEVE, of Edenpark, Cupar-Fife, died on 2d August 1843, ^{2D DIVISION.} leaving a trust-disposition and settlement dated 23d July 1836, and codicil thereto dated 22d June 1840.

By the trust-disposition and settlement he conveyed his whole estates to trustees, and directed them in the second place to pay the liferent of the trust-estate to his widow, "declaring always, and specially providing hereby, that my said wife shall be bound and obliged suitably to educate, aliment, and maintain such of my daughters as may be unmarried, so long as they remain unmarried, and also any of my sons who may be in circumstances to require such assistance, so long as it shall seem to my said wife necessary to afford such education and maintenance." In the third place, the trustees were directed, after the death of his widow, to pay an annuity of £100 equally among the testator's two sons, Thomas and John, and any other sons who might thereafter be born to him, and should have attained majority, the said annuity to be continued till the sons should be put into possession of their share of the testator's estate provided to them under the deed, and to aliment and educate such sons as might be in minority: In the fourth place, after the death of his widow, the trustees were to allow the testator's unmarried daughters the use and possession "during their lives, and while two remain unmarried," of his lands and estate of Edenpark. In the sixth place, the testator directed his trustees, after the death of his widow, "and after the death or marriage of all my daughters except one," to convey his heritable property in certain proportions to his two sons named, but that under burden of an annuity of £15 to the unmarried daughter so long as she should remain unmarried. In the seventh place, he made a provision which need not be quoted, as

No. 189. it was revoked by the codicil. He then provided that the residue of his estate should be divided among his sons equally.

July 14, 1892.
Reeve's Execu-
tor v. Reeve's
Judicial
Factor.

By the codicil the truster provided:—"And further, I do hereby revoke and recall the directions to my trustees contained in the seventh purpose of the foresaid trust, and in lieu and place thereof I do hereby direct and appoint them, from my trust-funds and estate (other than the subjects directed to be conveyed to my sons Thomas Campbell Twiss Reeve and John Milward Reeve), to pay to each of my daughters, married and unmarried, without restriction, and not exclusive of the *jus mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one: And it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right, equally among them, to their mother's provisions."

The truster was survived by his wife and by three daughters and one son, John Milward Reeve. Mrs Reeve, the truster's widow, died in 1868, one of the daughters died in 1871 leaving issue, another, Helen Harriot Reeve, died on 29th July 1891, unmarried. The third daughter, who survived, was unmarried.

In consequence of the event contemplated by the settlement, viz, the death or marriage of all the daughters but one, having occurred through the death of Miss Helen Harriot Reeve, a special case was presented for the opinion and judgment of the Court.

The first party to the case was David Pearson, C.A., Miss Helen Harriot Reeve's executor and trustee, and the second parties were Mr Pearson, as judicial factor on the trust-estate of Mr Reeve, the father, and the trustees of John Milward Reeve (who had died) as in right of the residue of that estate.

The following were the questions submitted:—" (1) Did a legacy or provision of £1500 from the estate of the said Thomas Reeve vest in the late Miss Helen Harriot Reeve? And if so"—(then followed two subordinate questions); "or (4) Does the said sum of £1500 continue to form part of the residue of the trust-estate belonging to said trustees of said John Milward Reeve?"

Argued for the first party;—A right to £1500 vested in Miss Helen Reeve *a morte testatoris* either absolutely, or, at all events, subject to defeasance in the event (which had not happened) of her leaving children. The vesting here was absolute, for there was no proper destination over. The mention of the issue of children was not a destination over to the effect of suspending vesting, for it was merely the expression of what the law would imply. The case therefore was within the principle of *Hay's Trustees*,¹ and not that of *Bryson's Trustees*.² But assuming that the gift was properly conditional, the condition was not suspensive of vesting, but only resolutive of it in the event of the condition being purified. The doctrine of vesting subject to defeasance was now well established in the law of Scotland, and had long been recognised in point of principle, as, for example, where the nearest heir of entail in existence took a vested right of fee in the entailed estate, subject to divestiture in the event of the birth of a nearer heir; or in the case of clauses of return or of devolution; or in the case of gifts to children as a class, which, as regarded existing children, were subject to partial divestiture by the birth of other children, or, it might be to total divestiture as regarded such child as should succeed to a particular estate.³ The modern development of the doctrine, how-

¹ *Hay's Trustees v. Hay*, July 19, 1890, 17 R. 961.

² *Bryson's Trustees v. Clark*, Nov. 26, 1880, 8 R. 142.

³ *Douglas v. Douglas*, March 31, 1864, 2 Macph. 1008, 36 Scot. Jur. 518.

ever, might be said to date from the case of *Gilbert's Trustees*¹ in the House of Lords; and it had since been very frequently applied.² The direction to pay to "each" of the daughters was the leading provision of the gift, and was therefore to be held as qualified by the subsequent provisions to the least possible extent, on the principle of the cases which established that where there was an initial gift to a family of children in fee followed by a gift of their shares to the daughters in liferent and their issue in fee, the daughters took a fee subject to divestiture only in the event of their leaving issue.³ That was also the rule in England.⁴

No. 189.
July 14, 1892.
Reeve's Executor v. Reeve's Judicial Factor.

Argued for the second parties;—Vesting was suspended till the period of distribution. The alternative was not vesting or intestacy, but vesting or residue, and no independent interest in a sum of £1500 had from the first been carved out of the general estate in favour of each of the daughters. On the contrary, the obvious scheme of the deed was to keep the estate together as a *unum quid* until the period of distribution. The only words of gift were in the direction to pay, and that direction to pay contained a proper destination over, for the gift to the issue of a predeceasing daughter could not here be reasonably read as nothing else than the expression of the *conditio si sine*. Further, the condition postponing payment was one personal to the legatees. It was true that the direction was to pay to each of the daughters, but that had reference to the possibility of the period of payment arriving in consequence of the marriage, not the death, of the daughters.⁵

At advising,—

LORD JUSTICE-CLERK.—The late Mr Reeve, by a codicil to his will, by which he left his estate to trustees, directed,—“And farther, I do hereby revoke and recall the directions to my trustees contained in the seventh purpose of the foresaid trust, and in lieu and place thereof I do hereby direct and appoint them, from my trust-funds and estate (other than the subjects directed to be conveyed to my sons Thomas Campbell Twiss Reeve and John Milward Reeve), to pay to each of my daughters, married and unmarried, without restriction, and not exclusive of the *jus mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one: And it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right, equally among them, to their mother's provisions.” By his will he left the residue of his estate to his sons, born or to be born.

¹ *Taylor v. Gilbert's Trustees*, July 12, 1878, 5 R. (H. L.) 217.

² *Steel's Trustees v. Steel*, Dec. 12, 1888, 16 R. 204; *Gregory's Trustees v. Alison*, April 8, 1889, 16 R. (H. L.) 10; *Haldane's Trustees v. Murphy*, Dec. 15, 1881, 9 R. 269; *Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709.

³ *Lindsay's Trustees v. Lindsay*, Dec. 14, 1880, 8 R. 281; *Dalglish v. Bannerman's Executors*, March 6, 1889, 16 R. 559; *Logan's Executors v. Ellis*, Feb. 7, 1890, 17 R. 425.

⁴ *In re Bennett's Trusts*, 1857, 3 Kay and Johns. 280; *Strother v. Dutton*, 1857, 1 De Gex and Jon. 675; *Gray v. Garman*, 1843, 2 Hare, 268; *Williams on Executors*, 8th ed., vol. 2, p. 1265.

⁵ *Authorities*.—*Lang v. Barclay*, July 20, 1865, 3 Macph. 1143, 38 Scot. Jur. 95; *Stoddart's Trustees*, March 5, 1870, 8 Macph. 667, 42 Scot. Jur. 330; *McAlpine*, March 20, 1883, 10 R. 837; *Waters' Trustees v. Waters*, Dec. 6, 1884, 12 R. 253; *Ross' Trustees*, Dec. 18, 1884, 12 R. 378; *Muirhead v. Muirhead*, May 12, 1890, 17 R. (H. L.) 45; *Fyfe's Trustees v. Fyfe*, Feb. 8, 1890, 17 R. 450; *Forbes v. McCondach's Trustees*, Dec. 12, 1890, 18 R. 230.

No. 189.

July 14, 1892.
 Reeve's Execu-
 tor v. Reeve's
 Judicial
 Factor.

The circumstances which have given rise to the present question are these: The testator had three daughters who survived him. One married and died leaving issue. One died unmarried. One still survives, and thus the event has occurred which in the clause I have quoted is signified as the event on the occurrence of which payment is to be made to daughters.

The question raised is, whether under the words of the codicil the sum of £1500 vested in the unmarried daughter who is dead, so as to be carried by her will, or whether the £1500 which might have fallen to be paid to her forms part of the residue of Mr Reeve's estate, she having died unmarried before the occurrence of any one of the possible events contemplated as being the period of payment or distribution.

The argument on behalf of her trustee and executor is that a bequest of £1500 vested in the deceased unmarried daughter *a morte testatoris*, and became payable on the death of the widow and the death or marriage of all the sisters but one, and that accordingly it is carried by her will to her executor.

I am of opinion that this contention is unsound. I do not consider it to be consistent with any natural reading of the clause itself, and I find nothing in the will or codicil to indicate an intention on the part of the testator that there should be such vesting. The scope of the truster's provisions for daughters is that while his widow survives and enjoys her life she is to maintain them; on her death, and as long as two remain unmarried, the whole of the daughters are to receive equally the free rents, interest, and produce of the estate, except a small fixed annuity to their brothers, and on the event occurring of only one daughter remaining unmarried, then £1500 is to be paid to each daughter, and £1500 to the children of any daughter predeceasing that event. Thus the daughters were provided for with certainty during their lives, and if they married their issue were provided for in the event of their death. If none of them should marry, then the period of payment could not come till all were dead but one. If, then, it were to be held that vesting took place *a morte testatoris*, it would be necessary to read the codicil as meaning in one contemplated event, that in respect of the death of A B, leaving only one sister surviving, payment is to be made to A B, and to her sisters who predeceased her, of the sum of £1500 to each of them. I do not know of any such reading of a bequest being adopted where another and perfectly natural reading can be given to the words. It appears to me that they mean, taken along with the rest of the testamentary writings, that on a certain event occurring which puts an end to daughters unmarried living together, the annual payment of produce is to cease, and payment is to be finally made to those then alive of a sum of £1500 each, and £1500 to the children of any who predeceased. It seems to me that any other reading is constrained and unnatural, and necessitates the assumption that a testator intends to make a bequest to the same person whose own death may be a condition of the bequest coming into operation. A direction to pay to a daughter on that daughter's death would, if so expressed, be a surprising provision. But that is what is expressed in this provision if the words "pay to each of my daughters, married and unmarried," mean that in the possible event of the period of payment arising by the death of the second last unmarried daughter—the event which actually occurred—that daughter is to have by the bequest a vested interest *a morte testatoris*. For it is only from the order to pay in a certain event that the vesting is to be implied.

In the view I take it is unnecessary to consider any question of vesting sub-

ject to defeasance. I have had an opportunity of reading the opinion of my brother Lord Rutherford Clark, in which I concur, and therefore I have only briefly stated my views upon the question. I come to the conclusion that the reading of the codicil which is consistent with its words, and which presents no startling character of bequest, but is quite consistent with every reasonable object the testator can have had in his mind, is the true reading, and that it should be adopted accordingly.

No. 189.
July 14, 1892.
Reeve's Executor v. Reeve's Judicial Factor.

LORD YOUNG.—This is a peculiar case, that is to say, the settlement of which we are asked to declare the import is a peculiarly drawn document, and on that account the question is not so interesting as it might otherwise have been, but the case is no doubt one of importance to the parties, and the decision of it involves considerations of some general interest. Put abstractly, the question is, whether a legacy or provision of £1500 did or did not vest in Miss Helen Harriot Reeve, who died on 29th July 1891. Mr Reeve, her father, left a trust-disposition and settlement, and also a codicil, and the answer to the question depends on the construction and import of the provision in the codicil which your Lordship has read. I understand it to be maintained, in the first place, that on a construction of the words which precede the special declaration regarding the issue of a predeceasing daughter, the provision is inconsistent with vesting *a morte testatoris*, and I understand it to be maintained further that even if these words, taken by themselves, import vesting *a morte testatoris*, the special provision which follows in favour of the issue of a predeceasing daughter suspended vesting as being a provision of the nature of a substitution or destination over. I think it may be convenient to consider these two points separately, although there can be no objection to considering them in combination also, and accordingly I proceed, in the first place, to consider whether the words which precede the special provision in favour of issue do or do not import vesting *a morte testatoris*.

Now the provision here is in the form—and most properly in the form—of a direction to trustees. I say most properly in the form, for we not unfrequently meet with trust-deeds in which the testator conveys his whole property to trustees for purposes to be named, and then in a subsequent part of the deed goes on to make provisions by way of direct gift to the legatees, regardless of his former divestiture in favour of the trustees. That is inaccurate conveyancing. It is, I think, Lord St Leonards who expresses the difference between the two things by saying that a man who has disposed of his property by means of directions to trustees is not “his own conveyance,” or is not “his own conveyancer”—the statement is expressed in both ways in the books. What he means is, that there is a difference between a testator who makes a gift by way of direct conveyance to the beneficiary, and one who merely expresses his will by directing his trustees to do what is necessary to convey the subject to the beneficiary. In the former case—where the man is his own conveyance or conveyancer, all the technicalities of conveyancing come in, but where the testator merely expresses his will by giving directions to trustees, a much wider latitude of construction is permitted in judging of the meaning of his settlement. I make these observations because of the remark which is often made in such cases, and was I think made here, that a direction to trustees to pay is not such a distinct indication of the testator's intention to benefit the legatee as is found where the legacy is in the form of a direct gift to the legatee. I think that the testator

No. 189. here took the proper course, for he had previously divested himself of his whole estate in favour of his trustees, and consequently a direction to them to pay the money when the period of payment arrived was the proper form to adopt.

July 14, 1892. *Reeve's Executor v. Reeve's Judicial Factor.*

The direction is thus expressed, confining it to the particular branch of the argument with which I am at present dealing—the trustees are directed “to pay to each of my daughters . . . the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife.” Now, suppose that the direction had stopped there, what would have been the period of vesting? There is no doubt—it is too clear for argument—that vesting would have taken place *a morte testatoris*, and that in accordance with the rule that vesting is held to take place *a morte testatoris* unless there is something to the contrary, and it is nothing to the contrary that the period of payment may not and does not arrive until after the death of the legatee. A sum of £1500 therefore vested on the death of the testator in each one of his daughters who survived him, although payment is not to be made until the death of their mother, so that with respect to the sum left to any one of the daughters who should die before her mother, since it cannot be paid into the daughter's own hand because her hand is in the grave, it will go to her representatives, legal or voluntary, and as it was possible that all the daughters might have predeceased their mother, it might have happened that the shares of all of them would have come to be paid to their representatives, legal or voluntary.

But the provision which I am now considering does not stop with the words which I have just quoted, for the direction is to pay at the first term of Whitsunday or Martinmas after the death of my wife, “and after the death or marriage of all my daughters but one.” Now, do these words “after the death or marriage of all my daughters but one,” make any difference in the result which would have been reached had these words been absent? I put the case of all the daughters dying in the lifetime of their mother, in which event their legacies would have passed to their representatives, legal or voluntary, and the only material point in the additional words which I am now considering is that they shew that payment may not take place until after the death of the legatee, but I do not think that that interferes with vesting in the least. It was said—and I rather think your Lordship's language gives some countenance to the view—that the provision is to be regarded as a provision for payment after the death of the legatee. I am unable so to read it. The period of payment is not the death of the legatee, although I know nothing in the world to prevent a testator from directing his trustees to keep a legacy in their own hands until the first term of Whitsunday or Martinmas after the death of the legatee. It will in that event have to be paid to the representatives—legal or voluntary—of the legatee. I know nothing to prevent a testator from giving such a direction, the meaning of which is that payment is to be made, not to the legatee, but to the representatives of the legatee. But if any inference adverse to vesting is to be drawn from a direction to pay at the first term after the death of the legatee, you have not got such a direction here. You have one period of payment and one only for all the daughters. Suppose that they had all married in the lifetime of their mother. When in that event would have been the period of payment? It would have been the death of the mother, at which date it was possible that none of the daughters should have died, yet they would have received payment. But the cases which I have

figured shew that the law is not startled by the fact of payment of a legacy No. 189. having to be made to the representatives of a deceased legatee. Suppose then that all the daughters had died in the lifetime of their mother, unmarried and therefore childless. Is it to be said that the testator's son is to be substituted to their legacies and no account taken of their legal or voluntary representatives? I cannot assent to that. I think the case is similar to those which I began by putting, and with respect to which the law is not doubtful. It so happened that it was the death of the legatee which brought about the period of payment, but that was an accident. It might have arrived, as I have said, before the death of any of the daughters, and it might not have arrived until after they had all died.

July 14, 1892.
Reeve's Execu-
tor v. Reeve's
Judicial
Factor.

I have now to consider the special provision and declaration "that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right equally among them to their mother's provisions." Now, I think that this declaration does not come within the rule relative to a destination over. I think it is of the nature of a special declaration with respect to a contingency which may or may not happen, and which here, in point of fact, did not happen. If a testator directs that if his daughter should die before any event you choose to figure leaving issue, or it may be, leaving boys only and not girls, or girls only and not boys, then the issue, or the boys or the girls, are to take their mother's legacy, I think that is not a case of a proper destination over, but is merely a special declaration with reference to a contingency which may or may not happen, and that it cannot interfere with vesting in the daughter if that is the result of the preceding parts of the deed, as I think it was here. Now, that is the whole case. It is a declaration that if any of the testator's daughters should die before the period of payment leaving issue, then in that event, and in that event only, the rule that her legacy should go to her representatives—legal or voluntary—shall not apply, but the trustees shall pay it to her children. Therefore, without entering upon any technical discussion about vesting and divesting, I give effect to that construction as being the will of the testator, which I am satisfied it was. If the daughter here had left children, I should then have held that there was a direction to the trustees to pay to these children, the ordinary rule of vesting, which gives the legacy to the representatives—legal or voluntary—of the legatee being in that event displaced in favour of a direction to pay to the children of the legatee.

I have thus come to the conclusion that vesting took place *a morte testatoris*, and that the period of payment was fixed by the death of the daughter whose death brought the period of payment forward.

LORD RUTHERFURD CLARK.—The question is, whether Miss Helen Reeve took a vested interest in the sum of £1500 bequeathed by the codicil?

The form of the legacy is a direction to pay on the occurrence of an event which did not happen in the lifetime of the legatee. But this is not conclusive, for I recognise the soundness of the rule which received effect in the case of *Hay's Trustees*, 17 R. 961, where it was held that a legacy in this form may vest *a morte testatoris*, provided nothing appears to shew a contrary intention. Such a bequest is regarded as absolute though the payment is postponed.

But we are not dealing with that simple case. Putting aside the event of marriage for the present, the term of payment is fixed by the life of the legatees,

No. 189. a circumstance which at once creates a material difference between the present case and that of *Hay's Trustees*. There it was uncertain whether the legatee should or should not survive the event on which the legacy was payable, viz, the death of a liferenter. But it was possible that he might, and that the payment might be made to him personally. Here it is certain that the trustees could pay to no daughter but one, and until the death of Helen it was uncertain who should be that one.

July 14, 1892.
Reeve's Executor v. Reeve's Judicial Factor.

I find great difficulty in supposing that the testator intended the legacy to vest at his death. Considering that a daughter who died before the term of payment could have no personal enjoyment of the legacy, such vesting would amount to a mere power of disposing after death, to the prejudice of the rights of the testator's residuary legatees. I see nothing to indicate that the testator meant to create such a right, more especially when I find that he made a special provision for the maintenance of his unmarried daughters until the term of payment arrived. I cannot imagine that he intended to provide for a daughter when all necessity for a provision ceased, or that he meant to give her the power of disposing of a fund of which he denied her all personal enjoyment.

But it was pointed out that the direction is in favour of "each of my daughters," and it was maintained that these words receive no meaning if the benefit of the bequest is confined to one. There would to my mind be great force in the argument if there was no case in which each of the daughters could take. But it was possible. For the payment is to be made on the marriage as well as on the death of all the daughters but one, and if two were married, and all survived the widow, it is plain that each would be entitled to a legacy of £1500.

It was further urged that inasmuch as there was but one direction, though conditional on two different events, its words must receive precisely the same construction with reference to each event. I am disposed to think that this argument is well founded; but I cannot hold as a necessary inference that the direction must be read as making an absolute gift to each daughter with a postponed term of payment. To read it in that sense is to hold that the testator bequeathed a legacy to his daughter coupled with the declaration that it was not to be paid to her till her death. It is open to serious doubt whether such a legacy could have had any legal effect. But I do not think that we would be justified in putting such a meaning on any will unless the words would bear no other. I give the direction the only sensible meaning which I think it can bear when I construe it as in favour of such daughters only as survived the term of payment.

To my mind this is the only admissible construction, and it becomes the necessary construction when we have regard to the destination in favour of the issue of a predeceasing daughter. In the ordinary case a declaration that the issue of a child shall take the parent's share does not prevent vesting *a morte testatoris*. For it is merely the expression of what the law would imply, and it is read as referring to the case of a parent predeceasing the testator. Here such a construction is impossible, for the destination is expressly in favour of the issue of a daughter who has predeceased the term of payment, which necessarily includes the case of her surviving the testator. There is therefore a conditional institution of her issue, or a destination over in favour of the issue in case of the parent dying before the term of payment. The issue would take in their own right, and not as the heirs of their mother. The case therefore falls within the rule of *Bryson's Trustees*, 8 R. 142, and not of *Hay's Trustees*.

It is true that the destination over is conditional, but only in the sense that until the death of the legatee it is uncertain whether the destination will take effect. There is not the less a destination over. But when I hold that a married daughter who predeceased the term of payment and had issue could not take a vested interest, the case is, I think, decided. For an unmarried daughter cannot be in a different position. The rights conferred on the daughters are precisely equal, for they are constituted by precisely the same words.

No. 189.
July 14, 1892.
Reeve's Executor v. Reeve's Judicial Factor.

There is no room for the doctrine of vesting subject to defeasance, for in my opinion nothing vested in the daughters.

LORD TRAYNER.—I concur in the opinion just delivered by Lord Rutherford Clark. I would like to say in addition, that having regard to the whole scope of the deceased's testamentary writing, I gather it to have been his intention that his daughters should take no vested right in the sums directed to be paid to them unless they survived the period of payment. It was in the testator's mind, in the first place, to provide for his family so long as they lived in family together. Accordingly he directed the interest and produce of his whole estate to be paid to his widow during her lifetime, putting upon her the burden of maintaining and educating the children. After his widow's death, and so long as two or more of his daughters survived unmarried, the revenue of the estate was to be paid to them subject to an annuity of £100 to go to two sons who were named, and the aliment and education of his other sons if there were any. On the death or marriage of all his daughters but one the estate was to be distributed. There was no use keeping up a family establishment for one unmarried daughter, and accordingly when the family reached this condition the shares of the estate provided to the children were to be paid over, so that each had his or her own share. But if a daughter predeceased the term of payment, leaving issue, it was the desire of the testator that such children should take their predeceasing parent's share; and this was so declared as shewing the testator's intention to favour such children rather than the predeceasing child's representatives other than children. In short, if a daughter predeceased the term of payment, leaving issue, that issue took the parent's share in preference to anybody else, but if the daughter predeceased the term of payment without issue the testator intended the share which would have gone to that daughter had she survived to go to his residuary legatee rather than to anyone to whom the daughter might have wished to leave it. The daughter had been provided for during her lifetime, and, if she predeceased the term of payment, took nothing, and could test on nothing. This I take to be the testator's intention, and it is given effect to by the judgment which your Lordships now propose to pronounce.

THE COURT answered the first question in the negative, and the fourth in the affirmative, and found it unnecessary to answer the second and third.

MELVILLE & LINDESAY, W.S.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

No. 190.

MRS LOUISA WARRAND OR FORBES AND OTHERS (Forbes' Trustees),
Pursuers (Respondents).—*Johnston—W. Campbell.*July 14, 1892.
Forbes' Trustees v. Davidson.HUGH DAVIDSON, Defender (Reclaiming).—*D.-F. Balfour—Guthrie Smith.*

Servitude—Thirlage—Agreement by suckeners to pay annual fixed sum—Discontinuance of mill.—By deed of submission dated in 1814 between certain persons "proprietors connected with the sucken and thirlage of the meal mill of Nairn" on the one part, and the proprietors of the mill on the other, on the narrative that it was expedient that the servitude of thirlage should be "compensated or commuted by a fixed annual payment" in lieu and satisfaction of the right of thirlage, and of all services, prestations, and restrictions incident thereto; and in order to prevent disputes in the exaction and payment of the multures and sequels at the mill; and that the intake and mill run of the mill had been attended with inconvenience and loss to the proprietors of the mill and to the proprietors and tenants astricted, and that the millowners were "willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken," on payment of an annual sum by each of the parties submitters as compensation in lieu of multures, sequels, and mill services—the parties therefore submitted to the arbiter all differences and disputes presently subsisting between them with regard to the said annual compensation, declaring that this compensation should in no ways prejudice the proprietors of the mill of their claim to out-sucken multures.

By decree-arbital the arbiter fixed the sums payable by the respective heritors and suckeners, as in full of all demands that the proprietors of the mill could have against the said heritors and suckeners for multures, sequels, and services, and ordained the proprietors of the mill to accept the same yearly and termly in all time coming.

In 1878 the mill was sold, the disposition conveying, *inter alia*, the "hail multures, sucken, sequels, and knaveships of the said mill, and hail parts, privileges, and pertinents thereof." The purchasers having demolished the building, one of the persons found liable in an annual payment under the decree-arbital declined to make any further payment. The purchasers of the mill then brought an action to enforce payment, but admitted that they had no intention of rebuilding the mill.

Held (rev. judgment of Lord Kincairney, *dub.* Lord Rutherford Clark), that: on a sound construction of the submission and decree-arbital, it was a condition of exacting the payments found due by the arbiter that the mill should be in a working condition, and therefore, as it was admitted that there was no intention of rebuilding the mill, that the defender fell to be *assoiilzied*.

Question, whether the original obligation to pay multures had been converted by contract into a personal obligation.

2D DIVISION.
Lord Kincairney.

In June 1891 the trustees under the trust-disposition and settlement of the late Arthur Forbes of Culloden brought an action against Hugh Davidson of Cantray, in the county of Nairn, in which they concluded for declarator "that the defender, as a proprietor of lands in the sucken or thirlage of the mill or meal mill of Nairn, and as heir-at-law of or otherwise representing the deceased Sir David Davidson, sometime of Cantray, and the deceased Hugh Davidson, Esq., sometime of Cantray, and the defender's heirs and successors in the said lands, are bound to make payment to the pursuers, as heritable proprietors of the said mill, and their heirs and successors in the said mill, of the sum of £4, 1s. 4½d., being the reduced rate of the converted multures, sequels, and services pertaining to the said mill from the said lands, under and in terms of" the submission, decreet-arbital, and agreement after mentioned, "and that yearly and in all time coming during the not redemption thereof, at the term of Candlemas in each year"; and they further concluded for payment of

£55, 18s. 8½d., "being the amount of the arrears of said converted multures due by the said deceased Hugh Davidson, Esq., and by the defender," as at Candlemas 1891, with interest. No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

The pursuers set forth as their title—(cond. 1) that in 1878 their author, Forbes of Culloden, had purchased the Nairn Mills, conform to disposition in his favour granted by Arthur and Matthew Cant, dated May 1878, and duly recorded. "By said disposition there were conveyed, *inter alia*, 'All and Hail the two halves of the Mill of Nairn . . . together with the mill-house and houses at Milltown following the said two halves of the said mill, hail multures, sucken, sequels, and knave-ships of the said mill, and hail parts, privileges, and pertinents thereof.' The said disposition also conveys the granters' 'whole right, title, and interest, present and future, in the whole lands, mills, and other subjects hereby disposed, with their pertinents.' It also contains the usual clause of assignation of writs, and in the inventory annexed thereto special mention is made of the submission and decree-arbital" mentioned in the summons.

The submission referred to in the summons was dated May and June 1814, and was in these terms:—"The parties following, *videlicet*, The Right Honourable John Lord Cawdor, Sir David Davidson of Cantray," and others, "proprietors connected with the sucken and thirlage of the meal mill of Nairn upon the one part, and Messrs Arthur Cant and James Houston, proprietors thereof, upon the other part, Considering that the servitude of thirlage and right of mill services incident thereto are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the grounds, and by occasioning troublesome and expensive litigation, and that it is highly expedient that such servitude should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining; and in order to prevent any disputes which may arise in the exaction and payment of the multures and sequels at the meal mill of Nairn, and considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services; and the said parties submitters having entire trust and confidence in the knowledge, skill, and ability of Sir George Abercromby of Birkenbog, Baronet, they hereby submit and refer to him as sole arbiter, chosen by and between the said parties, all differences and disputes presently subsisting between them with regard to the annual compensation which the said parties proprietors connected with the thirlage of Nairn ought and should pay to the said Messrs Arthur Cant and James Houston, as proprietors of the said meal mill of Nairn, for their respective multures, sequels, and mill services, now pertaining thereto, and the term of payment of such annual compensation: But declaring that this compensation shall in no ways prejudice the said Arthur Cant and James Houston of their claim of outsucken dues for such corn as may be ground at their mill either by the parties submitters, their tenants, or others: Declaring also that the present submission shall not affect the proprietors for such lands as are presently under lease until the expiry of these leases, but that the tenants of these leases shall con-

No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

tinue to pay and perform the present multures and services until the expiry of their leases, or, in their option, accede to the compensation to be granted by this submission, and decreet-arbitral to follow hereon: But declaring also that this option shall not be in the power of these tenants unless they shall accede thereto previous to a decree being pronounced in this submission, with power to the said arbiter to receive the claims of parties, take all manner of probation thereanent by writs, oaths of parties, or witnesses, as he may think proper and fit for determining the matters hereby submitted: And whatever the said arbiter shall determine in the premises . . . the parties submitters hereby bind and oblige themselves, their heirs and successors, to implement, fulfil, and perform."

The decreet-arbitral following on this submission was dated December 1814, and contained the following findings:—" *Primo*, I find that the annual compensation to be paid by the heritors and suckeners to the mill of Nairn who are parties to the aforesaid submission, in lieu and satisfaction of the multures, sequels, and services they presently pay and perform, shall, in all time coming, be the sum of £50, 10s. 1½d. sterling yearly, and that the said sum shall be exigible from the different heritors and suckeners in proportion following, viz., " *inter alios*, "Sir David Davidson of Cantray, the sum of £13, 0s. 6½d. sterling"; "and which proportions shall be in full of all demands that the proprietors of the mill can have against the said heritors and suckeners for multures, and sequels, and services: And I ordain the proprietors of the mill to accept the same accordingly, and that the commencement of the payment of said proportional sums of money shall be at the term of Candlemas 1816, for crop and year 1815, and so forth yearly and termly in all time coming: *Secundo*, I decern that the proprietors of such lands as are under lease shall not be liable in payment of the aforesaid proportional sum in so far as they may affect the lands under lease, until the expiry of these leases, but that the tenants of these leases shall continue to pay and perform the present multures and services until the expiration of the said leases: *Tertio*, I find and decern that this compensation shall in no ways prejudice or render ineffectual the claims of the said proprietors of the mill for outsucken dues on such corn as may be ground at their mill, either by the parties submitters, tenants, or others, and that the suckeners who are not parties to this submission shall be liable in the same multures and services as were formerly paid and performed by them: Declaring always that nothing herein contained shall invalidate or infringe any right competent to the proprietors of the mill when repairing the mill-dam, and the lead or aqueduct conducting the water to the mill, to take stones, turf, or other materials from the lands of any of the neighbouring heritors, or to deepen and clear the same, conform to use and wont."

The agreement referred to in the summons was entered into in 1866 between Arthur and James Cant, the proprietors of the mill of Nairn of the first part, and the suckeners of the said mill, including Hugh Davidson of Cantray (the father of the present defender), of the second part. In so far as here material, it provided that for the future the payments found due under the decreet-arbitral should be reduced by one-fourth, thereby reducing the annual payment due by Davidson of Cantray to £4, 1s. 4½d. (part of his lands having been previously sold). Such of the suckeners as chose were entitled to commute the reduced annual payment for a lump sum, but of this option Davidson of Cantray did not avail himself.

The pursuers stated that the defender's grandfather and father had paid the sums due by them under the decreet-arbitral and the agreement down to the crop 1879, but that since that date the defender had declined to pay anything.

The defender admitted that he had declined to pay since 1879. He explained that he and his authors had paid only so long as the mill was in a going serviceable condition, that it had been demolished in 1879, and that in consequence of an agreement with certain parties (the nature of which it is unnecessary here to explain), it was *ultra vires* of the pursuers to restore it. No. 190.
July 14, 1892.
Forbes' Trust-
tees v. David-
son.

The pursuers pleaded ;—(1) The defender, as heir-at-law of or otherwise representing on a passive title the said Sir David Davidson of Cantray and Hugh Davidson of Cantray, being liable to the pursuers in payment of the annual sum set forth in the summons, under and in terms of the decree-arbitral and agreement libelled on, and he having delayed or refused to make payment, the pursuers are entitled to decree as concluded for, with interest and expenses. (2) The pursuers are entitled to decree as concluded for, in respect that the said writs constitute a valid servitude, affecting the defender's lands ; and, *separatim*, in respect that such a servitude has been constituted by prescriptive possession.

The defender pleaded ;—(1) No title to sue. (4) The right to multures has been extinguished by the demolition of the subject, and the claim, so far as founded on the submission, is not enforceable, seeing that the pursuers are unable to fulfil their part of the contract.

A proof was allowed. The evidence shewed that the mill of Nairn had been demolished in 1879, and that the pursuers had no intention of restoring it.

On 26th March 1892 the Lord Ordinary (Kincairney) pronounced this interlocutor :—"Repels the pleas in law for the defender : Sustains the title of the pursuers, and decerns in terms of the conclusions of the summons : Finds the pursuers entitled to expenses," &c.*

* "OPINION.— . . . The questions are, whether under these circumstances the pursuers are *in titulo* to demand, and the defender under obligation to pay, the annual sum at which the multures and services for Cantray have been valued, and whether the obligation to pay it is a burden on the lands of Cantray ? I have found these questions difficult, but have ultimately formed the opinion that they should be answered in the affirmative.

"It is maintained by the defender that the obligation on the heritors was conditional on the continuance of the mill in a serviceable condition ; that no payments were due when it was not in such a condition, and that therefore no arrears were due, and that as the mill is now in a state of complete ruin, and as the owner has admittedly no intention of restoring it, the obligation had come to an end altogether.

"I cannot concur in that argument, and I think that by the award the sums allocated were imposed without reference to the future condition of the mill. Apart from the decret-arbitral and subsequent agreement the legal position was this :—The mill was the dominant tenement ; it was in no respect a servient tenement. There was no obligation to maintain it for the convenience of theucken. The heritors could not have insisted on its continuance. They were bound to take their grain to it to be ground as long as it was serviceable. When it was not serviceable they were not bound to do so, and were not liable to any action for abstracted multures. If the millowner chose to allow the mill to become unserviceable the only consequence was that he lost his multures.

"Now, the decret-arbitral does not purport to impose any new obligation on the owner of the mill in regard to its maintenance. Neither does it seem possible to imply, in the obligation to pay, a condition that the obligation was to be prestatable only so long as the mill endured. It is, on the contrary, found expressly and unconditionally that the allocated sums are to be paid in all time coming. The heritors had not before the agreement any right to insist that the mill should be kept up for their convenience, and they could certainly acquire no such right by being relieved of all obligation in connection with it. The

No. 190.

July 14, 1892.
Forbes' Trustees v. David-
son.

The defender reclaimed, and argued ;—The submission of 1814, and decree-arbital following upon it, might be regarded either (1) as fixing a

heritors remaining charged with annual payments were in this respect in the same position as those who had compounded by a lump payment, and it would seem out of the question to hold that these latter had any right to interfere in regard to the upkeep of the mill.

"The defender maintained that there were clauses in the decret-arbital which imported an obligation to maintain the mill. But I think that his construction is erroneous. It is true that it was clearly contemplated that the mill should be continued. But that is easily accounted for, because there were apparently other suckeners whose obligations were not commuted, and besides the parties submitters, and probably other persons outside of the sucken, might still resort to the mill and have their corn ground at the ordinary market rates. The defender referred in particular to the clause in the submission to the effect that the proprietors took the responsibility of supporting the intake and aqueduct in all time coming for their own improvement and for the immediate service and accommodation of the sucken. But it is, I think, clear that that does not mean that the millowner undertook an obligation to all the suckeners to maintain the intake and aqueduct, but only that he guaranteed the parties to the submission that no part of the cost of that maintenance should fall on them.

"The decret-arbital therefore appears to me to import and create an obligation on the heritors to pay the annual sums specified, which obligation was to be perpetual and entirely independent of the condition or continuance of the mill.

"The position of the millowners therefore was this—they were owners of the mill, and they were creditors in an obligation for the annual payment of the sums stipulated.

"The next question is, whether that right to the annual payments was a separate right unconnected with the mill, or was so connected with it and attached to it as to pass to the late Mr Forbes by the disposition in his favour of the mill and mill services. The pursuers have no special assignation to it, and if it was a separate personal right it would not, I think, be covered by the disposition or pass by the assignation to writs, on the principle of the case of *Spottiswoode v. Seymer*, 1853, 15 D. 458, and other authoritative cases to the same effect, of which the most recent is *Durie's Trustees v. Elgin*, July 19, 1889, 16 R. 1104.

"It was manifestly the intention of the parties to the submission that the right should be attached to the mill, and should pass with it, and there seems no doubt that the intention of the former millowners was to convey it to Mr Forbes, and I am of opinion that they did convey it. I think that it was not an independent right, but a right inseparable from the mill, and passing by a disposition of the mill and mill services, on the ground that the decret-arbital did not operate any change on the substance of the existing obligation which burdened the lands, and that it did not disburden the lands, but merely effected a change on the mode of the implement of the obligation.

"I think, therefore, that the defender's plea to title falls to be repelled. . . .

"The question remains, whether the obligation has been made a real burden on the lands of Cantray. No doubt the intention was to impose a real burden by substituting the payment of a regular annual sum for occasional payment of sums or the occasional delivery of victual. But it is not so clear that that purpose was effected.

"On the one hand, there is great difficulty in holding that lands are burdened with an obligation to pay money which does not enter the Register of Sasines; and it cannot escape observation that this case differs from cases of commutation under the statute in two respects—in the first place, because the decret-arbital has not the aid of statutory authority; and in the second place, because there is no provision for recording it in the Register of Sasines, as there is in the statute for recording the award of the statutory jury.

"I have come with hesitation to think that the manifest intention of the

money payment in extinction of the servitude of thirlage, or (2) as leaving the servitude still standing and merely liquidating the annual prestations in respect of it. In either view the defender was entitled to prevail. (1) The sounder view probably was the first—that the right of thirlage had been extinguished, and a merely personal obligation to pay money substituted. The submission proceeded on the narrative that thirlage was a nuisance and should be extinguished. The operative clause of the submission provided for the payment of “compensation” for this extinction,

No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

parties may receive effect on the ground already expressed, that the obligation was not changed in substance but only in the mode of performance, and that the sums made payable by the decret-arbitral and agreement are substantially of the nature of ‘dry multure.’

“I think that the obligation to pay dry multure, although it be an obligation to pay money which does not enter the Register of Sasines, has been recognised as a servitude affecting the lands astricted. Thus in *Stewart v. Erskine*, 1741, where the tenants of astricted lands had not resorted to the mill for forty years, but had paid dry multure, they were held to have acquired immunity from the servitude except the dry multure; and in *Kinnaird v. Drummond*, 1675, M. 10,862, a servitude of thirlage was held to be constituted by the payment of dry multure for forty years; and Erskine recognises the payment of dry multure as an unquestionable mode of constituting the servitude of thirlage—*Erskine ii.*, 9, 28.

“Whether this obligation be of the precise nature of an obligation to pay dry multure or no, the fact that there may be a servitude affecting the lands consisting of an obligation to continue the annual payment of a fixed sum in name of dry multure shews that the objection that this obligation does not appear in the Register of Sasines is not conclusive against the obligation being held to be charged on the lands.

“I therefore come to the conclusion that there was constituted by the decret-arbitral and agreement an obligation which subsisted notwithstanding the disuse of the mill, and which burdened the lands of Cantray and passed by the disposition of the mill and mill services, and which is now exigible by the pursuers as owners of the mill, although in disuse, against the defender and his successors in the lands.

“It was argued that if that view were correct it affirmed the existence of a servitude without a dominant tenement, which was said to be impossible, and contrary to the first principles of the law of servitudes.

“But the obligation of thirlage, although it has been generally regarded as a servitude, is certainly a servitude of a most anomalous kind, differing from all other servitudes in its most characteristic features, so that it has often been disputed whether it be properly speaking a servitude at all, and certainly the principles applicable to servitudes must be applied with much caution to questions of thirlage. It seems well settled that the total destruction of a mill does not of necessity extinguish the servitude of thirlage which was connected with the mill, but that the burden will revive if within forty years the mill be re-erected on the same site, or on a site as conveniently situated for the lands within the mill—*Kinloch v. Morrison*, December 18, 1830, 9 S. & D. 244, and *Harris v. Magistrates of Dundee*, May 29, 1863, 1 Macph. 833, 35 Scot. Jur. 487. If it be not re-erected within that time, apparently the obligation would be lost by the negative prescription, if not continued by written agreement. But that is no more than would happen by non-exaction of the burden for forty years although the mill existed—*M'Dowall v. Cleghorn*, December 2, 1882, M. 16,086.

“It is true that the insucken multures cannot be exacted so long as there is a mill capable of grinding the corn brought to it. But I cannot see that the want of the mill could afford a defence against a demand for dry multures, or a defence against a demand for payment of sums ascertained and imposed on the basis of unconditional and perpetual obligation, and of relief from all further litigation in reference to the mill. . . .”

No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

not for the "commutation" of the thirlage, and the decree-arbital determined what should be paid as compensation. Had the parties proceeded under the statute,¹ the money payment would have run with the lands, but they had not; consequently it was a personal obligation only. In that view the pursuers had no title, for the right to exact the money had not been assigned to their author—Forbes of Culloden. But (2) even if the servitude was regarded as still existing, the defender was entitled to prevail, for the mill had been demolished, and, it was not disputed, would never be restored; and that being so, the sums fixed by the arbiter, whether they were regarded as dry multures, or as commuted multures, could not be exacted, it being a condition of such exaction that the mill should be in existence. It was, at all events, the reasonable construction of the submission and decree-arbital, that the mill should be in existence as a condition of exacting the sums found due.

Argued for the pursuers;—Even if the sum sued for was regarded as founded on a personal obligation merely, the pursuers ought to prevail. For the right had been well assigned to their author under the assignation to writs. The true view, however, was that the submission and decree-arbital did not extinguish the servitude, but merely liquidated the annual prestations in respect of it by fixing an annual money payment. The effect of the submission and decree-arbital was to provide for the payment of dry multures in the future. Dry multures were not the same as abstracted multures. The latter were damages for not bringing corn within the thirl to be ground at the mill, whereas dry multures were a perpetual payment to be free of the obligation to send grain to the mill. The former could not be exacted unless the mill were in existence and fit for grinding, but no such condition attached to dry multures. That was the necessary result of the authorities, although it had never been in terms so decided.² It would be inequitable to require that the mill should be kept standing when there was no obligation to send grain to be ground at it. That this was the nature of the rights here was plain from the terms of the submission and decree-arbital, and was supported by the practice of about seventy years.

At advising,—

LORD JUSTICE-CLERK.—The pursuers ask declarator that they have right to a sum of £4, 1s. 4½d. per annum from the defender as proprietor of lands in theucken or thirlage of the mill of Nairn, that sum being the reduced rate of converted multures, sequels, and services pertaining to the mill from his lands. Their declarator is based on a decreet-arbital dated in 1814, which was issued in a submission between the then proprietors of the mill and the proprietors of land in theucken or thirlage.

The deed of submission and the decree-arbital have in their terms considerable resemblance to the provisions of the Commutation of Thirlage Act (39 Geo. III. c. 55), and the procedure thereunder, but there are differences in material particulars. It is important to look at the exact terms of the submission, for whatever conditions were there entered were binding, and neither party could enforce anything ordered in the decree-arbital unless he fulfilled the undertaking entered into by him as a condition on which others became parties to the submission. The submission was for the fair ascertainment of the sums

¹ 39 Geo. III. c. 55.

² *Kinnaird v. Drummond*, 1675, M. 10,862; *Stuart v. Erskine*, 1741, M. 16,020; *Maxwell v. Glasgow University*, 1745, M. 16,022; *Elphinston v. Leith*, 1749, M. 16,026.

to be paid by the different proprietors within the sucken in all time coming in the light of the agreement between the parties as expressed therein. Now, the submission sets forth a general narrative of the expediency of commutation by a fixed annual payment in lieu of the right of thirlage and all incident services, prestations, and restrictions. It then sets forth that the submission is entered into to prevent disputes regarding exaction and payment of the multures and sequels, and proceeds,—“And considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services.”

No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

The question truly is, what is the effect to be given to this paragraph. I agree with the Lord Ordinary that in the ordinary case there is no obligation on the proprietor in right of the thirl to maintain the mill. The only effect of his allowing the mill to become unserviceable is that he loses his multures. But the Lord Ordinary says that the decret-arbital imposed no new obligation on the owner of the mill, and that the heritors had no right before to insist that the mill should be kept up for their convenience. That is quite true, but equally it is true that the conditions expressed in the submission are the law of the application of the decree-arbital, and that without the decree-arbital the proprietor of this mill, if he ceased to provide a mill to which his suckeners could resort, could not draw his multures.

But the contention of the pursuers is that the effect of the submission and decret-arbital was to give the owner of the mill a right in all time coming to exact multures although there was no mill maintained to which the suckeners could resort to have their grain ground should they so desire. I am not satisfied that the suckeners entered into any such agreement. In order to come to that conclusion it would be necessary to read the clause regarding the intake and aqueduct of the mill as meaning only that the proprietors and tenants astricted to the thirlage were to be relieved of the trouble, loss, and inconvenience falling on them in connection with their upkeep while the mill should continue to exist. I cannot so read the clause. It seems to me that the undertaking of the responsibility of keeping up and supporting the intake and aqueduct in all time coming, if it is to be given any effective meaning at all, must be held to apply to a mill to be kept in operation, more particularly when one of the purposes of this undertaking by the one party is declared to be “the more immediate service and accommodation of the other party.” I hold that under these words the millowner is submitting the question what he is to receive, and the suckeners are submitting the question what they are to pay in all time coming, in respect that in all time coming the intake and aqueduct are to be maintained by the owner of the mill, such maintenance being, *inter alia*, for their service and accommodation. But they could be of no service or accommodation to them unless in connection with a mill in working order, and therefore the clause seems to me to have no meaning consistent with the reason of the thing unless it meant that a mill being to be maintained the millowner under-

No. 190. took to keep for it an efficient intake and aqueduct so that the sucken might be served and accommodated by the mill, and that the arbiter was to take into consideration in fixing the annual payment the service thus undertaken to be rendered in the future by the millowner at his own charges, as being in the suckeners' interest as well as his own.

July 14, 1892.
Forbes' Trustees v. Davidson.

According to the view of the pursuers their authors would have been entitled, immediately upon the issue of the decree-arbital, to pull down the mill, thus rendering the intake and aqueduct useless, whether they maintained them or not, and to exact the dues fixed by the arbiter "as a compensation in lieu of multures, sequels, and mill services," without doing anything for that service and accommodation of the sucken which the submission expressly provides for, and calls the arbiter to consider in fixing the compensation. That seems to me to be an unfair construction of the terms of the submission. That submission plainly intended that the arbiter should ascertain a value for this relief service which the owner of the mill undertook, and the arbiter could put no value upon it unless it was to be rendered in some degree, and if to be rendered he could put no measure of value upon it except under the words "in all time coming." In any other view his position as an arbiter called upon him to value, among other things, compensation for a service to be given by perpetual annual payment, which service there was no obligation to render at all, or which might cease to be a service at all at the option of the party drawing the compensation, while the compensation would continue exigible in perpetuity.

I therefore differ from the view taken by the Lord Ordinary, and think that his interlocutor should be recalled, and that the fourth plea in law for the defender should be sustained.

LORD YOUNG.—This is a case of an unusual character, for we do not often at the present day have any question about thirlage, but it has that sort of interest which attaches to things of ancient date.

On the case itself I agree with your Lordship and differ from the Lord Ordinary. I am not sure that I do not even go further, for I more than doubt the pursuers' title to sue,—not technically their title to sue, but whether they have any title whatever. Assuming that there is an obligation on the defender to pay the yearly sum sued for, I more than doubt whether the pursuers have any title to receive it.

The title which the pursuers produce is a disposition in favour of Arthur Forbes of Culloden dated in 1878, giving him right to "All and Hail the two halves of the mill of Nairn . . . together with the mill-house and houses at Milltown following the said two halves of the said mill, hail multures, sucken, sequels, and knaveships of the said mills," and so on. But his case in support of his demand is that we have here no concern with the multures, sucken, or sequels, or anything connected with the mill, unless the proprietor of the mill for the time being was also creditor in a certain money obligation. The question truly is whether there is any obligation unconnected with thirlage and multures incumbent on the defender and enforceable by the pursuers. My opinion is that there is no such obligation. I think the pursuers have set forth no obligation on record unconnected with the mill and its multures, or which could survive the extinction of the thirlage of the mill.

It is almost superfluous to observe that according to our old law on the subject a right of thirlage cannot continue to be exercised after the mill has ceased

to exist. The extinction of the mill does not indeed extinguish the right of thirlage, but so long as the mill does not exist the right of thirlage was suspended, although, if the mill was restored at any time within forty years, the old abomination was restored with it. In so describing this ancient and semi-barbarous branch of our law I do not mean to imply that in very early times there was not a great deal to be said in support of it as being an encouragement to the building of mills for the use and profit of the neighbourhood, but by the time of Mr Erskine, and still more strongly in Mr Bell's time, it had come to be regarded as a very obnoxious portion of our law. Now, it always was a part of that law that the right to make demands within the thirl depended on the mill being kept up. There was no obligation on the tenants to send their grain to be ground at the mill. They might send it to another mill, or they might export it if they chose. If they so chose, their only obligation was to pay the insucken multures for the grain which they might have sent to be ground at the mill. Nor, on the other hand, was there any obligation on the millowner to grind the grain of the tenants, but his having the mill in a condition ready for grinding was the condition of his getting the multures. But if the grain was sent to the mill and was ground, then what the tenants had to pay was the market price of grinding plus the special tax,—that is to say, the insucken multures, the outsucken multures being just the fair market price for grinding. If the grain was not sent, there being no obligation to send it, then there was no obligation to pay the market price for grinding, but there was still the obligation to pay the special tax or insucken multures.

Now, there was a variety of practice in different thirls, and it appears to have been the practice in this thirl, if the grain was not sent to the mill, to find out the quantity which had been grown but not been sent, and the suckeners who had not sent the grain were under obligation to pay the insucken multures, minus the outsucken multures, on that quantity,—that is to say, they had to pay the tax but not the ordinary market price for grinding. Then the tax was estimated in grain and not in money, so that what had to be done was first to find out the quantity of grain which had been produced in the thirl and not sent to the mill, then to fix the amount of that which was due to the millowner as multures, then to convert that quantity into its money value, and then to pay this money tax to the millowner.

This practice it was found gave rise to disputes almost every year, and no wonder. Besides these disputes there seems also to have been some dispute about the intake and mill run, which apparently were upheld partly by the millowner and partly by the suckeners. Such disputes were naturally felt to be very inconvenient and accordingly in 1814 an agreement was entered into between the suckeners on the one hand and the proprietors of the mill on the other. It sets out in the preamble very much in the words of the statute, the inconveniences of the servitude of thirlage, and also “considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston”—the proprietors of the mill—“are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having

No. 190.
July 14, 1892.
Forbes' Trustees v. Davidson.

No. 190. **ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services; and the said parties submitters having entire trust and confidence in the knowledge, skill, and ability of" the arbiter named, "they hereby submit and refer to him"—**
 July 14, 1892. **Forbes' Trustees v. Davidson.**

What?—" All differences and disputes presently subsisting between them with regard to the annual compensation which the said parties proprietors connected with the thirlage of Nairn ought and should pay to the said Messrs Arthur Cant and James Houston, as proprietors of the said meal mill." Now, what were the disputes presently existing between these parties. There could be none except those regarding the amount of the multures which the owners of the mill were entitled to receive, and the suckeners were bound to pay. The disputes and differences, we are told, included also the dispute regarding the upkeep of the intake and the mill-run, but this dispute was settled by the parties themselves without the interposition of the arbiter, and the disputes and differences on which the arbiter was called on to give a judgment were an annual estimate of the grain which might have been sent to the mill but was not, and the difference in money between what was actually paid to the proprietors of the mill and what they ought to have been paid.

It was in regard to this that the disputes and differences had recurred every year, and it was with the view of preventing such disputes in the future that the arbiter was appealed to in order to fix the amount of the tax which should thereafter be paid. But there is nothing in the submission, as far as I can see, to suggest the idea that the mill may be dispensed with altogether and yet that the tax which the arbiter had fixed should continue. It is enough to say that the condition which the law implies with regard to every thirlage—the condition, namely, that in order to entitle the millowner to exact the multures the mill must be in an efficient state for grinding the corn sent to it—will be implied in this submission unless there is clear stipulation otherwise. I cannot here find any such stipulation. There is none in what I have read. On the contrary, what the millowners undertake is the support of the intake and mill-lade in all time coming for the accommodation of the sucken. And then there is the declaration that "this compensation shall in no way prejudice the said Arthur Cant and James Houston of their claim of outsucken dues." That is to say, the parties contemplate that grain might be sent to be ground at the mill, in which case outsucken dues were to be paid, and these only because the insucken dues would be paid in the form of the tax as fixed by the arbiter. Now, if there had been any immediate prospect of discontinuing the mill, I hardly think that the parties would have made such a provision. It seems to me to indicate the reverse of an intention to discontinue the mill.

Taking that view, I think it is sufficient for the decision of the case that the mill has ceased to exist. The mill has ceased to exist, and therefore the right to demand insucken multures, however their amount may have been fixed, must have ceased also. If this obligation to pay £4 a-year is independent of the thirl altogether, where is Mr Forbes' title to enforce that obligation? He, or rather his representatives who are here now, have produced none. If you have here a claim for multures, then the right to demand multures is dead and gone; if you have a claim for something else not multures, then Mr Forbes and his trustees have no title to enforce such a claim.

LORD RUTHERFURD CLARK.—I confess that I have felt some difficulty in this

case. If it had been necessary to hold that the decree-arbital effected a change in the relations of debtor and creditor, I should not have been able to reach the same conclusion as your Lordships. I think that the decree made a change in the debt only, by fixing a round sum instead of one of varying amount, but made no change in the debtor or the creditor. I think the creditor remained the owner of the mill for the time being, and the debtor the owner of the lands. But I think that the decision may be put on the ground that the decree-arbital implies an obligation on the owner of the mill to keep up the mill as a condition of maintaining an action for the sum here sued for. I have some doubt, but I think the decree-arbital may be so read, and that would justify our decision, because the pursuer has not kept up the mill.

No. 190.

July 14, 1892.
Forbes v. Trustees of David-son.

LORD TRAYNER.—The claim which the pursuer seeks to enforce against the defender is based upon a decree-arbital pronounced in the year 1814, and in disposing of that claim it is necessary to have regard to the terms of that decree-arbital and the deed of submission upon which it followed. The deed of submission proceeds upon the narrative that it is highly expedient that the servitude of thirlage to which it refers should be commuted or compensated by a fixed annual payment “in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restriction thereto incident or pertaining; and in order to prevent any disputes which may arise in the exaction and payment of the multures and sequels at the meal mill of Nairn.” The parties to the submission referred to the decision of the arbiter named the fixing of the amount of annual compensation which “the parties proprietors connected with the thirlage” should pay to the proprietor of the mill for their respective multures, sequels, and mill services, and the term of payment of such annual compensation. The deed also narrates, and it is a condition of the submission, that the proprietors of the mill are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the mill in all time coming, “both for their own improvement and the more immediate service and accommodation of the sucken,” on being paid the foresaid annual compensation. The arbiter accordingly, by his decree-arbital, fixed a certain sum, payable at Candlemas of each year, as the annual compensation to be paid by the heritors and suckeners, parties to the submission, “in lieu and satisfaction of the multures, sequels, and services they presently pay and perform,” and which shall be paid and received “in full of all demands that the proprietors of the mill can have against the said heritors and suckeners for multures, sequels, and services.” The arbiter further finds that the annual compensation fixed by him shall not prejudice the claim of the proprietor of the mill for outsucken dues on such corn as may be ground at the mill, either by the parties submitters or others; nor their claims against the suckeners who were not parties to the submission.

In this state of the facts, I think the annual compensation fixed by the arbiter (which is what the pursuers are now claiming) may be regarded in either of two different aspects. Either (1) it is an annual payment in extinction and discharge of the servitude itself, or (2) it is a sum fixed to take the place of the insucken dues—the fixing of which would prevent disputes as to the “exaction and payment of the multures and sequels at the meal mill of Nairn.” Regarded in either of these views, according to my opinion, the pursuers cannot prevail. If the annual payment is regarded as the price paid or agreed to be paid for the extinction or discharge of the servitude itself, then it appears to me that the

No. 190.

July 14, 1892.
Forbes' Trustees v. Davidson.

obligation to make the payment is one binding upon the person who gave it, and one which may or may not transmit against his representatives according to circumstances, but the right to enforce the obligation is in the person to whom that obligation was granted or his assignee. The right and the obligation are alike personal; they do not attach in the one case to the mill lands, nor in the other to the lands within the thirl. The servitude being discharged, the owner of the mill lands cannot enforce it or take benefit from it; the lands within the thirl cannot be bound or burdened by a servitude which has been discharged. The title to the mill lands, granted to the pursuers' author after the servitude had been extinguished, gave him no title to the price of that which, although formerly a pertinent of these lands, was no longer so at the date of the conveyance in his favour. To put the pursuers in the position of creditor in the obligation in question something more was necessary than the title to the lands; there was needed an assignation to the debt. This, however, the pursuers or their author never had, and in this view of the case I think the pursuers have no title to sue—that is, to receive the amount sued for.

On the other hand, if the annual payment is only a change in what previously existed—if it is the substitution of a fixed sum payable at a fixed annual term in place of a sum to be ascertained each year according to the circumstances of the time—then the pursuers' claim is one still for multures. It is still the claim which the proprietor of the mill has against the suckeners. No multures, however, are due or exigible unless there exists a mill to which the suckeners may resort for the grinding of their grain; and here there is no longer any mill, consequently there can be no claim for multures. I see nothing in the deed of submission or in the decree-arbitral which entitles the proprietor of the mill to claim multures, or any fixed amount payable in place thereof, in the event of the mill ceasing to exist. Both deeds plainly contemplate that the mill will be maintained. More than that, the narrative of the deed of submission, in which it is stated that the proprietors of the mill "are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the mill," may fairly enough be read as imposing an obligation on them to keep up the mill. The mill, including the intake and aqueduct, was partly maintained by the suckeners. It was for that they gave the "services" along with the multures. But the proprietors of the mill, by the deed of submission, agreed to have a sum fixed to cover multures, sequels, and service—that is, to take one payment in lieu of their various claims against the suckeners, and thenceforward to relieve the suckeners not only of the multures but of the service also. Now, it can scarcely be supposed that the suckeners were compounding in money for services which were never to be rendered—paying, that is, for work which was never to be done.

The statement in the narrative of the deed of submission amounts to this, that in addition to their obligation as proprietors of the mill, relative to its maintenance, they undertook the obligations thereanent incumbent on the suckeners, in consideration of the annual payment or compensation to be fixed by the arbiter. Their obligations in reference to the maintenance of the mill were in no way diminished or discharged; they were, on the contrary, increased as matter of agreement.

I think the fixed annual payment was to come in place of the then existing obligations binding on the suckeners; but it did not discharge the mill proprietor of the corresponding obligation upon him to keep up the mill, on the fulfil-

ment of which depended his right to enforce the obligation by the suckeners No. 190.
to him.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the defender's fourth plea in law, and assoilzied him from the conclusions of the summons.

July 14, 1892.
Forbes' Trustees v. David-son.

SKENE, EDWARDS & GARSON, W.S.—MACRAE, FLETT & RENNIE, W.S.—Agents.

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Complainers (Respondents).—*D.-F. Balfour—Jameson—Kennedy.* No. 191.
CHARLES MANN, Respondent (Reclaimer).—*Dickson—Ure.*

July 15, 1892.
Great North of Scotland Railway Co. v. Mann.

Trade name—Hotel—Distinctive addition—Interdict.—A railway company purchased for use as a hotel certain premises to which the original proprietor had sixteen years before given the name "Palace Hotel," and by which name it had ever since been known to the public. Mann, who had under lease successfully managed the hotel as tenant for thirteen of these years, removed to another hotel in close proximity, and advertised his new hotel as the "Palace Hotel," and "Mann's Palace Hotel."

In a suspension and interdict by the railway company against Mann it was proved that his use of either name had led to many mistakes injurious to the complainers. The Court granted interdict against Mann's using either name, holding (1) that his use of the name "Palace Hotel" amounted to a representation injurious to the complainers' interests; and (2) that it had been proved that the addition of his own name was not sufficient to distinguish it from the complainers' hotel.

In 1890 the Great North of Scotland Railway Company acquired from the trustees of the late John Keith, merchant in Aberdeen, a piece of ground in Aberdeen, with the buildings thereon known as the Palace Buildings, with entry as at Whitsunday 1890, for the purpose of carrying on a hotel business. The buildings which had been erected by the late Mr Keith, were completed in 1875, part of the building being from the first designed as a hotel. Mr Keith gave to it the name "Palace Hotel." The hotel was let as the "Palace Hotel" by Mr Keith to Alexander Mackie for three years from May 1875. In November 1878 Mr Keith let the hotel to Charles Mann, the hotel being described in the lease as "the Palace Hotel." At the date of the purchase by the railway company Mann was still tenant under a lease which expired at Whitsunday 1891.

Previous to the expiration of his lease at Whitsunday 1891 Mann took from that date a lease of the Bath Hotel, which was in the vicinity of the "Palace Hotel." He published in the local newspapers advertisements announcing to the public that he was removing to the Bath Hotel, and that his premises there would be known as formerly by the names "Mann's Palace Hotel," and "Palace Hotel." He also proceeded to remove from the Bath Hotel the signboards of the hotel, and placed there instead the signboards which were upon the Palace Hotel.

On 6th May 1891 the Great North of Scotland Railway Company presented a note of suspension and interdict against Mann to interdict him "and his agents, servants, and all others acting for him, from publishing, or causing to be published, notices or advertisements of removal in the terms set out" (*supra*), "or terms of a like import and effect, and from exhibiting or using the name 'Palace Hotel,' or 'Mann's Palace Hotel,' or any name framed so as to be a colourable imitation of the name by which the complainers' hotel is commonly known, or mislead the public,

No. 191. as the name of any hotel carried on, or to be carried on, by him in the premises lately occupied by the Bath Hotel Company, Limited, or in any premises situated in Aberdeen, and from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen, except while tenant of and in connection with the Palace Hotel in Palace Buildings, owned by the complainers; and to ordain the respondent forthwith to take down and remove the two signboards bearing the name 'Palace Hotel,' put up by him on the front and gable respectively of the said Bath Hotel premises, and to grant interim interdict and decree of removal."

July 15, 1892.
Great North
of Scotland
Railway Co. v.
Mann.

The complainers stated that a portion of their buildings had been all along occupied as a hotel, and known by the distinctive name of the "Palace Hotel," which name was given to it by the said John Keith. "There is not, and has not been, any other hotel in Aberdeen known by the name or a similar designation, and the name is a valuable commercial incident of the property."

They further stated,—(Stat. 10) "The said actings or threatened actings and representations of the respondent Mann are intended and calculated by him to mislead and deceive the public into the belief that the hotel premises to be occupied or now occupied by him in Bath Street are the same as those formerly tenanted by him as aforesaid, and to deprive the complainers of the benefit accruing from the said distinctive name, and to divert or attract custom to a material extent from the Palace Hotel to his own hotel premises by pirating the said distinctive name, or using some merely colourable imitation of it. In particular, the addition of the name 'Mann' to the name 'Palace Hotel' is not sufficient to distinguish the respondent's hotel from the complainer's hotel, but is intended and certain to mislead and deceive the public to the injury of the complainers. In these circumstances his said actings and misrepresentations are illegal. They have already caused, and will continue, unless prevented, to cause serious injury to the complainers' rights and interests in their said property, and to mislead and deceive the public."

The respondent explained,—". . . That the name 'Palace Hotel' was given to the hotel in question by the respondents' predecessor in the tenancy, who originated the business therein carried on. The respondent purchased the goodwill of that business, and by his own efforts and expenditure of money he very greatly increased its size and reputation; and, inasmuch as the complainers had not purchased the goodwill of the said business, but merely the premises as described in their title-deeds, the respondent considered that he was entitled to appropriate the said name for his new hotel."

The respondent offered (ans. 8) to abandon the use of the name "Palace Hotel" standing alone, and to confine himself to the use of the name "Mann's Palace Hotel," under reservation of all his pleas.

The complainers pleaded ;—(1) The complainers being proprietors of and holding a licence for their said hotel known by the distinctive description or designation of the "Palace Hotel," are entitled to interdict against the use or exhibition of the name "Palace Hotel," or any colourable imitation thereof, by the respondent, Charles Mann, as the name of his said hotel premises in Bath Street or as his telegraphic address. (2) The addition of the name "Mann" to the name "Palace Hotel" not being distinctive, but framed by the respondent in order to mislead the public, and unfairly attract custom to his hotel premises, the respondent should be interdicted from exhibiting or using "Mann's Palace Hotel," as the name of his said hotel premises. (3) The respondent's said actings or threatened actings and representations being intended or calculated to mislead and deceive the public and wrongously attract custom from the

complainers' Palace Hotel to the respondent's hotel premises, interdict should be granted in terms of the prayer of the note. No. 191.

The respondent pleaded ;—(1) The complainers' averments are irrelevant. (3) In respect that the complainers are not the proprietors of the goodwill of the said hotel business, and have no right to use the name "Palace Hotel," interdict ought to be refused. (5) In respect of the offer contained in answer 8, this action should be dismissed. July 15, 1892.
Great North
of Scotland
Railway Co. v.
Mann.

On 22d May the Lord Ordinary (Low) passed the note, and upon caution as offered, interdicted "the respondent from publishing, or causing to be published, notices or advertisements of removal in the terms set forth" (*supra*), "or in terms of like import and effect, and from exhibiting or using the name 'Palace Hotel,' or 'Mann's Palace Hotel,' by signboards or otherwise, and from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen."

The respondent reclaimed to the First Division, who on 20th June pronounced this interlocutor :—"Of new passes the note as amended, on caution as offered : Interdict the respondent from exhibiting, or using by signboards or advertisements, the name 'Palace Hotel' without some distinctive addition, also from using the name 'Palace Hotel' as his registered telegraphic address in Aberdeen : *Quoad ultra* recall the interim interdict."

A record having been made up, Lord Low, on 28th November 1891, allowed the parties a proof of their respective averments.*

* "OPINION.—(After narrating the facts)—I must hold it as settled, by the terms of the interlocutor of the First Division of 20th June 1891, that the respondent is entitled to use the name 'Mann's Palace Hotel,' and the question which I have to decide is whether the respondent is entitled to use the name 'Palace Hotel' without any distinctive addition.

"It was conceded, I understand, by the respondent's counsel that a distinctive name of a hotel may in certain circumstances be protected. For example, if a hotelkeeper is carrying on business in a hotel with a distinctive name, such as the 'Palace Hotel,' a rival would not be allowed to set up another hotel in the neighbourhood under the same name, because to do so would amount to a fraudulent personating of the hotelkeeper's business, with the object and effect of misleading his customers and diverting his trade. But the ground of interference in such a case, it is said, would be fraudulent personation of the business of the hotelkeeper, and not any right to call the house by a particular name apart from the business which was being conducted in it. In the present case it was contended that the complainers had no business which was or could be personated. All that they had acquired right to was certain heritable property, not even described in the titles by any descriptive name, but merely as 'All and Whole that piece of ground or building area,' &c. To interdict the respondent in such circumstances would be, it was maintained, to affirm that apart from a business of any kind a person could have exclusive right to the name of a house, a proposition which was contrary both to principle and authority.

"I agree with the respondent that, apart from a business of some kind, there is no exclusive right of property in the name of a house, any more than in the name of a person, but I do not think that that is conclusive of the present case. A hotel acquires a reputation, and a large custom is attached to it, not merely because the management is good, but on account of qualities belonging to the building itself. The public hear of a hotel, known by a distinctive name, as being in a convenient situation, and as having ample accommodation and good sanitary arrangements. These advantages belong to the building, are inseparable from it, and necessarily pass with the building to anyone who acquires it. Now, assume that a person builds a hotel possessing advantages such as those to which I have referred, calls it by a distinctive name, and lets it to a hotelkeeper. That hotelkeeper's lease comes to an end, and the owner at the same time sells the hotel to a third party, who purchases it for the purpose of carry-

No. 191. The respondent having reclaimed to the First Division, the Court, on 6th January 1892, recalled "the said interlocutor; allow the parties a

July 15, 1892.
Great North
of Scotland
Railway Co. v. a
Mann.

ing on business there as a hotelkeeper. Is the outgoing tenant entitled to take a house in an adjoining street and, by calling it by the distinctive name by which the hotel is known, induce the public to believe that by going to his house they will get the benefit of those advantages of situation and structure which the hotel possesses? I do not think that such a proceeding would be allowed, because it would truly amount to a representation by the outgoing tenant that the premises which he had taken were the hotel premises. Such a representation would be injurious to the business for the purpose of carrying on which the hotel had been purchased, because it would have the tendency to divert customers who would otherwise resort to the hotel. The outgoing tenant would be entitled to tell the public, in any terms he chose, that he was the person who had previously carried on business in the hotel, but he would not, in my judgment, be entitled to make what amounted to a representation that his premises were in fact the hotel premises.

"It was contended, however, that the proprietor of a hotel who had not acquired any right to the business or the goodwill of the business which was carried on in it could never prevent the use by another of the name of the hotel. I am not prepared to assent to that proposition without considerable qualification. If a person invests his capital in the erection of a hotel he has a material interest in the business which is carried on in it, because upon the prosperity of that business the success of his investment depends. If the hotel is known by a special name I think that it would be conceded that the tenant carrying on business in it could prevent another starting a rival hotel by the same name. Why should not the proprietor, who has an equal interest with his tenant, also be entitled to prevent such a proceeding? He has *ex hypothesi* built a house for the purpose of having a special business carried on in it; he has given it a distinctive name by which it may be distinguished from other houses in which a similar business is carried on, and it has become known to the public under that name—can he not protect the adventure in which he has embarked his capital by preventing another deliberately and for his own advantage misleading the public as to the identity of the house? I am of opinion that he can, and that upon equitable principles akin to those under which a trade-mark or a trade-name is protected.

"If, therefore, the present case is one of the nature which I have figured, the complainers would, in my opinion, be entitled to be protected by an interdict. But I am by no means sure that it is of that nature. The respondent avers that the name 'Palace Hotel' was given to the hotel by his predecessor in the tenancy, that when he took a lease of the premises he purchased the goodwill, furniture, fittings, &c., and that among the fittings so purchased were the signboards and brass-plates having upon them the name of the hotel. The respondent certainly appears to have removed the signboards and brass-plates without objection on the complainers' part; and they themselves state that during the respondent's tenancy he called the hotel 'Mann's Palace Hotel' as well as the 'Palace Hotel.' Now, if the proprietor of a building suitable for use as a hotel lets it to a hotelkeeper and allows the latter to call it by any name he chooses, it may well be that the tenant, at the expiry of his lease, would be entitled to transfer the name to new premises. He might say, 'I did not take the house as a known hotel, but merely as a building suitable for my business, and the name which I gave it designated nothing more than the house in which I carried on business, and was in no way connected with any business of yours, or in which you were interested.'

"Therefore, although I have doubts of the relevancy of the complainers' averments, I think that it is safer to ascertain the precise facts. I shall therefore allow a proof before answer. I must add, however, that I fail to appreciate the interest which the complainers have in pressing the case. The respondent no doubt maintains that as matter of right he is entitled to call his new hotel the 'Palace Hotel,' but he offers upon record to confine himself to the use of the

proof of their respective averments, . . . and of consent appoint the No. 191.
proof to proceed before Lord Kinnear."

At the proof the following facts were proved :—By the Great North of Scotland Railway (Various Powers) Act, 1890, the railway company was authorised to purchase and take by compulsion or agreement "lands . . . in Aberdeen 'known as the Palace Building,' situated. . . ." Section 18—"It shall be lawful for the company to adapt, furnish, and use the whole or any part of the buildings at Aberdeen, hereinbefore mentioned as Palace Buildings, for the purpose of a hotel."

July 15, 1892.
Great North
of Scotland
Railway Co. v.
Mann.

The disposition by Mr Keith's trustees in favour of the railway company, dated in November 1890, described the subjects by boundaries, and continued "which whole subjects, . . . with the buildings thereon," are described in "the Railway Act as lands . . . known as the Palace Buildings," "together with the whole parts, privileges, &c., and all such right, title, and interest in and to the said subjects as we are or shall become possessed of."

The name "Palace Hotel" had been originally given to the premises by the first proprietor, Mr Keith, and it was laid down in tiles in the lobby of the hotel. Mr Mackie, the first tenant, deponed that on his entry he wished it to be called the Northern Hotel, but Mr Keith insisted on the name Palace Hotel being used. It was also proved that since Whitsunday 1891 the prefix of "Mann's" Palace Hotel had not, in point of fact, served the purpose of a distinctive addition. Customers intending to stay at the complainers' hotel had been taken to that of the respondent, and many mistakes had occurred in regard to both passengers and their luggage. There had also been great confusion from the similarity of the names of the two hotels in the delivery of letters, parcels, telegrams, and tradesmen's orders.

Argued for the complainers;—1. They were in virtue of their titles successors in the premises of Keith, who had erected them for the purposes of a hotel, and had given them the name of "Palace Hotel," fixing it to the building. The name was a particular distinctive appellation purporting to describe a particular house as associated with a business. It had become widely known as such to the general public, and as owners of the house the complainers were entitled to its exclusive use.¹ It was not necessary to aver or prove fraudulent intent to interfere injuriously with this use in order to entitle them to interdict against a rival attempting to use the name. It was sufficient to prove that their interests were seriously affected by a rival's actings. The respondent maintained that he had acquired the goodwill, and with it the name. But of goodwill there were two kinds (1) heritable, pertaining to property, and (2) personal. The respondent was entitled to the latter. But the name "Palace Hotel" belonged to the former category. It belonged to the house, and could not be severed therefrom.² *Levy v. Walker*³ was a case of a business name, and had nothing to do with a heritable subject like the present. At most the respondent was only entitled to represent himself as the person who had for some years successfully conducted the Palace Hotel. 2. It was

name 'Mann's Palace Hotel,' which, according to the interlocutor of the First Division, as I read it, is a name which he is entitled to use."

¹ Sebastian's Law of Trade-Mark, 1890 (3d edn.), pp. 294 and 295, and cases there cited.

² *Mason v. Queen*, April 8, 1886, 23 S. L. R. 641 (per Lord Kinnear), 644; Allan on Law of Goodwill, p. 111; *Ex parte Punnett in re Kitchin*, 1880, L. R., 16 Ch. Div. 226, per Sir Geo. Jessel, M. R., p. 233; Sebastian's Law of Trade-Mark, 329.

³ *Levy v. Walker*, 1879, L. R., 10 Ch. Div. 436.

No. 191. clearly proved that the prefix of "Mann's" Palace Hotel was not a distinctive addition, but had the effect of misleading the public.¹ The interlocutor of 20th June fell to be altered, and interdict granted in express terms against the use of the supposed distinctive addition.

July 15, 1892. Argued for the respondent;—1. As far as title to the name went, the complainers had none. They had merely acquired right to certain heritable property described in their title as "All and Whole that piece of ground, &c." There was nothing conveyed to them by any descriptive name. The proprietor of a heritable subject such as a public-house had no exclusive right to the name of the house apart from the goodwill of the business conducted in it.² There the goodwill had been acquired by the respondent from the previous tenant, who alone could dispose of it. It was a personal goodwill unconnected with the premises, and he was entitled to take it away with him when he left them.³ In *Levy's case*,⁴ it had been held that the assignment of a goodwill and business included the exclusive right to use the name of the old firm. Assuming that the respondent had no exclusive right to use the name, it might be that the goodwill was joint property reared upon the merits of the house and superiority of management, and that neither he nor the complainers had the exclusive right to it. 2. The prefix "Mann's" Palace Hotel was sufficiently distinctive.⁵ Mere confusion from the similarity of names was not sufficient to entitle the complainers to interdict.

Great North
of Scotland
Railway Co. v.
Mann.

At advising,—

LORD M'LAREN.—In this case the Great North of Scotland Railway Company apply for interdict against Mr Charles Mann, formerly tenant of the company's hotel at Aberdeen, restraining him from using the name Palace Hotel in connection with the business which he now carries on in other premises on his own account. On 22d May 1891 the Lord Ordinary (Lord Low) granted interim interdict in terms of the note of suspension as amended. On 20th June 1891, the Court varied the interlocutor to the effect of interdicting the respondent from using the name Palace Hotel "without some distinctive addition." The respondent then designed his establishment by the name of "Mann's Palace Hotel," and one of the questions for consideration is, whether this is a sufficient distinctive addition.

The case having been remitted to the Lord Ordinary, his Lordship allowed a proof; and the case having again come before your Lordships on a second reclaiming note, the proof was appointed to be taken before Lord Kinnear, and consideration of the legal questions was reserved. We are now to dispose of the case on the record and evidence, having also before us the Lord Ordinary's opinion on the law applicable to the case.

Before approaching the actual question between the parties, it may be useful to consider what are the rights arising from the use of a particular name in connection with trade, and who is the person who is entitled to assert such rights.

This much is clear, that there is neither property nor exclusive privilege in

¹ *Dunnachie, &c., v. Young & Sons*, May 22, 1883, 10 R. 874.

² *Day v. Brownrigg*, 1878 (*Ashford Villa Case*), L. R., 10 Ch. Div. 294, per Sir Geo. Jessel, M. R., p. 302.

³ *Woodward v. Lazar*, reported as case 212 in *Sebastian's Digest of Trade-Mark Cases*, p. 119; *Banks v. Gibson*, 1865, 34 Beavan, 566.

⁴ *Levy v. Walker*, 1879, L. R., 10 Ch. Div. 436.

⁵ *Charleson v. Campbell*, Nov. 17, 1876, 4 R. 149.

the use of a descriptive name. This point was very authoritatively settled in No. 191. the "Ashford Villa" case, *Day v. Brownrigg*, Dec. 4, 1878, L. R., 10 C. D. 294, on grounds which we should consider altogether sufficient had the case arisen in Scotland. On the other hand it may be assumed, as was pointed out by Lord Kinnear in the Waverley Hotel case, *Mason v. Queen*, April 8, 1886, 23 S. L. R. 641, that where pecuniary interests are concerned the party injured is entitled to protection, on the principle that a hotelkeeper or tradesman is entitled to prevent his rivals from deceiving his customers by personating his business. It appears to me that in all such cases the question is, whether the respondent by the use of a name which has been employed to designate a particular commercial business, or place of business, thereby represents that he is in right of that business or establishment, to the injury of the true proprietor or trader. I am not sure that it is necessary to aver or to prove that the use of the name is fraudulent. My individual view would be that a case for interdict is made out if the Court be satisfied that the use of the name in question amounts to a representation which is untrue in fact, and is injurious to the party whose trade-name has been appropriated, because the injury is independent of the fraudulent intention. The absence of fraudulent intention might be a good answer to an action of damages, but it will not entitle the party who has done the wrong to persist in using the trade-name after it has been brought home to him that the use of the name is injurious. It seems to follow that the wrongdoer, if he will not give a voluntary undertaking to abstain from using the name, must submit to interdict against what would probably amount to a fraudulent representation if it were continued after its injurious tendency had been proved.

The next question is, who is the person entitled to protect himself against such representations? It appears to me that this is purely a question of fact, and that in each case the same evidence which establishes the injurious representation necessarily points out the person against whose interests that representation is directed.

The case of the name of a hotel has some specialities, but these appear to depend mainly on matter of fact. We may suppose the case of a small private hotel carried on in a dwelling-house to which a name is given by the hotelkeeper. In such a case, if the tenant removes to other premises and continues to use the trade-name which he had given to his hotel, it is difficult to see how he could be chargeable with misrepresentation, or interference with the rights of other persons. But again, if a building specially designed for the purposes of a hotel is erected by a proprietary company, and this building comes to be sold, every one would admit that the purchaser of the building (in the absence of agreement to the contrary) would be entitled to use the name by which the hotel was known, and that in so doing he would not be guilty of misrepresentation. In such a case, the tenant of the first proprietor could not very well make use of the name of the hotel in any new establishment to which he might migrate without laying himself open to a charge of misrepresentation. On this point also I may refer to the case of *Mason v. Queen*. I agree with the view there taken, that the Caledonian Railway Company, having purchased the licensed premises and the goodwill, were entitled by themselves or their assignees to the use of the name Waverley Hotel, by which the premises were known, and that the ex-proprietor could not transfer the name to other premises consistently with fair dealing towards the purchaser of the hotel known by that name.

No. 191. There is this distinction between the case of a hotel and that of a shop or

July 15, 1892. warehouse (but again I say it is only a distinction of fact, and not universally true), that in the case of a purchaser of goods a trade-name represents to his mind the commercial firm with whom he is in the habit of dealing, and there is no misrepresentation to him in the continued use of this name by the same commercial firm in connection with different premises occupied by the firm in succession—the place where the goods are sold being really a very unimportant incident in the contract of sale.

Great North
of Scotland
Railway Co. v.
Mann.

But the contract which is made by the guest in a hotel is a contract of location. He contracts for sleeping and living accommodation in a house that suits him, and beyond doubt, the situation of a hotel, and the character and style of the accommodation which it offers, are very important elements in the contract. Moreover, the chief part of the capital of the undertaking is the money expended on the building, and it is the proprietor of the heritable property who has the chief pecuniary interest in the success of the house. As was observed in an English case by Sir George Jessell, the goodwill of a licensed house is the "habit of customers resorting to the house"; and this, as I think, is an interest which has a claim to the protection of the law.

In the present case, it is proved that the name "Palace Hotel," was originally given to the premises now owned by the Great North of Scotland Railway Company by the first proprietor, and that the house or hotel has always been known by that name. It may be assumed that Mr Mann, the respondent, contributed to the success of the hotel by his good management; and he is quite entitled to advertise himself as late tenant (or "landlord" in the special sense) of the Palace Hotel. But it is another question whether he can lawfully advertise himself as now of the Palace Hotel. To give that name to his new premises is, in my opinion, a mere evasion. The advertisement of his name in connection with the trade-name Palace Hotel, would, I am satisfied on the evidence and from the nature of the case, be understood as meaning that he was hotelkeeper in the building which had come to be known as the Palace Hotel. Such advertisement accordingly amounts to a representation injurious to the proprietary interests of the railway company. On this general ground my opinion is that the interim interdict originally granted is well founded, and ought to be made perpetual.

There remains for consideration the question whether the respondent has brought himself within the qualifying words of the interdict by altering his trade-name to "Mann's Palace Hotel." In other words, is the prefixing the respondent's own name a "distinctive addition," or is it an addition which would not suggest a distinction to travellers and customers?

Now, it is part of the respondent's case that he was well known, and had gained a reputation with the public as the person who carried on the Palace Hotel in property belonging to the railway company. On that hypothesis the name "Mann's Palace Hotel," would not convey an obvious distinction—would indeed rather suggest that he was carrying on business in the old premises. But further, it has been proved that the prefix Mann's has not in fact served the purpose of a distinctive addition; that customers intending to go to the railway company's hotel have been taken to Mann's, and that, in other cases, the passenger and his luggage have been taken to different hotels. This may not be the fault of Mr Mann, but the case against him is not founded on delict, but on the right of the complainers to be protected against the effects of the

representation implied in the use of their trade-name. It is therefore not a **No. 191.**
 satisfactory answer to say that passengers were taken to the wrong hotel because
 they did not attend to the difference between the two names; because this only **July 15, 1892.**
 proves that the name adopted by the respondent is not sufficiently distinctive. **Great North**
of Scotland
Railway Co. v.
Mann.

I would therefore suggest that we should continue the interdict formerly pronounced, and should also grant interdict in express terms against the use of the name "Mann's Palace Hotel," on the ground that it is not sufficiently distinguishable from the name "Palace Hotel," which the complainers have been in the habit of using to describe their hotel at Aberdeen.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of this Court dated 20th June 1891, and the interdict therein: Grant interdict in terms of the prayer of the note of suspension and interdict, and decern."

T. J. GORDON & FALCONER, W.S.—AULD & MACDONALD, W.S.—Agents.

JOHN ROBERT HOWARD M'LEAN, Petitioner (Appellant).—*Constable.* **No. 192.**

Succession—Trust—Service—Conveyancing Act, 1874 (37 and 38 Vict. c. 94), July 16, 1892.
sec. 43.—Trustees under a marriage-contract acquired right to a heritable bond **M'Lean.**
 by assignation to themselves *nominatim* as trustees "and the survivor of them, and their or his foressaids and assignees whomsoever." There was no antecedent in the deed to which the expression "their or his foressaids" could refer. All the trustees having died, the survivor of the spouses, by virtue of a power in the marriage-contract, appointed new trustees. This deed of appointment contained no conveyance. The heir of the last survivor of the trustees named presented a petition for service as nearest and lawful heir in special to the last survivor in the lands contained in the heritable bond under the provision of section 43 of the Conveyancing Act of 1874.*

Held that this was a competent way of making up the title.

By marriage-contract in the English form, dated 24th August 1848, **2d Division.**
 Mr and Mrs Latham Bailey, the spouses, appointed certain trustees to **Sheriff of**
 administer the trust thereby created. It was declared that the trus- **Chancery.**

* 37 and 38 Vict. c. 94, sec. 43, enacts,—“When a sole or last surviving trustee has died, or shall have died, possessed of an estate in land held in trust, and there shall be no contrary provision in the deed of trust, and no contrary order shall be made by the Court of Session, the heir-at-law of such trustee, being of full age and not subject to any legal incapacity, may complete a title thereto as trustee in his room, in the manner provided by the Titles to Land Consolidation (Scotland) Act, 1868, with respect to the title of any other heir; but such heir-at-law shall not, unless under the orders of the Court, or with the consent and approval of all the beneficiaries (being all above age, and not subject to any legal incapacity), administer the trust, but, in the absence of such order, or such consent and approval, shall be bound forthwith to make over the lands to any trustee or judicial factor appointed by the Court for administering the purposes of the trust, or to any trustee or trustees appointed by any person who has power under the trust-deed to make such appointment, or to any person or persons whom the beneficiaries as aforesaid may have concurred in appointing to execute the remaining purposes of the trust, or to the beneficiaries themselves if the whole trust purposes except the conveyance of the lands in terms of the trust have been, or shall have been, executed; and such heir-at-law shall, unless he acts as a trustee under such orders, or with such consent and approval, be in no way responsible as trustee in regard to the administration of the trust, or of the lands to which he may have made up title as aforesaid.”

No. 192. **tees named and the survivor of them and the executors, administrators, and assigns of such survivor, should stand possessed of certain funds.**
 July 16, 1892. **The deed further provided,—“That if the trustees hereby constituted, or either of them, or any succeeding or other trustees or trustee to be appointed as hereinafter mentioned, shall die, . . . it shall be lawful for the said William Latham Bailey and Frances Byng M’Lean, during their joint lives, and after the decease of either of them, for the survivor of them . . . to appoint a trustee or trustees in the place of the trustee or trustees so dying, . . . and that whenever any such new trustee or trustees shall be appointed as aforesaid, all the trust-moneys and premises shall be thereupon, or as soon as may be thereafter, transferred, assigned, and conveyed accordingly, and that such new trustees or trustee shall, as well before as after such transfer, act in the execution of the trusts and powers herein declared and contained as effectually as if he or they had been originally hereby appointed.”**
 M’Lean.

By assignation, dated 11th and recorded in the Register of Sasines the 14th November 1876, Hector Frederick M’Lean and the Rev. Alexander Hugh M’Lean, who were then the sole trustees under the contract, acquired right to a bond and disposition in security of certain heritable property. The assignation was to them *nominatim*, “and the survivor of them, as trustees or trustee foresaid, and their or his foresaids and assignees whomsoever.” There was no antecedent in the deed to which the expression “their or his foresaids” could refer.

Hector Frederick M’Lean, who had come to be the last survivor of the trustees, died on 10th July 1891. On 7th December 1891 Mrs Latham Bailey, the survivor of the spouses, appointed new trustees. The deed of appointment contained no conveyance.

John Robert Howard M’Lean, who was the nephew and nearest lawful heir of Hector Frederick M’Lean, presented a petition in Chancery, “under and by virtue of the before-recited provisions of the Conveyancing (Scotland) Act, 1874, to be served nearest and lawful heir in special of the said Hector Frederick M’Lean in the lands and others, in which the said Hector Frederick M’Lean as trustee foresaid was last vest and seised in security.”

The Sheriff (Wallace), on 11th June 1892, found that the petitioner is not the nearest and lawful heir in special of the late Hector Frederick M’Lean under and in virtue of the marriage-contract and assignation, and therefore refused the petition.*

The petitioner appealed, and argued;—The section of the statute applied *in terminis*, and obviously contemplated the case of trustees having been nominated by someone who had power to do so, which had taken

* “NOTE.— . . . Before the application for service Mrs Bailey, the survivor of the spouses, had, in terms of a power contained in the indenture of marriage, by deed of appointment, dated 7th December 1891, appointed Messrs John L. Bailey and Llewellyn C. Bailey to be trustees under the indenture. The trust is therefore not a lapsed trust. It was maintained, however, that the assignation founded upon contained no destination in favour of trustees who might be assumed on the failure of Mr M’Lean and his co-trustee, and that the petitioner was entitled to be served in terms of section 43 of the Conveyancing and Land Transfer Act of 1874. The Sheriff is unable to take this view. Although the whole destination contained in the indenture is not recited in the assignation, the Sheriff thinks that it is sufficiently imported, and that the trust is one created by the indenture, and not by the assignation. The Sheriff is accordingly of opinion that section 43 of the recited Act does not apply in the circumstances of this case, and that the proper parties to apply for service are the acting trustees under the indenture.”

place here. The course taken by the petitioner was therefore, to say the least, clearly competent, while the course suggested by the Sheriff was of very doubtful competency. There was in truth no destination in the indenture, and there was no conveyance in the deed of appointment. How then could the new trustees make up a title? Had there been a conveyance in the bond to "successors in office," as in *Hare's* case,¹ the result would have been different.

LORD RUTHERFURD CLARK.—The question is whether this is a competent way of making up the title. I think it is.

LORD TRAYNER.—It is not only competent, I think it is the only safe way.

LORD YOUNG.—I agree.

THE COURT recalled the Sheriff's interlocutor, and remitted to him to proceed.

W. J. JOHNSTONE, S.S.C., Agent.

ANDREW AITKEN AND OTHERS (Baird's Trustees), First Parties.—*Jameson* No. 193.
—*G. R. Gillespie.*

MRS ISABELLA KIRK DUNCANSON AND ANOTHER, Second Parties.—
Comrie Thomson—Cook.

GRAHAM'S TRUSTEES AND OTHERS, Third Parties.—*Dickson—Deas.*

MISS LIZZIE BAIRD, Fourth Party.—*C. J. Guthrie—Ure.*

July 19, 1892.
Baird's Trustees v. Duncanson.

Trust—Power to make advances—Interest.—A truster left his estate to be divided among his family of four daughters, vesting being postponed till the period of payment, viz, the majority of the youngest daughter. He empowered his trustees "to make advances" to his daughters "on their marriage," which advances were to be accounted as part of their shares, and to be deducted from their shares of the residue on the final division taking place. Three of the daughters were married during the subsistence of the trust. The trustees on the occasion of each marriage paid the daughter a sum of £1000, and made her an annual allowance of £300. *Held* (1) that the annual allowances were *ultra vires* of the trustees; (2) that the allowances so paid to each married daughter, with interest thereon to the date of division, were to be imputed to account of her share of residue; (3) that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and (4) that no interest was chargeable on the sums of £1000.

MR ROBERT BAIRD, of Limerigg, died on 26th November 1871, survived by his second wife and by four daughters, Isabella, the only child of his first marriage, Jessie, Annabella, and Lizzie. The youngest was born in 1870 and thus attained majority in 1891.

Isabella was married in 1875 to Dr Duncanson, Jessie in 1884 to Mr James Graham, and Annabella in 1884 to Mr James Rowley Orr.

By his trust-disposition and settlement Mr Baird made certain provisions for his wife, which she repudiated, and, as regarded his daughters, he directed and appointed his trustees "to manage and preserve the residue and remainder of my estate, heritable and moveable, hereby conveyed for the use and behoof of the lawful children of my body until the division hereinafter appointed to take place; and until the youngest of my children shall have attained the age of twenty-one years complete, I appoint the said trustees to pay and apply the rents, interest, and annual profits of my said estate, or so much thereof as the said trustees may consider necessary, for and towards his, her, or their maintenance and education

¹ *Hare*, Nov. 25, 1889, 17 R. 105.

No. 193.

July 19, 1892.
Baird's Trustees v. Duncanson.

respectively, while, and so long as, in the opinion of the trustees, any of my children are unable to provide for themselves; but when, in the opinion of the trustees, any of my children shall be able to provide for himself or herself, such child or children shall cease to participate in the annual income of my estate: Declaring that it shall be in the power of the said trustees at any time before the division of the residue of my estate, at their discretion to make advances to any of my sons for placing him or them out in any profession, business, or employment, or to my daughters on their marriage, for his, her, or their benefit or advancement in the world, notwithstanding that their share or shares in the residue shall not then have become vested, which advances shall be accounted as part of the share or shares of the residue of my estate accruing to the child or children to whom such advances shall be made, and shall be deducted from his, her, or their share or shares of the said residue upon the division after mentioned taking place; and at and upon my youngest surviving child attaining the age of twenty-one, . . . I direct and appoint the said trustees immediately to proceed to convert into money the whole residue of my estate, real and personal, and after payment of my whole debts and expenses and others foresaid, to pay, assign, and disburse the free residue to and in favour of my whole lawful children, share and share alike: . . . But specially providing that, in case any of my lawful children shall have died leaving lawful issue before such division shall take place, such issue shall be entitled to the share or shares to which their deceased parent or parents would have been entitled if alive."

The trustees, by minute dated 26th December 1874, "having taken into consideration a proposal for an advance or allowance to Miss Isabella Baird on the eve of her marriage, and having heard Mr Dundas Simpson" (her grandfather) "on behalf of Miss Baird, and considered the position of the estate, and the prospects of Miss Baird, resolve, by virtue of the powers conferred upon them as to the making of advances to the children on their entering into business or marriage, as the case may be, to allow Miss Isabella Baird an instant advance of £1000, and a yearly allowance of £250, said advance and allowance to be accounted part of Miss Baird's expectant share, and to be deducted from her share upon the division mentioned in the said settlement taking place. The factor was instructed to pay over these amounts to Miss Baird or anyone duly authorised."

These sums were accordingly paid to her (Mrs Duncanson). Payments were also made by the trustees for his second and third daughters for the purpose of their education and maintenance, these payments being made to their mother on their behalf, up to the date of her death in December 1887. After their respective marriages, however, each of these daughters received from her mother the sums so paid to her, the amount so paid being £300 for each per annum. The only reference to these payments in the minutes of the trustees was of date 2d February 1881, and was in these terms, viz.:—"Referring to the trust accounts, which shew a considerable accumulation of revenue in the hands of the trustees, and the representations of Mr Dundas Simpson, acting in the interests of the beneficiaries, it was thought that the trustees would be warranted in increasing the allowance made to the beneficiaries, and the meeting accordingly hereby sanction an increase so as to make the allowance £300 per annum to each beneficiary, the increase beginning as at Candlemas 1881." Each daughter was also paid on the occasion of her marriage a lump sum of £1000.

Lizzie, the unmarried daughter, had payments made on her account for maintenance and education, so long as her mother lived, and after her mother's death received an annual allowance of £300.

The total sum received by Mrs Duncanson, exclusive of the lump sum of £1000, was £4557, 5s. 3d., by Mrs Graham, £2025, and by Mrs Orr, £1875. No. 193.
July 19, 1892.
Baird's Trustees v. Duncanson.

None of the husbands of the married daughters were in such circumstances as to be unable to maintain their wives in a manner befitting their station, or to require assistance from the trust-estate for this purpose.

The time having now arrived for the ultimate division of the estate, a question arose as to whether interest fell to be charged to each of the married daughters on the amount of annual allowance they had respectively received since their marriages. It was not suggested that the unmarried daughter should pay any interest on the advances to her.

To determine this question a special case was presented, to which the trustees were the first parties, Mrs Duncanson and her husband the second parties, the marriage-contract trustees of Mrs Graham and Mrs Orr the third parties, and the unmarried daughter Lizzie the fourth party.

The following questions were submitted:—"1. In framing a scheme for the division and payment of the estate, do the payments made to each or any, and if so to which, of the married daughters on and after their respective marriages fall to be deducted from or imputed as part of their respective shares of residue as payments already made to account, and does interest fall to be charged against each or any, and if so against which, married daughter upon the said payments from the respective dates thereof? 4. If interest is chargeable, at what rate is it chargeable?"

The second party argued;—The shares here vested *a morte testatoris*. Further, the allowances were made by the trustees, and necessarily therefore must be presumed to be under their powers. The power which covered them was the power to make advances on the occasion of marriage. It was immaterial whether such advances were made by way of money down, or by annual payments. If, then, these allowances were authorised by the deed, they were in the same position as Miss Lizzie Baird's advances for maintenance and education, on which it was not said that interest could be charged. Mrs Duncanson had, besides, received these sums *in bona fide* and had spent them. It was therefore inequitable to ask her to refund interest.¹

The third parties argued that the annual payments made to Mrs Graham and Mrs Orr after marriage were in continuation of the allowances made for their maintenance prior to marriage, and ought not to be deducted from their shares.

Argued for the fourth party;—It was not proposed to ask Mrs Duncanson to refund anything, the question was merely one of deduction from her share; hence the doctrine of *bona fide* consumption had no place. There was no vesting here till the period of division arrived. But that was unimportant, as also was the question, whether the advances were or were not authorised by the deed. A beneficiary who had got part of her share in advance must pay for that advantage. The estate had yielded so much less interest after her advance had been made; hence she must not only abate her claim to the extent of the capital of her advances, but must also pay in for division among the other beneficiaries some interest to represent the fruits which her advances if she had not withdrawn them would have been yielding for the common benefit.

At advising, —

LORD ADAM.—The answer to the first question which is put to us depends

¹ See *Monteith v. Monteith's Trustees*, June 28, 1882, 9 R. 982.

No. 193.

July 19, 1892.
Baird's Trustees v. Duncanson.

in the first instance on whether, as maintained by Mrs Kirk Duncanson, a right to the residue vested in the children *a morte testatoris*, or only, as maintained by Miss Baird, at the period of distribution.

The trustor by his trust-disposition and settlement disposed his estate to trustees, to be held by them for the use and behoof of the children, and to be administered by them at their absolute discretion, subject to the powers thereby conferred, until the youngest child should attain twenty-one years of age. On that event occurring, he directed his trustees then to realise the estate, and to pay the free residue to his whole lawful children, share and share alike. The right of the children to a share of the residue depends entirely on this direction, and it gives them a right to a share at the time of division, and at no other or earlier time. That this was the intention of the trustor is quite clear, when we have regard to another clause in the deed, by which he empowers his trustees at any time before the period of division to make advances to any of his sons or daughters on majority or marriage, "notwithstanding that their share or shares in the residue shall not then have become vested." It appears to me that this amounts to a plain declaration that a right to a share of the residue was not to vest until the period of division.

That being so, the question comes to be whether the several payments made by the trustees to the daughters were validly made by them in execution of the powers conferred on them by the trustor.

As to the payments to Mrs Kirk Duncanson, these were made in virtue of a resolution of the trustees, by which they professed to exercise powers to that effect conferred on them.

By the powers referred to the trustor authorised his trustees "at their discretion to make advances to any of my sons for placing him or them out in any business, profession, or employment, or to my daughters on their marriage, for his, her, or their" advancement in the world.

It was not disputed that the advance of £1000 to Mrs Kirk Duncanson was validly made in terms of the power, that having been made on her marriage, but it was maintained that the grant of an annual allowance was *ultra vires* of the trustees. It appears to me that the power conferred on the trustees was a power to make advances to a daughter on her marriage only, and not at any other time.

I think that annual payments made after marriage cannot be considered as being advances made on marriage. I think, accordingly, that these payments cannot be supported as having been made in execution of the power.

As regards the payments of £1000 made to Mrs Graham and Mrs Orr on marriage no question is raised. But, as regards the annual payments made to them after marriage, they maintained that these were in a different position from those made to Mrs Kirk Duncanson, in respect that they were made in continuation of the allowance which had been made to them for their maintenance prior to marriage, and they endeavoured to support these payments by a reference to a power conferred on the trustees, by which they were authorised to pay out of the annual profits of the estate so much as they might consider necessary for the education and maintenance of a child, so long as in their opinion such child was unable to provide for itself.

It is no doubt stated in the case that the payments were made "for the purpose of their education and maintenance." But it is also stated in the case that none of the daughters' husbands were in such circumstances as to be unable

to maintain their wives in a manner befitting their station, or to require assistance from the trust-estate for this purpose. It cannot therefore be said that at the time those payments were made Mrs Graham or Mrs Orr were insufficiently provided for, and I accordingly think that none of the payments to Mrs Graham and Mrs Orr after marriage were validly made by the trustees under the powers of the trust.

I accordingly think that we should answer the first question to the effect that all the payments made to the married daughters, on and after their respective marriages, fall to be deducted from their respective shares of the residue.

As regards the question whether interest should be charged on these payments, and if so, at what rate, I think that as regards the payments made after marriage the position of matters was this. These were unauthorised payments made by the trustees out of the trust-funds. The primary claim therefore would be by the beneficiaries against the trustees to replace these funds. But the trustees, having made the payments in perfect *bona fides*, would, I think, only have been liable to replace them with such interest as would presumably have been received upon the money by the trust, if it had not been so misapplied. The daughters to whom the payments were made would have been bound to relieve the trustees to that extent only, and I therefore think that only such interest should now be charged as the trust funds were earning at the time, which I suppose may be taken at three and a-half per centum.

With reference to interest on the advances of £1000 each made to the three daughters on their marriages, the deed directs that such advances shall be deducted from the child's share of the residue, but it does not direct that any interest shall be charged thereon or deducted, and I do not think that it was the trustor's intention that interest should be charged. I think therefore that no interest falls to be charged in respect of these advances.

LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find and declare that in framing a scheme for the division and payment of the estate, the payments made to the married daughters on and after their respective marriages fall to be deducted from and imputed as part of their respective shares of residue as payments already paid to account, and that interest falls to be charged against them upon the said payments in so far as made after marriage, from the respective dates thereof, but that no interest falls to be charged upon the payments of £1000 each to the married daughters on marriage: Find and declare further, in answer to the fourth question, that interest is chargeable at the rate of four per centum per annum."

A. P. PURVES & AITKEN, W.S.—W. & J. COOK, W.S.—SIMPSON & MARWICK, W.S.—Agents.

W. MORRISON & COMPANY, LIMITED, Petitioners.—*Neish.*

No. 194.

Company—Capital—Reduction—Creation of new capital under colour of a resolution to reduce capital—Companies Act, 1867 (30 and 31 Vict. cap. 131), secs. 9 to 19—Companies Act, 1877 (40 and 41 Vict. cap. 26), secs. 3 and 4.— A limited company, registered under the Companies Acts, with a capital of £2000, in 2000 £1 shares, all issued and fully paid up, presented a petition for the confirmation of a resolution to reduce its capital. The resolution bore that the company, on the narrative that its capital had been lost to the extent of £500, had resolved to reduce its paid-up capital from £2000 to £1500, by

No. 193.

July 19, 1892.
Baird's Trustees v. Duncanson.

July 19, 1892.
W. Morrison & Co., Limited.

No. 194. converting its £1 shares fully paid up into £1 shares with only 15s. paid up. The Court *refused* the petition, holding that the resolution was not a proper resolution to reduce capital.

July 19, 1892.
W. Morrison &
Co., Limited.

1ST DIVISION.

On 6th September 1889 W. Morrison & Company, Limited, was incorporated under the Companies Acts, 1862 to 1886. Its object was defined in its memorandum of association to be the taking over and carrying on of the printing and publishing business of W. Morrison & Company, Hawick. Its capital was £2000, divided into 2000 shares of £1 each, 1000 shares being "founders' shares," and the remainder "ordinary shares." The whole capital was issued and fully paid up.

On 14th May 1892 the company presented a petition, under the Companies Act, 1867 (30 and 31 Vict. cap. 131) secs. 9 to 19, and the Companies Act, 1877 (40 and 41 Vict. cap. 26), secs. 3 and 4, praying the Court to pronounce an order confirming the reduction of capital resolved on by a special resolution of 23d March 1892.

The special resolution was in these terms:—"Being satisfied that the price paid by the company for the business of William Morrison & Company, printers and publishers, Hawick, was at least £500 in excess of the real value of the concern, and that the original capital of the company has thus been lost to the extent of £500, it is hereby resolved to modify the conditions contained in the company's memorandum of association to the effect of reducing its paid-up capital from £2000 to £1500 as follows, viz.:—1000 founders' shares of £1 each, fully paid up, to 1000 founders' shares of £1 each, with 15s. per share paid up; and 1000 ordinary shares of £1 each, fully paid up, to 1000 ordinary shares of £1 each, with 15s. per share paid up. And the said paid-up capital is hereby declared to be reduced accordingly."

On 1st June 1892 the Court remitted to Mr C. B. Logan, W.S., to inquire and report as to the regularity of the proceedings; and the reasons for the proposed reduction of capital.

On 14th July Mr Logan reported, *inter alia*, as follows:—"The effect of the resolution would be that, instead of the whole capital of £2000 being held to be fully paid up as at present, only £1500, or 15s. per share, would be deemed to be paid up, the remaining £500 of the paid-up capital being cancelled or written off as paid up, but revived as uncalled capital, with the sum of 5s. per share on the whole shares remaining uncalled. This would imply not only a reduction of the present capital, which is competent, but the creation, in an irregular manner, of £500 of new capital to be called up, with the imposition upon the shareholders of an additional liability, which does not attach to them at present. It appears to me that the course proposed is irregular, and that the proper course for the company to have adopted (if they desired to raise £500 of new capital), would have been to have passed a resolution reducing their present capital from 1000 founders' shares of £1 each, fully paid up, to 1000 founders' shares of 15s. each, fully paid up, and 1000 ordinary shares of £1 each, fully paid up, to 1000 ordinary shares of 15s. each, fully paid up; and thereafter to have created £500 of new capital in the manner authorised by the Companies Act, 1862, and articles 26 to 28 of table A, appended to that Act. It does not appear to me that the resolution of the company is one which your Lordships can be competently called upon to confirm."

Mr Logan then further reported that the proceedings otherwise appeared to him to have been regular, and the proposed reduction of capital to be warranted, and that if the objection suggested by him was ill-founded, the petition was one which in his opinion ought to be granted.

Argued for the petitioner;—The objection suggested by the reporter No. 194. ought not to be given effect to. It was clear from the report that what the company proposed to do might competently be done, and that the circumstances of the company made it a right thing to be done. The objection was that the company had endeavoured to effect its object by one resolution, whereas it ought to have passed two resolutions. But there was nothing in the Acts to suggest that such a proposed combination was incompetent.

July 19, 1892.
W. Morrison &
Co., Limited.

LORD KINNEAR.—I am of opinion that the objection which the reporter has stated to the present application is perfectly well founded, and I do not think that this objection could be more clearly brought out than by a comparison of the language of the prayer of the petition, with the statement by the reporter as to what the company actually propose to do. What we are asked to do is to confirm a special resolution to reduce the capital of the company, but it is clear from the report that the real proposal is not to reduce capital but to raise £500 of new capital to replace capital which has disappeared. That appears to me to be an entirely incompetent proceeding under an application like the present. I do not say that the company may not obtain the result which they desire, but that can only be by following the very explicit and precise provisions of the Companies Acts, and they are not entitled under colour of doing one thing to do something entirely different. I am therefore of opinion that we cannot grant the prayer of this petition.

LORD ADAM.—I am of the same opinion. It appears to me that what is here called a resolution to reduce capital is not a resolution to reduce capital at all. There is here only one resolution with reference to one and the same act to be performed at one and the same time, and the result of the act would be to leave the amount of the capital exactly the same as it was before, the only difference being that at the end of the operation while the amount of the capital would be the same, only £1500 would be paid up, while £500 would remain uncalled. I cannot see how this can be described as a reduction of capital, and I therefore agree in thinking that we ought not to confirm the resolution.

LORD M'LAREN.—What the company here proposed to do is to replace nominal capital, which was actually contributed, but has been lost, by real capital to be called up in the future. I agree in thinking that the company have not adopted the proper procedure for attaining this end, but I see no reason to doubt that by following the course suggested by Mr Logan in his report they may accomplish what they desire.

The LORD PRESIDENT concurred.

THE COURT refused the petition.

FYFE, IRELAND, & DANGERFIELD, S.S.C., Agents.

JOHN FULLARTON BEATSON AND OTHERS (Mackinnon's Trustees),
First Parties.—*Johnston—J. C. Dove Wilson.*

No. 195.

THE OFFICIAL RECEIVER IN BANKRUPTCY IN THE HIGH COURT OF
JUSTICE IN ENGLAND, Second Party.—*Dundas—Guy.*

July 19, 1892.
Mackinnon's
Trustees v.
Official
Receiver in
Bankruptcy in
England.

Succession—Discretionary power in trustees to retain subject of a vested right
—*Bankruptcy of legatee.*—A testator directed her trustees to make over the residue of her estate to her son on his attaining the age of twenty-five, "declaring that my trustees shall be entitled, so long as they think it expedient to do

No. 195.

July 19, 1892.
Mackinnon's
Trustees v.
Official
Receiver in
Bankruptcy in
England.

so, to retain the said residue and remainder in their own hands, and that even after my son shall have attained said age, and only pay him the annual produce or income thereof, it being understood that should they so retain it after he attains twenty-five years, and should he die without said residue and remainder and others having been paid to him, then the same shall be paid to his nearest heirs and representatives whomsoever, my intention being that the same should vest in him at said age of twenty-five."

In a competition between the son's trustee in bankruptcy and the mother's testamentary trustees, after the son had attained the age of twenty-five, but before the residue had been made over to him, *held* that the residue having vested in the son the testamentary trustees were not entitled to retain it, but were bound to pay it over to the son's trustee.

1ST DIVISION.

MRS MARY BEATSON OR MACKINNON, widow of Campbell Mackinnon, Inspector-General of Hospitals, died on 13th February 1884, leaving a trust-disposition and settlement by which she conveyed her whole estates to trustees, directing them, in the third place, to "hold, retain, and invest in their own names the residue and remainder of my said means and estate until my son, John Campbell Mackinnon, attains the age of twenty-five years complete, at which time they shall, subject to what is hereinafter contained, pay and make over to him the said residue and remainder, together with any interest or other produce that may have accrued thereon; declaring that my trustees shall be entitled, so long as they think it expedient to do so, to retain the said residue and remainder in their own hands, . . . and that even after the said John Campbell Mackinnon shall have attained said age, and only pay him the annual produce or income thereof, it being understood that should they so retain it after he attains twenty-five years, and should he die without said residue and remainder and others having been paid to him, then the same shall be paid to his nearest heirs and representatives whomsoever, my intention being that the same should vest in him at said age of twenty-five; and I authorise my trustees to apply the annual produce or income of said residue and remainder, or such portion thereof as they may think proper, for behoof of my said son until he attains said age of twenty-five, and also to advance to him, or for his behoof, the whole or such portion of the capital as they may think proper, should circumstances arise, which in their sole discretion render it expedient for them to do."

John Campbell Mackinnon became twenty-one years of age on 29th August 1887. On 19th August 1889 a receiving-order in bankruptcy was made by the High Court of Justice in England, by which the Chief Official Receiver of the High Court was constituted receiver of J. C. Mackinnon's estate. When J. C. Mackinnon attained the age of twenty-five (on 29th August 1891) the Official Receiver claimed payment from Mr Mackinnon's trustees of the residue of the trust-estate (which amounted to about £2000), he having previously intimated that he made no claim for the income accruing down to that date. The trustees declined to pay, maintaining that, under the trust-deed, they had a discretionary power to retain the residue, and that in the exercise of that power it was their duty to retain it.

A special case was accordingly presented, the trustees being the first parties, and the Official Receiver the second party.

The questions of law were,—“1st, Are the first parties entitled to retain the remainder and residue of the said trust-estate in their own hands since the said John Campbell Mackinnon attained twenty-five years of age on 29th August 1891, and to apply the income thereof for the said John Campbell Mackinnon's maintenance? or, 2d, Is the second party, as trustee on the bankrupt estate of the said John Campbell Mackinnon, entitled to claim as from the said date of 29th August 1891, the remain-

der and residue of the said trust-estate, and to receive and be paid the same, together with the income or revenue thereof from the said 29th August 1891?"

Argued for the first parties;—Although the word "alimentary" was not used here, the plain object of the testator was to give her trustees a discretionary power of converting her son's provision into an alimentary life-rent. Such a discretionary power was quite competent,¹ and it could not be maintained that the income—about £80—exceeded a proper alimentary allowance. Therefore, the trustees having exercised the power, the son's creditors were not entitled to payment of the capital in the meantime, whatever right they might ultimately be found to have. But the capital was also effectually protected, for although it had vested in him the son could not himself have obtained payment of it against the resolution of the trustees,² and his trustee in bankruptcy took his estate *tantum et tale* as it stood in him.³

No. 195.
July 19, 1892.
Mackinnon's
Trustees v.
Official
Receiver in
Bankruptcy in
England.

The second party was not called upon.

LORD PRESIDENT.—I think that this is quite a clear case. The provision in the trust-deed leaves no doubt as to the vesting of the capital, for it says in so many words that the capital shall vest when the son reaches the age of twenty-five. He has reached that age, and therefore the capital has vested in him, and he can do what he likes with it. He has done what he liked, because he has made a legal assignation of it to his trustee in bankruptcy. The same is true of each year's income as it falls due. The right both to the capital and also to the income being thus in the trustee in bankruptcy, it seems impossible to dispute that the entire rights in the subject are in him, and consequently that he is entitled to have the money. I think therefore that we must answer the first question in the negative, and the second in the affirmative.

LORD ADAM concurred.

LORD M'LAREN.—The son here has an unqualified right to the income and a like unqualified right to the fee, although, for the better administration of the estate, a power is given to the trustees to retain the trust funds in their own hands if they see fit. Now, whoever has an unqualified right in property is bound to make that property available for payment of his debts, and he is not the less bound because the property may be in the hands of trustees for administrative purposes. I therefore agree with your Lordship.

LORD KINNEAR concurred.

THE COURT answered the first question in the negative, and the second in the affirmative.

MURRAY, BEITH, & MURRAY, W.S.—SMITH & MASON, S.S.C.—Agents.

¹ Chambers' Trustees v. Smiths, April 15, 1878, 5 R. (H. L.) 151.

² Christie's Trustees v. Murray's Trustees, July 3, 1889, 16 R. 913; Campbell's Trustees v. Campbell, July 17, 1889, 16 R. 1007.

³ Chambers' Trustees v. Smiths, *supra*.

No. 196.

July 19, 1892.
Cramb v.
Caledonian
Railway Co.

WILLIAM CRAMB AND OTHERS, Pursuers (Respondents).—*Shaw—J. C. Dove Wilson.*

THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—*D.-F. Balfour—Dundas.*

THOMAS M'EWEN JUNIOR AND COMPANY, Defenders (Respondents).—*Johnston—Aitken.*

Reparation—Railway—Culpa—Carriage—Bags of sugar in transit contaminated by leakage from boxes containing poison—Liability of railway company to persons poisoned thereby.—A railway company received for carriage a box containing tin cases filled with a highly poisonous but almost colourless liquid weed-killer. The box had the words "weed-killer" stencilled on it, but the consignor did not inform the railway company that the box in fact contained weed-killer, or that its contents were poisonous. In the course of the journey the box had to be transferred from one waggon to another. In making this transference the railway company's porters noticed that the box was leaking, and they recorded this fact on the way-bill. In the new truck were some bags which the railway company knew to contain sugar, and the company's porters put the leaking box of weed-killer into the truck without taking any precautions to prevent its escaped contents from reaching the sugar. When the sugar reached its destination one of the bags was observed by the railway porters to be externally discoloured, and they entered this fact in the railway company's private way-bill as "one bag wet with dip." They did not inform the consignee of this, but his assistant noticed the external discolouration. Thinking, however, that it was due to rain, the assistant put the contents of the bag into a tierce along with those of the uncontaminated bags. When the contents of the discoloured bag were reached in the course of retail consumption, there was nothing in the appearance of the sugar to suggest that anything was wrong, but it was found that it had been poisoned through admixture with the weed-killer, a large number of the retail customers of the consignee having been taken ill and two having died.

The representatives of the two customers who had died brought an action concluding for damages *ex delicto* against the consignors of the weed-killer, the railway company, and the consignees of the sugar, jointly and severally, and also severally. The facts just narrated were proved, and it was further established that the primary cause of the leakage was the insufficiency of the tin cases containing the weed-killer. The consignors of the weed-killer admitted liability for themselves, and paid a sum in name of damages.

The Court (*rev. judgment of Lord Stormonth Darling*) *assolized* the railway company, holding (1) that the primary responsibility for the accident lay upon the consignors of the weed-killer who had sent the box to the railway company without warning them of the extremely poisonous nature of its contents; (2) that it was proved that the railway had no reason to suspect the poisonous character of the contents of the box; (3) that the mere fact that the company's servants had placed the leaking box near the sugar inferred no such delict as would make the company liable to the pursuers; and (4) that the failure of the railway company's servants to tell the consignee that the bags were wet with a liquid which they believed to be sheep dip inferred no such delict.

Held further (aff. judgment of Lord Stormonth Darling), that the consignees of the sugar fell to be *assolized*, no fault having been established against them.

1st Division. ON 3d April 1891 Mrs Cramb, wife of Peter Cramb, carter, Crieff, Id. Stormonth bought some sugar from Thomas M'Ewen junior & Company, grocers, Darling. Crieff. This sugar, as it afterwards appeared, contained arsenic, through its having, when being carried in bags by the Caledonian Railway Company, between Stirling and Crieff, become wet with some arsenical weed-killer, which had escaped from a box marked "weed-killer," on the same railway waggon. In consequence of having eaten of the sugar Mrs Cramb

and her husband died, and their son Frederick Cramb was also taken ill, but recovered. No. 196.

William Cramb and his brothers and sisters then brought this action against the Boundary Chemical Company, Liverpool, the consignors of the weed-killer, against the Caledonian Railway Company, and against M'Ewen & Company, the grocers, concluding against the defenders, jointly and severally, or otherwise severally, for payment of £500 to each of the pursuers other than Frederick Cramb, as damages and *solatium* for the loss of their parents, and for payment of £1000 to Frederick Cramb on the same ground, and in respect of his own personal injuries. July 19, 1892.
Cramb v.
Caledonian
Railway Co.

The Boundary Company settled the case as against themselves by payment to the pursuers of £210.

As against the Caledonian Railway Company the pursuers stated that "the defenders the said Caledonian Railway Company acted negligently, recklessly, and culpably, firstly, in allowing the said sugar, an edible subject, to come in contact with the leakage of a box marked 'weed-killer'; and secondly, in not intimating to the consignees that such contact had taken place."

As against M'Ewen & Company the pursuers stated that the bag containing the sugar was stained, that this stain "was plainly visible, and had been observed by the defenders Thomas M'Ewen junior & Company, or their assistant, and the sugar itself was stained, and in the circumstances the defenders Thomas M'Ewen junior & Company behaved negligently, recklessly, and culpably in selling the sugar without due inquiry and examination into the nature of the damage."

The pursuers pleaded;—(1) The death of the said Peter and Mary Cramb, and the illness of the said Frederick Cramb having been occasioned by the fault or negligence of the defenders, or of one or other of them, the pursuers are entitled to decree against the defenders, or one or other of them, as concluded for.

The Caledonian Railway Company pleaded;—(3) These defenders having acted with care and prudence, and in accordance with their usual custom, in regard to the transmission of the goods in question, and having been guilty of no fault or negligence in the premises, ought to be assoilzied. (4) The alleged cause of damage is too remote to infer liability against these defenders.

M'Ewen & Company pleaded;—(3) In any view, the death of the said Peter and Mary Cramb not having been occasioned by the negligence of these defenders, these defenders should be assoilzied.

A proof was allowed. The evidence was to this effect:—The weed-killer in question, known as "the Climax Weed-killer," was a fluid with no very distinctive colour but somewhat like dirty water, and contained about three pounds of arsenic to the gallon, enough to kill about 7000 persons. The consignment in question was despatched by the Boundary Chemical Company on 10th March 1891 by sea to Glasgow, and thence by rail to Crieff. It was contained in a number of square tins which were packed in a wooden box, and the primary cause of the leakage was the fact that the stoppers of several of these tins had fallen out. The box had stencilled on it the words "weed-killer," but there was nothing on it otherwise to indicate that it contained poison, and it was shewn that boxes were often used for other than their original purpose. There was also evidence that while some kinds of weed-killers were poisonous to animal life, others were not. The Boundary Company did not intimate to the carrying companies that the box contained poison. On its arrival in Stirling the box was in ordinary course transferred to a waggon for Crieff, and the porter who made the transference having observed the

No. 196.
 July 19, 1892.
 Cramb v.
 Caledonian
 Railway Co.

leakage he called that out to the checker, who marked "leakage at Stg." on the invoice, the entry so marked being "1 Case." In the Crieff waggon was the sugar for M'Ewen & Company, contained in five jute bags. One of these bags became stained with the escaped weed-killer, some of which passed inside among the sugar. On the arrival of the bags at Crieff the stain was observed by the porter there, and the invoice of the sugar was in consequence marked, "one bag wet with dip." There was some sheep dip also on the waggon, but it did not clearly appear why the wetness of the bag was invoiced as due to dip. The railway officials at Crieff did not intimate to the carter who was to take the sugar to M'Ewen & Company that one of the bags was stained, and the goods delivery-sheet handed to him contained no such notification as was on the invoice, which last, it was explained, was a document intended solely for the internal regulation of the railway company's traffic, and not for delivery to the consignee of the goods. The railway officials both at Stirling and at Crieff who had to do with the sugar bags and the weed-killer deponed that they had never heard of weed-killers, and that they did not know that the contents of the box in question were poisonous. The railway officials knew that the bags contained sugar. The carter at Crieff deponed that he had no recollection of having observed anything wrong with any of the bags. M'Ewen & Company's assistant, who took delivery of the sugar, deponed that he called the carter's attention to the state of one of the bags, and that the latter said it was probably due to water off his tarpaulin sheet. This, the assistant further deponed, appearing to be a reasonable explanation, he emptied the contents of the five bags into a tierce. The poisoned sugar was not reached until about the time of the sale to Mrs Cramb, when, in consequence of a number of cases of arsenical poisoning having occurred in Crieff (none except those of Mr and Mrs Cramb proving fatal) inquiries were made with the result that the evil was traced to the sugar. The damaged sugar, when examined by itself, shewed hardly any appreciable peculiarity, but when placed beside uncontaminated sugar it looked slightly darker.

On 19th February 1892 the Lord Ordinary (Stormonth Darling) assolizied the defenders M'Ewen & Company, but decerned against the railway company for payment of various sums to the respective pursuers, and found them liable in expenses to the pursuers, but *quoad ultra* found no expenses due.*

* "OPINION. — . . . It is obvious that the ground of alleged liability has nothing to do with breach of contract, for the pursuers had no contract with any of the defenders. The railway company are not sued under the contract of carriage, nor the grocer under the contract of sale. The ground of liability is *culpa*, and the duty in which both of the defenders are said to have failed is the duty which every man owes to take reasonable precautions for the life and safety of his neighbour. . . .

"With regard to the railway company, I am clearly of opinion that negligence is proved. With regard to the grocer, I have come to the conclusion (though not without difficulty) that he is entitled to absolvitor.

"For the railway company, it was strongly urged by the Solicitor-General that weed-killer was a commodity, the poisonous properties of which were unknown to their servants, and that there could be no liability without positive knowledge of the danger to which others were exposed by the acts complained of. I do not doubt that weed-killer was a somewhat unfamiliar article to the porters at Stirling and Crieff, and certainly they could not be expected to know how exceedingly poisonous it was; but I think a very little reflection would have shewn them that a liquid intended to kill vegetable life was not likely to make a safe mixture with a highly absorbent article of human consumption

The railway company reclaimed.

At the hearing on the reclaiming note the pursuers intimated that they did not insist in their action in so far as directed against M'Ewen & Com-

No. 196.

July 19, 1892.
Cramb v.
Caledonian
Railway Co.

like sugar, and it is not in my opinion exacting an excessive degree of intelligence or care on the part of the porters at Stirling to require that when they found a liquid of unknown composition (to put it no higher than that) leaking from a box, they should not have placed that box in contact with what they knew to be an edible substance packed in a jute bag. It would have been the easiest thing in the world to keep the leaking box apart from other goods, or at all events, apart from any other goods which it could by possibility injure. By acting as they did, they as truly compounded a poisonous article for human consumption as if they had used a pestle and mortar in a chemist's shop. Similarly as regards the porters at Crieff; they saw that the sugar bag was saturated with a liquid which was not mere water, and which they assumed to be sheep-dip. A little more attention to the marking on the box would have shewn them that it was weed-killer and not sheep-dip; but even though it had been sheep-dip, I think they were not entitled to conceal the fact from the consignee, on the chance of the sheep-dip being of a non-poisonous description. It may be all very well as a general rule to leave consignees to find out for themselves defects in the articles delivered to them, but surely this rule must suffer exception when the article is an edible subject, and when the foreign matter with which it is seen to have become impregnated is either suspected to be deleterious, or is of unknown composition. My opinion therefore is, that on both the heads of negligence alleged against the railway company the case of the pursuers is made out.

"With regard to M'Ewen & Company, I cannot say that the evidence discloses an altogether satisfactory state of things. I do not blame the lad of seventeen who took delivery of the bags, for I think that, in accepting the lorryman's explanation of the cause of the stain, and emptying the contents of the bag into the tierce without telling his master anything about the state of the bag, he was only following what he had come to recognise as an ordinary practice. It is not comfortable to consumers of sugar to learn that grocers are in the habit of selling sugar out of wet bags, on the assumption that the wet is caused by rain water. But I think that the fault of the railway company's servants is not telling what they knew goes far to relieve the grocer of liability, for I think that he (or rather his assistant for whom he is responsible) was fairly entitled to expect that if the stain had been caused by contact with other goods of a deleterious or doubtful character, he would have received notice from the railway company to that effect. He still might have been guilty of negligence if, during the time when the sugar lay in his cask, any change of a suspicious kind had appeared in its condition. But I think it is proved that no such change took place. The colour afterwards deepened from white to brown, but when the poisoned sugar was sold it is tolerably certain that the only peculiarity in its appearance to an ordinary observer was a slight degree of moisture, not greater than what is often found in sugar which has lain in a damp cellar. The persons who bought it found no fault with it, and even the more practised eye of Dr Thom, when he came to examine it, after the cases of poisoning had occurred, could not detect anything unusual about it until he closely compared it with other white sugar, when it was seen to be slightly darker and more opalescent. The stain on the bag after it had lain for some weeks was also found to be darker than a stain caused by rain water would have been, but there again Dr Thom, a witness for the pursuers, says that 'at the time of delivery there might be nothing in the mark inconsistent with wetting by water.' On the whole, then, I am of opinion that although greater vigilance on the part of M'Ewen & Company might have prevented the deplorable consequences which ensued, they are not chargeable with such a degree of negligence as to make them liable in damages to the pursuers.

"I was referred to a number of cases, principally English, but I cannot say that I have found them very helpful. I do not think, however, that the

No. 196. pany, who consequently confined their argument to the question of expenses.

July 19, 1892.
Cramb v.
Caledonian
Railway Co.

Argued for the Caledonian Railway Company;—In the first place, the railway company were not in fault in not giving McEwen & Company, the consignees, notice of the leakage. They were under no obligation to be alert to suggest to consignees of goods entrusted to them for carriage that something was wrong. It was the consignees' duty to satisfy themselves and claim damages if they were not satisfied. No doubt they would have been in fault in not giving notice of the damage to the sugar, if they had had notice of or had reason to suspect the poisonous nature of the contents of the box marked "weed-killer." Now, they had had no such notice given to them by the consignors in express terms. It was said that the words "Weed-killer" on the box amounted to notice. But the company's servants were not bound to read such stencilled markings on boxes, for it was well known that boxes were used for all sorts of purposes different from their original purpose; nor did it appear that the porters who had had the handling of the box had ever read the stencilling, or that if they had it would have conveyed to them the idea that the contents were poisonous. There thus being nothing outside the box to indicate what it contained, the company were entitled to treat it as an ordinary package, for they had neither the right nor the duty of opening it.¹ No doubt they saw that the box was leaking, and it might be that they were in breach of contract for allowing the sugar to come into contact with the escaped liquid. But that was beside the present question, which turned on delict, not contract, and here the railway company had no reason to suspect danger, and therefore they were not liable *ex delicto*.² But even if a certain amount of negligence could be brought home to the railway company their fault was trifling compared with that of the consignors, who as the *causa causans* ought alone to be found liable.³ In any event, the injury was too remote.⁴

Argued for the pursuers;—The question was whether the railway company had taken such reasonable precautions in the carriage of the sugar as entitled them to say that they were not liable as in a question with the pursuers, who although not parties to the contract of carriage had nevertheless certain rights arising out of that contract. A party to a contract might be liable to third parties for negligence in the performance of the contract.⁵ Now, here the railway company, acting through its

liability of the defenders is doubtful in law, if the facts proved amount to negligence in dealing with an article of human consumption.

"It was argued that the settlement with the chemical company had the effect of freeing the other defenders from all liability. I cannot assent to that view, for, however blameworthy the chemical company may have been in sending out the weed-killer in defective tins, the fault of the railway company directly contributed to the result, and the case of *Western Bank v. Bairds*, 24 D. 859, seems conclusive on the point that a settlement with one wrongdoer does not liberate another. . . ."

¹ *Crouch v. London and North-Western Railway*, 1854, 23 L. J., C. P. 73; *Farrant v. Barnes*, 1862, 31 L. J., C. P. 137; *Parrot v. Wells Fargo & Co.*, 1872, 15 Wallace (U.S.A.) 524.

² *King v. Pollock*, Oct. 27, 1874, 2 R. 42; *Galloway v. King*, June 10, 1872, 10 Macph. 788, 44 Scot. Jur. 449; *Parry v. Smith*, 1879, L. R., 4 C. P. D. 325.

³ *Hill v. New River Co.*, 1868, 9 Best and Smith, 303; *Sneesby v. Lancashire and Yorkshire Railway Co.*, 1875, L. R., 1 Q. B. Div. 42.

⁴ *Gray v. North British Railway*, Nov. 4, 1890, 18 R. 76.

⁵ *Addison on Contracts*, 9th ed., p. 273; *Hayn v. Culliford*, 1879, L. R., 4 C. P. Div. 182; *Blyth v. Proprietors of Birmingham Waterworks*, 1856, 11 Hurl. and Gord. Exch. 781; *Smith v. London and South-Western Railway Co.*, 1870, L. R., 5 C. P. 98.

servants, had made no attempt to protect articles of human food entrusted to them for carriage from the risk of contamination from poison, or to warn the consignees of that risk. Their initial error consisted in putting a leaking box containing a liquid, which they certainly could not suppose to be pure water—for it could not be supposed that anyone would send a box of pure water from Liverpool to Crieff—into a waggon near bags which they knew contained sugar. It was said that they did not know the nature of the contents of the box, but it was marked “weed-killer,” and that might at anyrate have put them on their guard, for what was calculated to destroy vegetable life was not improbably destructive of animal life. Then, again, the porters at Crieff saw that the sugar had been damaged, and attributed the damage to sheep-dip, yet they delivered the bags to the consignees without giving the slightest hint of their suspicions. It might be that as in a question of contract they were not bound to do so, but as in the present question they were, unless it was the law that a railway company, which had not had a positive intimation of the dangerous character of goods entrusted to them, was entitled to treat the goods as harmless, whatever grounds for suspicion to the contrary they might have. They certainly had here ample grounds for suspicion, if suspicion was enough. It was said that the damage was too remote, but that was a question of degree,¹ and here the danger was a direct consequence of the company’s carelessness.

At advising,—

LORD PRESIDENT.—The facts in this case are singular, but they are neither controverted nor complicated. A wooden box, which ultimately proved to contain a fluid with an enormous quantity of arsenic in it was sent by one of the Caledonian Railway Company’s trains. In course of the journey the box leaked, and some of the fluid got into some bags of sugar which were in the same van. The sugar was consigned to the defenders M’Ewen & Company; they, not knowing what had happened, sold it to their customers, and some of the buyers died. This action is brought by the children of two of those victims, and one of them who had eaten of the sugar claims also for injury to his own health. The action was directed against the chemical company which sent the poisonous matter by rail, the railway company, and the grocers. The chemical company have had the claim against them discharged on payment of 200 guineas, and the question before the Lord Ordinary, and now before us, is as to the liability of the railway company and the grocers.

As regards the grocers, I agree with the Lord Ordinary that they must be absolved. The pursuers’ case is rested solely on *culpa*, and there is no contract relation between them and the defenders. I do not think that the defenders M’Ewen & Company had any reason to suppose or suspect that there was poisonous matter in the sugar. This entitles them to absolver, and on the same ground I am unable to acquiesce in what the Lord Ordinary has done in refusing them an award of expenses. I think the expenses should follow the absolver.

In considering the case of the Caledonian Railway Company it is necessary again to emphasise the fact that the action against them is brought by persons entirely unconnected with them by contract, and of whom they had no knowledge. We are not considering, and we have no occasion and no means to determine, whether the railway company duly fulfilled the obligations incumbent on them as carriers of the bags of sugar. In the present action fault must

¹ *Heaven v. Pender*, 1883, L. R., 11 Q. B. Div. 503; *Thrussell v. Handyside & Co.*, 1888, L. R., 20 Q. B. Div. 359.

No. 196. be brought home to the railway company in the omission to perform some duty which they owed to all the world.

July 19, 1892.
Cramb v.
Caledonian
Railway Co.

Now, the matter in debate is, whether in a question with the public generally the railway company were to blame, first, in allowing this stuff to get in contact with the sugar; and second, in not warning the consignee that seeing the bags had got marked with moisture there might be poison in the sugar.

It is quite certain that none of the railway officials knew that the stuff was poison. Had they reason to suspect it? Now, to begin with, there is no duty on the part of the railway company to acquaint themselves with the contents of the boxes they carry, and, unless in special circumstances, they have neither the right nor the means of obtaining that information. This box had stencilled on it the words "weed-killer," and the whole case of the pursuers really turns on that fact. There is no other circumstance in the evidence which can be represented as conveying to an observer the smallest hint that the fluid leaking from the box was poisonous. The servants of the railway company do not seem to have noticed the stencilled words, and one question is, whether this was fault—such fault as we are in search of. I cannot think that there was fault of any kind; it is proved, and indeed is notorious, that boxes are used for all sorts of purposes besides that which they are first employed for; and a stencilled marking is therefore little attended to. Again, the fact that a fluid was leaking called for attention from the company's servants merely because for their own purposes they note the stage of the journey at which a package is observed to be damaged or not intact, but a leakage would never of itself suggest the question whether the fluid was poison, and the inquiry what it was. It is also to be noted that even if the company was bound to know that the fluid was weed-killer, this was far from being equivalent to knowledge that it was poison, as poison is not necessary to the destruction of vegetable life, and many weed-killers in use are not poisonous.

My opinion therefore is that the company's servants were not bound to know that the stuff was poison, and that they had not such ground for suspicion as to make them responsible to the pursuers either for placing the sugar in the same van with the box, or for not warning the grocer that there was danger of poison when it was noticed that the bags had got wet from the leakage. The fact is, the party to blame and legally responsible was the chemical company, who in dealing with a substance of such enormous peril were bound to have taken the greatest precaution for its safe package, and to have given to the railway company the fullest warning of the extraordinary risk to all the world which attended its transit. Once this is realised, I cannot help thinking that the true relation of the railway company and its servants to the question is better understood. That duty of the consigner not being fulfilled, the railway company and their servants were entitled to treat the box as an ordinary package, and its contents as requiring no special safeguards, unless and until some cogent cause of suspicion arose. For the reasons I have stated I do not think that any such case occurred.

I am for recalling the Lord Ordinary's interlocutor, and assoilzieing both defenders.

LORD ADAM concurred.

LORD M'LAREN.—I also concur. I just wish to make one observation. It is, that we are not in any way suggesting that the railway company is discharging its duty as carrier if it allows a box of sugar or flour to come in contact

with leaky packages. No doubt there might be a question between the grocer and the Caledonian Railway Company as to whether they had fulfilled their contract of carriage when they delivered one of these boxes in the condition of being damaged by leakage from another package, but we have no such question here. It is, of course, a question whether they are responsible for the injury to life which resulted from the sale of their sugar; and for the reasons which your Lordship has given I am clearly of opinion that no such responsibility does or can exist.

LORD KINNEAR concurred.

THE COURT recalled the judgment of the Lord Ordinary, and assoilzied both defenders, with expenses.

DAVID RITCHIE, W.S.—HOPE, MANN, & KIRK, W.S.—FORRESTER & DAVIDSON, W.S.—
Agents.

BAIRD & STEVENSON, Pursuers (Reclaimers).—*C. K. Mackenzie.*
JAMES MACGREGOR MALLOCH, Defender (Respondent).—
A. S. D. Thomson.

No. 197.

July 20, 1892.
Baird &
Stevenson v.
Malloch.

Expenses—Taxation—Fees to counsel.—The fact that the hearing of a case has been continued from one day to another is not in itself a reason why an additional fee should be sent to counsel, but the circumstance that the case has not been heard on a single day is an element to be taken into account in fixing the amount of the fee to which counsel is entitled as an adequate equivalent for his trouble.

The hearing in the Inner-House in an ordinary petitory action lasted for about half-an-hour one afternoon and for about an hour and a-half on the following day. The fees sent to senior counsel for the successful party were five guineas for the first day and four guineas for the second day, and to junior counsel four and three guineas respectively. The Auditor taxed off one guinea from each of the first day's fees and disallowed the second day's fees. *Held* that the second day's fees had been rightly disallowed, but that the sums taxed off the first day's fees fell to be restored, the case not having been heard on a single day.

In an action by Messrs Baird & Stevenson, quarrymasters, 21 Clyde Place, Glasgow, against James Macgregor Malloch, joint agent, British Linen Company Bank, Govan, for payment of £50, the Lord Ordinary (Kincairney) assoilzied the defender and found him entitled to expenses; and to this interlocutor the First Division, on a reclaiming note, adhered, finding the defender entitled to his expenses in the Inner-House.

The hearing in the Inner-House occupied about half-an-hour one afternoon and about an hour and a-half on the following morning. Five guineas and four guineas were the fees sent to the defender's senior and junior counsel respectively for the first day, and four and three guineas for the second day. The Auditor taxed off a guinea from each of the first day's fees and disallowed the second day's fees.

Upon the motion for the approval of the Auditor's report the defender objected to the taxation of counsels' fees, and argued;—The hearing had occupied a substantial part of two days, and therefore was one for which two days' fees had rightly been sent. At all events if the second day's fees were to be disallowed the reduction of the first day's fees was indefensible, looking to the total length of the hearing and to the fact that it had been interrupted, and so had caused more trouble to counsel.

The pursuers argued that the Auditor had acted within his discretion, which ought not to be interfered with.¹

¹ Brady v. Watson, March 19, 1881, 8 R. 694.

No. 197.

July 20, 1892.
Baird &
Stevenson v.
Malloch.

LORD PRESIDENT.—The facts here I understand to be these:—The case was taken up late on the afternoon of one day, and after having been heard for about an hour it was continued till the next day, when it was further heard for about an hour and a-half, I think,—the precise figures are immaterial. I think that the sound practice as recognised by the Court is this: At one time counsel got refreshers as if a day which was partially occupied had been a whole day irrespective of the proportion which the particular part might bear to a whole day. The proper view, however, which now prevails, is that the whole time which has been occupied by the hearing is to be taken into account in fixing the amount of counsel's fees. At the same time it is sufficiently obvious that a case which, for example, has occupied a solid three hours on a single day may give counsel less trouble than it would have done had the same time been split up between two days. I think that there is an appreciable difference depending on that consideration. It appears to me therefore that we should allow the whole fees sent to counsel for the first day, namely, five guineas to senior counsel and four guineas to junior counsel; and this more by way of emphasising the principle to which I have alluded, than because of the pecuniary importance of the matter in this particular case. As regards the fees for the second day, I think that the Auditor has rightly exercised his discretion, and I am not for interfering with what he has done.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT allowed to each of the defender's counsel one guinea in addition to the fees allowed by the Auditor, and *quoad ultra* approved of the Auditor's report.

MACANDREW, WRIGHT, & MURRAY, W.S.—MARCUS J. BROWN, S.S.C.—Agents.

No. 198.

THE STEEL COMPANY OF SCOTLAND, Pursuers (Respondents).—

Asher—Salvesen.

July 20, 1892.*
Steel Co. of
Scotland v.
Tancred,
Arrol, & Co.

TANCRED, ARROL, & COMPANY, Defenders (Reclaimers).—*D.-F. Balfour—C. J. Guthrie.*

Res Judicata.—A steel company brought an action against the contractors for the Forth Bridge for declarator that the defenders were bound by contract to take from them the whole steel required for the bridge. The defenders answered that on a true construction of the contract they were not bound to take from the pursuers more than 30,000 tons; that the pursuers had always acted on this view of the contract, and had for this reason acquiesced in the defenders purchasing steel rivets from another firm; and that they were therefore barred from putting any other construction upon the contract. In this action, on 2d March 1888, the following interlocutor was pronounced:—"Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge." This interlocutor was affirmed on appeal by the House of Lords.

In a subsequent action of damages for breach of contract at the pursuers' instance against the defenders, *held* that the judgment in the former action did not preclude the defenders from maintaining in defence that the pursuers had acquiesced in the defenders purchasing rivets from another firm, and had accordingly, so far as regarded rivets, waived their rights under the contract.

Contract—Acquiescence.—A entered into a contract with B to purchase from

* The opinion of the Court was delivered on 19th March 1892

him all the steel he required for a work on which he was engaged. A subsequently ordered a quantity of steel rivets from C, who applied to B for rivet bars, informing him that they were to be made into rivets for A. After some discussion with A, B agreed to supply C with the rivet bars, and he continued to make him additional supplies until he had supplied him in all with 1200 tons. He thereafter, while continuing to fulfil C's orders, intimated to A that he reserved his claim of damages against him. In an action of damages for breach of contract by B against A, *held* that B had waived his rights under the contract only as regarded the 1200 tons.

No. 198.

July 20, 1892.

Steel Co. of
Scotland v.
Tancred,
Arrol, & Co.

In November 1890 the Steel Company of Scotland, Limited, brought an action against Tancred, Arrol, & Company, the contractors for the building of the Forth Bridge, concluding for £50,000 as damages for breach of the defenders' contract to take from the pursuers the whole steel required for building the four main spans of the bridge. In so far as material to the present report, the question related to the steel rivets required for the bridge. The defenders maintained that the pursuers had waived the right to supply these rivets. The pursuers, in answer, denied that they had so waived their rights, and maintained further, the plea of waiver was competent and omitted in a former action (Feb. 8, 1889, 16 R. 440, and May 7, 1890, 17 R. (H. of L.) 31), between the present parties, and was therefore now *res judicata*.

1st Division.
Ld. Kyllachy.

In the former action raised in June 1887 the summons concluded for declarator "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and for decree for £100,000, as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

In defence to that action, the defenders maintained that under the contract founded on they were not bound to take from the pursuers more than 30,000 tons of steel, or an amount not more than 5 per cent in excess of that quantity, in respect the contract stated,—“The estimated quantity of steel we understand to be 30,000 tons more or less.” In their statement of facts they further averred,—(Stat. 4) “ . . . The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers, they might get any extras elsewhere as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter. . . .” (Stat. 5) “In particular, the contract founded on embraced, *inter alia*, steel rivet bars. These were specified with the view to the defenders manufacturing the rivets themselves at the Forth Bridge works, but they subsequently found that it would be more convenient to buy them in a manufactured form. They accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde Rivet Works, providing in their contract that the steel should be obtained from one of two makers, viz., the pursuers or D. Colville & Sons, Motherwell. The Clyde Rivet Company accordingly purchased steel for making said rivets from the pursuers at the market rate then current, which was much lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. The pursuers' manager at first objected to what was being done, on the ground that this steel fell within the contract in question. The defenders, how-

No. 198.
 July 20, 1892.
 Steel Co. of
 Scotland v.
 Tancred,
 Arrol, & Co.

ever, informed the pursuers that 30,000 tons of steel would be taken under the contract, and that being so that the contract would be satisfied. This view was acquiesced in by the pursuers, and the steel was sold to the Clyde Rivet Company as before mentioned. Subsequently the following additional quantities of steel were purchased by the defenders from the Clyde Rivet Works Company, viz. . . . All the said steel was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge Railway."

The defenders' only plea founded on the averments just quoted was the following:—5. The pursuers are debarred by their own actings under the said contract, and by *rei interventus*, from maintaining the declaratory conclusions of the summons.

After a proof had been led as to the averments above quoted, the Lord Ordinary (Trayner), on 2d March 1888, pronounced this interlocutor:—"Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge, at present being constructed at Queensferry, in so far as such steel is or may be required in the construction of the four main spans of said bridge, and decerns; reserves all questions of expenses, and *quoad ultra* continues the cause."

Thereafter the parties were allowed a proof of their respective averments on the question of damages, but to obviate the necessity of leading proof the parties subsequently lodged a joint minute, in which, "under reservation of all pleas and rights of appeal," they agreed that the defenders were liable to the pursuers in damages at a certain rate in respect of 5000 tons of steel (in which no rivet bars were included) ordered by them outside the contract, and that the pursuers' claim for further damages, and the defenders "whole pleas and rights thereanent," should be settled in a separate action or by arbitration, as might be afterwards determined.

On 13th June the Lord Ordinary interponed authority to the joint minute, and in respect thereof decerned against the defenders for £14,850.

The defenders reclaimed, but the First Division adhered to the interlocutors reclaimed against with variations unimportant to the present question, and on appeal to the House of Lords the judgment of the First Division was affirmed.

In the present action the pursuers concluded for £50,000 as the amount of the damages still due to them in respect of the defenders' breach of contract.

In defence the defenders averred (stat. 3) that of the quantity of steel in respect of which the pursuers claimed damages about 4600 tons were purchased by the defenders from other firms in the form of steel rivets. "The contract founded on by the pursuers embraced, *inter alia*, steel rivet bars. These were specified in view of the defenders manufacturing the rivets at the Forth Bridge works out of the steel rivet bars purchased by them, but they subsequently found it would be more convenient to buy them in a manufactured form. This was communicated to the pursuers, who acquiesced therein, and unconditionally agreed to waive any claim they might have had to supply the steel rivet bars above mentioned." Then followed averments as to the purchase of steel through the Clyde Rivet Works substantially in accordance with the averments above quoted from the original action.

The defenders had no specific plea of waiver.

Proof was allowed. It appeared that in August 1884 the defenders ordered about 500 tons of rivets from the Clyde Rivet Company. On

receiving this order the Clyde Rivet Company asked the pursuers to give them a quotation for steel rivet bars "for the Forth Bridge contract." No. 198.
 The pursuers replied that they were entitled under their contract with the defenders to supply them with all the rivet bars required for the Forth Bridge, and on 12th August they wrote to the defenders in these terms:—"We were surprised this morning to receive an inquiry from a firm of rivet-makers for 400 to 500 tons rivet bars 'for Forth Bridge contract.' We would remind you that we are under contract with you to supply all the rivet steel for the Forth Bridge, and we shall be glad if you would kindly explain how we came to receive the inquiry referred to."

July 20, 1892.
 Steel Co. of
 Scotland v.
 Tancred,
 Arrol, & Co.

After some further correspondence between the pursuers and defenders a meeting took place between Mr Riley, the manager of the pursuers' company, and Mr Arrol, of the defenders' firm, about the beginning of September 1884.*

Between September 1884 and July 1888 the pursuers supplied the Clyde Rivet Company with 1200 tons of steel to be made into rivets for the Forth Bridge. In July 1888 the pursuers were asked by the Clyde Rivet Company to give them a quotation for 1000 tons of rivet bars for the Forth Bridge. The pursuers thereupon wrote to the defenders in the following terms:—"Dear Sirs,—The Clyde Rivet Works Company have asked us to quote to them for 1000 tons rivet bars for the Forth Bridge. We have done so, but we think it right to intimate to you at the same time that we do so under reservation of all rights and claims of damages

* With reference to this meeting Mr Arrol deposed,—“I saw Mr Riley, and asked why he would not supply the Clyde Rivet Works with this steel. He said he could not afford that to be taken off his contract. I said I did not want to take it off his contract; that I would bind myself to take up the full 30,000 tons irrespective of whatever he supplied to the Clyde Rivet Works, and if he did not supply it I would require to buy the steel somewhere else. He said in that case he was quite agreeable, and we had no more communication about it. From that time onwards the steel was got from the pursuers by the Clyde Rivet Company in the knowledge on the part of the pursuers that it was going to the Forth Bridge. Mr Riley at that meeting did not mention any number of tons of rivets at all, either 1200 or any other figure.”

Mr Riley's evidence on this point was as follows:—"The meeting was about rivets, and it arose on a proposal by the Clyde Rivet Works Company to buy bars from us for the manufacture of rivets for the Forth Bridge. That proposal was discussed, and the end of it was that we agreed to quote to the Clyde Rivets Company, in response to their inquiry, for 400 to 500 tons of rivet bars, and we did so. In the first place I consulted my directors, who considered the matter, and, as I have stated, we agreed to quote. We had objected to quote to the Clyde Rivets Company because we were under our contract entitled to deliver all the rivet bars. (Q.) At that meeting with Sir William Arrol did you agree to waive that contention? (A.) That is the practical result—that we agreed to quote to the Clyde Rivets Company in response to their inquiry. (Q.) Did your directors agree to waive that contention? (A.) They agreed that we might quote to them. By the Court.—(Q.) Which implied a waiver of that contention? (A.) I suppose so. Examination continued.—(Q.) You adhere to what you said before, that you consulted your directors and they agreed to waive the point? (A.) Clearly. . . . Cross.—. . . I conducted the preliminary negotiations between the company and Sir William Arrol about the contract to supply steel. I had general information from him as to the probable quantities that would be required. . . . I had a strong impression at the time of our meeting that 1200 tons of rivets would be required. . . . In communicating with my directors about this matter I told them my strong impression was that 1100 or 1200 tons would be required."

No. 198.

July 20, 1892.
Steel Co. of
Scotland v.
Tancred,
Arrol, & Co.

or otherwise competent to us against you in connection with these rivet bars."

On 26th January 1892 the Lord Ordinary (Kyllachy) pronounced an interlocutor finding the pursuers entitled to £24,447 in name of damages, that sum including £13,659 in respect of the rivets.*

The defenders reclaimed, and argued;—The question whether or not the pursuers had waived the right to supply rivet bars was not *res judicata*. The averments made by the defenders on that subject in the previous action had been made *alio intuitu*, and all that the Court had decided was that the pursuers were not barred by their actings from construing the contract in a wider sense than that contended for by the defenders. It had never been decided that the defenders had not a competent defence to the pursuers' claim in respect of rivets, on the ground that they waived their right to supply the rivet bars, nor could it be said that the defence, though competent, had been omitted, inasmuch as the question of damages had been withdrawn from the cognisance of the Court by the joint minute. The defence was therefore still open to the defenders, and the evidence established that the pursuers in September 1884 had waived their right to supply rivet bars in the terms of the contract. The waiver applied to all the rivets required for the Forth Bridge, and it was not in the power of the pursuers afterwards to withdraw it.

The pursuers argued;—The Court in the former action had decided without qualification that the pursuers had a right to supply the defenders with the whole steel required for certain parts of the bridge. It was competent for the defenders to have pleaded in defence to that action that the pursuers had discharged their claim under the contract in regard to rivets. The defenders had either maintained that plea, and it had been rejected, or they had omitted to maintain it. In either case they were precluded from putting it forward now. Further, on the evidence, the plea of waiver could only be maintained, if at all, as to the rivets purchased by the defenders prior to July 1888.

At advising,—

LORD PRESIDENT.—The Lord Ordinary has decided the only question raised

* "OPINION.— . . . With respect to rivets, I have included them in the above figures. I do so for this reason. I think that the rivet steel fell within the contract. Indeed, I did not gather that this was seriously disputed. The only question therefore is whether the contract was modified to the effect of discharging this part of the defenders' obligation. On this question, if it were open, I should, I confess, have had difficulty in deciding against the defenders. My impression is, that there was on this matter a concluded verbal agreement, followed by *rei interventus*, to the effect that the defenders might get their rivets where they pleased. But I do not think that the question is open. The question was fairly raised by the conclusions of the summons in the former action. It would have been, so far as I can see, a good defence to the action that, at least as regards rivet steel, the defenders were not bound to take the whole steel required for the bridge from the pursuers. In other words, it would, so far as I see, have been a competent and relevant plea in the former action that, at least *quoad* rivet steel, the contract had been discharged. But no such plea was taken, and accordingly the judgment of the Court, affirmed by the House of Lords, was expressed in unqualified terms, affirming that the defenders were bound to take from the pursuers the whole steel required for the superstructure of the four main spans. It is not, I am afraid, possible to read that judgment as declaring merely the construction of the original contract without reference to modifications of the contract subsequently made. But that is the only answer which, on this point, the defenders were able to make."

under this reclaiming note, viz., the claim of damages for rivets, on the ground that the defenders' liability in damages on that head has already been affirmed by the judgment of this Court and the House of Lords in the previous action, and that the present dispute is *res judicata*. It is argued by the defenders that all that the previous judgments did was to decide that the terms of the contract dated in February and March 1883 covered all the steel, including rivets, but that these judgments did not negative, and do not preclude the plea now stated, viz., that in September 1884 the pursuers waived their right to supply rivets under the contract.

No. 198.

July 20, 1892.
Steel Co. of
Scotland v.
Tanner, &
Arrol, & Co.

I have come to be of opinion that the latter view is right. The scope and effect of the decree of 2d March 1888 (which was subsequently modified only in a matter unimportant in the present question) is to be ascertained by its own terms, and by the summons and the record on which it was pronounced. Taking these writings together, I think that the question submitted for decision and decided was the construction of the contract of February and March 1883, and that the decree did not declare the rights of parties as affected by fulfilment or release so as to state the net results of those rights at the date of the decree. The opposite theory would have this result—that it would make us read the word “required” as meaning “now required”; and the declarator, pronounced as it was when much of the bridge was already constructed, would limit the pursuers' claim of damages to such steel as was required at and after 2d March 1888.

An examination of the record confirms the view that the decree only construes the contract. The pursuers make much of the fact that the arrangement of September 1884 now founded on was made matter of averment, and proof was led upon it. That is quite true, but it is clear that those averments were made in support of the plea that the pursuers were barred by their actings from insisting in the declaratory conclusions of the summons. The argument was that the fact that the pursuers agreed that the rivets might be taken from the manufacturers was irreconcilable with the view of the contract taken in the summons, and could be accounted for only by the defenders' theory of a limit of 30,000 tons. The matter of the rivets was thus germane to the question which construction had been adopted by the parties, and a perusal of statements 4 and 5 in the record in the former action, as well as the matters alongside of which the topic is brought in, makes its relation to the controversy sufficiently clear. It is of course true that if in the dispute submitted for decision those facts gave rise to a separate plea which was not stated, the plea of competent and omitted would not be met by shewing that the subject was introduced *alio intuitu*. But at present I am concerned to see how far the presence of the averments about the rivets affects the question what was truly the matter of debate and decision, and their presence does not conflict with the view that the dispute was solely as to the construction of the contract of 1883, as that should be ascertained from its terms, or as fixed by the conduct of parties. I think that, assuming the rivets were within the contract, the Court had no occasion to consider whether the pursuers had waived their right to claim fulfilment of that part of the contract, that not being *hujus loci*. In truth, the latter question had no bearing except either as binding the parties to one construction of the contract, or as stopping a claim of damages on that head. But the question of damage was admittedly held over till the construction of the contract was

No. 198. determined, and thus the judgment of 2d March 1888 had no relation to the present controversy.

July 20, 1892.
Steel Co. of
Scotland v.
Tancred,
Arrol, & Co.

Unless the defenders' right to their present plea was taken away by that judgment, it certainly is before us now; for the joint minute of 12th May 1888 most amply saves for the new action all possible pleas, new and old, which were competent to them. I am therefore of opinion that we are not precluded from considering the case on its merits.

I shall briefly state the conclusion to which I have come on the facts. In or about August 1884 the pursuers became aware that the defenders were getting rivets from the Clyde Rivets Company, and they complained to the defenders, claiming that this was a breach of contract. In September 1884 Sir W. Arrol and Mr Riley, the pursuers' manager, had a meeting to consider the question which had thus arisen. The precise form in which the question arose requires to be noted. The Clyde Rivets Company when they got the order for rivets from the defenders asked the pursuers to sell them bars for the manufacture of these rivets to the extent of some 500 tons. It was thus that the pursuers became aware of the breach of contract, and they felt that they would compromise themselves if in that knowledge they supplied their supplinters with the material for the rivets. The practical question therefore was, whether the pursuers should quote for the bars, the alternative being that they should intimate a claim of damages. Now, I hold it to be proved that at this meeting in September 1884 Mr Riley agreed to waive the objection taken by his company to the defenders taking the rivets from the Clyde Rivets Company instead of from the pursuers, and to quote for the bars. Mr Riley's evidence on this point is quite explicit. Nor do I think that the evidence of Sir W. Arrol varies the result. It is true Sir William thought Mr Riley's consent to waive was due to trust in the theory of the 30,000 tons limit. But I do not think that this affects the fact that Mr Riley, for good reasons or bad, waived his company's objection to the Clyde Rivets Company supplying the rivets.

If the facts stand as I have stated them, then the position of the parties is this,—The pursuers are claiming damages, *inter alia*, for the defenders having got those 500 tons from the Clyde Rivets Company. But then they cannot get damages for what they themselves have agreed to, and this in my opinion is the fact. Mr Riley, as I have said, did so agree, and his directors approved of what he had done, and left the matter in his hands. No further communication was made to Sir W. Arrol by Mr Riley, and none was necessary.

The next question is, whether the parties are in the same position as regards the rest of the rivets as they are in regard to the 500 tons. Now, I do not adopt the defenders' view that what was done in September 1884 was a contract which tied the hands of the pursuers as regarded all rivets. I think that it was a mere waiver of objection implying consent to what was objected to, and that the pursuers were quite free, if the defenders went back to the Clyde Rivets Company for more rivets, to give notice to the defenders that they were going to stand to their rights. It appears, indeed, that no figure was mentioned to Sir William Arrol as the measure of the concession made by Mr Riley. It may fairly be held, therefore, that the pursuers could not claim damages until they had told the defenders that they withdrew their consent, and that the claim of damages would not lie for goods ordered prior to such intimation. This, I think, is the sound view. In that view, the question is, what quantity of rivets had been ordered from the Clyde Rivets Company prior to 25th July 1888, when

distinct intimation was made that the pursuers withdrew their consent. On No. 198. the evidence, not more than 1200 tons have been proved to have been so ordered ; July 20, 1892. and therefore, in my opinion, the sum found due and decerned for by the Lord Steel Co. of Ordinary must be reduced by a sum representing that quantity. The figures Scotland v. Tancred, Arrol, & Co. can be adjusted by the parties.

LORD M'LAREN.—When a question arises whether a particular claim is *res judicata*, the ordinary mode of determining that question would be by a comparison of the conclusions of the first action and the *media concludendi* with those of the action in which the question arises, and if it is found that the subject-matter of the two actions is the same, that the rights asserted with reference to that subject are the same, and if the defender was a party to the original action, then the matter is *res judicata*, and the party can neither be allowed by way of defence nor by instituting a reduction of the original decree to raise a point which might competently have been pleaded in defence to the original action, but which was omitted to be stated in that action. But then that absolute criterion evidently only holds good where the first action is contested upon all the points submitted by the summons and record to the adjudication of the Court, because if in the course of the proceedings in the first case part of the subject is withdrawn from the cognisance of the Court, the comparison evidently lies between the new claim and the original claim as restricted. It appears to me, accordingly, that in the technical sense of the expression this claim cannot possibly be a *res judicata*, because the only subject as to which a decree was given in the first action was the 5000 tons of steel, as to which it was agreed that a test opinion should be obtained, and as regards all the remainder of the steel which was reserved for consideration by arbitration or a subsequent action it is plain that special defences might arise, and might be very proper for consideration, which could not have been taken to any part of the 5000 tons which constituted the subject of the original decree. Now, although there is, as your Lordship has pointed out, a reference to those letters which are said to constitute the waiver in the original record, I do not understand that that waiver applied to any part of the 5000 tons on which this Court, and eventually the House of Lords, were asked to give a decision, and it was therefore impossible after the first action had been thus restricted that a decision could have been given upon the question which the Lord Ordinary has been called to decide in the present case. No doubt if an opinion had been given upon the point incidentally—especially in the House of Lords—that might have been binding upon us as a precedent, but the fact is that the matter was never considered at all, and it appears to me to be entirely open for consideration in the present case.

On the merits of the claim I agree with your Lordship.

LORD KINNEAR.—I am of the same opinion. It appears to me that the previous judgment determined the construction and legal effect of the contract between the parties. Whether the contract being so determined the pursuers had waived their right to enforce it with reference to a particular quantity of steel for rivets, was an entirely distinct and separate question. I think that is a question which was not put in issue in the previous action and not adjudicated upon. If the operative conclusions of the summons had embraced this particular quantity of steel for rivets, so as to bring the mutual rights and liabilities of the parties with reference to that specific subject within the scope of the

No. 198. **July 20, 1892.** **Steel Co. of Scotland v. Tancred, Arrol, & Co.** decree of the Court, then I should have had no difficulty in holding that the judgment of the Court was a *res judicata* with reference to this as with reference to any other part of the steel which formed the subject of the contract, and in that case the defender would have been met by the plea which I think would have been a perfectly valid plea, of competent and omitted, because it would have fallen upon him in that case to plead the waiver he is now pleading, and if he failed to do so and had a decree against him in reference to this specific subject, there could be no doubt, in my opinion, that that would have been a final and binding judgment. But then by the time the Court came to pronounce a decree of declarator in the former action, this particular quantity and all quantities of steel that were in the same position had been withdrawn from the scope of the summons, and therefore could not possibly be within the scope of the decree, because when the Lord Ordinary had allowed a proof the parties by agreement fixed the amount of damage in respect of certain quantities of steel, and then they agreed that the pursuers' claim in respect of all further quantities of steel already used or which might be used, and their whole rights, and the defenders' whole pleas and rights thereanent, should be reserved for subsequent determination, and should be settled in a separate action.

Now, this action is brought in order to enforce the pursuers' claim in respect of certain quantities of steel which were so reserved and taken out of the scope of the previous action, and therefore it appears to me quite out of the question to say that the previous judgment determines the liability of the defenders in respect of that claim which was specially reserved by the agreement of parties. It appears to me, therefore, that there can be no plea of competent and omitted in this case. The judgment would undoubtedly be binding as a precedent between the parties if the question had been raised or considered by the Court, but I agree with both of your Lordships that the judgments had no application to the special point we are now called upon to consider. My only doubt is, not whether the plea was competent and omitted in the former case, but whether it is not competent and omitted now, because I confess I am unable to find any plea upon record which relates to the point we have been asked to decide, and according to the stricter and more scientific rules of pleading which were at one time enforced in this Court, we should have been compelled, whatever our opinion of the justice of the case might have been, to refuse to give effect to this plea which is not maintained upon record. But it has been argued, and argued without opposition, and therefore I think we may fairly give effect to the opinion we have formed on the subject.

With reference to the application, I entirely agree with your Lordship that it must be limited to the 1200 tons supplied prior to 25th July 1888.

THE COURT left it to the parties to adjust the amount of the damages payable by the defenders in terms of the judgment, and the matter was afterwards settled out of Court, without any interlocutor being pronounced.

TODD, MURRAY, & JAMIESON, W.S.—MILLAR, ROBSON, & Co., S.S.C.—Agents.

JOHN PROCTOR KYD (Mr and Mrs Kay's Trustee), Pursuer and Real
Raiser.

No. 199.

ALEXANDER CANT KAY STALKER, Claimant (Reclaimers).—*C. J. Guthrie—
Salvesen.*

July 20, 1892.
Kay's Trustee
v. Stalker.

MARY KAY AND OTHERS, Claimants (Respondents).—*W. Campbell—
Sandeman.*

Succession—Mutual settlement—Power to revoke.—By mutual settlement two spouses conveyed to trustees the whole property belonging to them or to either of them at their respective deaths, for certain purposes, reserving "our respective liferents of the premises, with power to us or the survivor of us to alter, innovate, or revoke these presents at pleasure." *Held* that under this clause the surviving spouse had no power to revoke bequests in the settlement of subjects which were the property of the predeceasing spouse, or bequests which were the joint gift of both spouses.

By a trust-disposition and settlement, dated 3d January 1882, David Kay, Fort Street, Broughty-Ferry, and Mrs Margaret Kay, his spouse, on the narrative that, being resolved to make "a mutual settlement of" their affairs so as to prevent disputes after their deaths, they had agreed to execute these presents,—the spouses "mutually" disposed to trustees the whole estates, heritable and moveable, "belonging to us or either of us, or that shall pertain and belong to us or either of us, or of which we or either of us have the power of disposal at the time of our respective deaths," for the purposes following:—First, Payment of debts and expenses. Second, "In the event of me predeceasing my said husband, I, the said Mrs Margaret Cant or Kay, direct our trustees to pay over the free yearly income arising from any separate means and estate I may leave to the said David Kay, my husband, during all the days of his life, and that at such times and in such proportions as they may find it convenient. Third, In the event of the said Margaret Cant or Kay, my spouse, surviving me, the said David Kay, I direct and appoint our trustees to allow her the free use and enjoyment, during all the days of her life, of the whole household furniture and plenishing that shall belong to me at the time of my death, and also to pay to her during all the days of her life the free yearly income of the residue and remainder of my means and estate, and that at such times and in such proportions as they may find it convenient. Fourth, After the death of the last survivor of us, we direct our trustees to deliver over to our daughter, Jessie Kay or Stalker," certain specific articles, "and also as soon as conveniently may be after the death of the last survivor of us, to pay to the said Jessie Kay or Stalker the sum of £40 sterling as a legacy, which we hereby leave and bequeath to her, free of legacy-duty or any other claim whatever. Fifth, We direct our trustees, upon the death of the last survivor of us, or as soon as conveniently may be thereafter, to dispoise and convey to and in favour of our daughter, the said Jessie Kay or Stalker," two heritable subjects, which in point of fact belonged to Mrs Kay. "Lastly, Upon the death of the last survivor of us, or as soon as conveniently may be thereafter, and after answering the foregoing purposes, we direct our trustees to divide the whole residue and remainder of our respective means and estates into five equal parts or shares, and pay over the same" to their five children and the issue of predeceasing children *per stirpes*. "And to prevent doubts, it is declared that the shares of succession accruing to our said children and grandchildren shall become vested interests in their persons at and only upon the arrival of the periods of payment above mentioned." There was also this clause,—“And we reserve our respective liferents of the premises, with power to

1st Division.
Lord Kin-
airney.

No. 199,
July 20, 1892.
Kay's Trustees
v. Stalker.

us or the survivor of us to alter, innovate, or revoke these presents at pleasure: And we dispense with the delivery hereof."

Mrs Kay died on 8th January 1882, survived by her husband, and the trustees thereupon accepted office. Mr Kay died on 13th August 1890. Neither spouse exercised the power of revocation.

On 31st October 1891 the surviving trustee brought a multiplepinding for the distribution of the trust-estate. The questions (in so far as now reported) related to the provisions in the fourth and fifth purposes of the deed in favour of Mrs Stalker, who had died intestate on 10th February 1883, thereby surviving her mother, but predeceasing her father.

Alexander Cant Kay Stalker, her eldest son and heir-at-law, claimed the two heritable subjects left to his mother by the fifth purpose, on the ground that the right to them had vested in her by her survivance of her mother; and, on the same ground, he claimed a share along with his brothers and sisters of the legacy of £40 left by the fourth purpose.

Mary Kay and others, the children of William Kay, a deceased son of the testator, as residuary legatees, maintained that both these provisions had lapsed by reason of Mrs Stalker having predeceased her father.

On 16th March 1892 the Lord Ordinary (Kincairney), proceeding on the ground that the power of revocation reserved to the spouses prevented vesting till the death of the survivor, held that no right to the provisions in question vested in Mrs Stalker.

A. C. K. Stalker reclaimed, and argued;—The case of *Lang's Trustees*¹ (which had not been cited to the Lord Ordinary) settled that a reserved power to revoke, such as that now in question, gave the surviving testator power to revoke only as regarded his or her own estate. Therefore the fifth provision of the deed became irrevocable on the death of Mrs Kay, the subjects therein disposed of being her property. The legacy of £40 given by the fourth purpose also became irrevocable on that event, for it was a joint legacy, so that it was *pars contractus* that the surviving spouse should not have power to revoke it. Both bequests therefore had vested in Mrs Stalker, for the express clause of vesting had reference to the residue only.

Argued for Mary Kay and others;—*Lang's Trustees* was very different from the present case, for the terms of the reserved power there shewed that no joinder of right or interest was intended from the first. It was simply a case of two wills combined for convenience in a single deed. At all events, the clause of vesting applied to the fourth and fifth purposes, and not merely to the residuary gifts.

At advising,—

LORD ADAM.—I am of opinion on the construction of the deed, and upon the authority of the case of *Lang's Trustees*, 12 R. 1265, which directly applies to this case, that the meaning of the clause reserving power of revocation is, that, except in so far as any of the provisions of the deed may be considered to be contractual, either party could revoke it at pleasure in so far as his or her means and estate are thereby conveyed, but the survivor could not revoke or alter the deed in so far as regards the means and estate of the predeceaser. From this it follows that the legacy of the heritable subjects in the fourth purpose could not be revoked or altered by Mr Kay after his wife's death, as these were part of her separate estate. This, therefore, is just the ordinary case of a legacy left to a person, the

¹ *Lang's Trustees v. Lang*, July 14, 1885, 12 R. 1265; also *Kerr v. Kerr*, June 28, 1873, 11 Macph. 780, 45 Scot. Jur. 512; *Welsh's Trustees v. Welsh*, Oct. 24, 1871, 10 Macph. 16, 44 Scot. Jur. 15.

period of payment of which is postponed ; but the mere postponement of the period of payment does not suspend vesting. I think, therefore, that these subjects vested in Mrs Stalker, on the death of her mother, and she, having died intestate, they now belong to her son who is her heir in heritage.

No. 199.

July 20, 1892.
Kay's Trustees
v. Stalker.

With regard to the legacy of £40, contained in the third purpose, I also think that a right to this legacy vested in Mrs Stalker upon the death of her mother. It will be observed that this legacy was directed to be paid by both Mr and Mrs Kay. They agreed that this should be done. They could jointly have revoked, but on the death of the predecessor I do not think the legacy was revocable by the survivor. I think, therefore, that this legacy also vested in Mrs Stalker and goes to her heirs *in mobilibus*, who are her children.

It was, however, further argued to us, that the legacies or provisions in question did not vest in Mrs Stalker on the death of her mother, in respect of the declaration in the deed "that the *shares* of succession effeiring to our said children and grandchildren shall become vested interests in their persons at and only upon the arrival of the periods of payment." I am of opinion, however, that this applies only to the shares of the residue, and not to these special provisions. I propose, therefore, that the interlocutor should be altered in terms of the opinion I have expressed.

LORD M'LAREN.—The question here is as to the right to revoke a mutual will. When one reads on the outside of an instrument "the mutual will of Mr and Mrs So-and-so," it is not unnatural to suppose that it really is what it purports to be, a mutual deed, and that accordingly there is in it the element of reciprocity. Of course if there be reciprocity,—that is, if one set of provisions is given in return for the other set, or as a matter of stipulation,—the deed must be interpreted on the principles which regulate contracts. Sometimes this happens when, for example, the husband makes provision for his wife's relatives and she for those of her husband. But in the absence of a special declaration that the will is a mutual one, I think in the ordinary case it is to be understood, and it has been so laid down in cases of considerable authority, that there is not reciprocity merely because two wills are contained in one and the same instrument. That merely shews that the parties wished it to be understood that they knew about each other's settlement. It does not take from either the right to alter his or her will.

There is nothing in this will to take it out of the ordinary category to which I have referred. There are really here two wills in one instrument, the clause of revocation is in the usual form ; it only "reserves" a power to revoke or alter, and under such a reservation each party can only test upon his or her individual estate. On all the points I concur in the opinion delivered by Lord Adam.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT recalled the interlocutor of the Lord Ordinary ; found that on the death of the testator Mrs Margaret Cant or Kay a right to the legacies and provisions mentioned in the fourth and fifth heads of the mutual trust-disposition and settlement vested in Jessie Kay or Stalker, wife of William Stalker, blacksmith, Broughty-Ferry ; and ranked and preferred accordingly.

J. SMITH CLARK, S.S.C.—HENDERSON & CLARK, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 200.

ANDREW FERRIER, Complainer.—*Rankine.*ASSESSOR FOR EDINBURGH, Respondent.—*Cheyne—Boyd.*

July 20, 1892.

Ferrier v.

Assessor for
Edinburgh.

Valuation-roll—Public parks—Basis of valuation.—Where a municipal corporation allows land held by it to be used for public recreation, it should be entered in the Valuation-roll at an annual value equal to the rent which might be obtained if the lands were let and the public excluded, but if the land is held subject to servitudes of way or other restrictions which are binding on the corporation, the land should be valued at the rent which might be obtained for its use subject to these restrictions.

Lands Valua-
tion Appeal
Court.Ld. Kyllachy,
Ld. Wellwood.(SEQUEL of case reported *supra*, June 17, 1892, 19 R. 882.)

The case set forth that at a Valuation Appeal Court held by the Magistrates of Edinburgh, Andrew Ferrier, inspector of poor of St Cuthbert's Combination, complained that the following public parks belonging to the Corporation of Edinburgh were entered by the Assessor at too low values, and craved that the values should be altered as under:—

Case 138.

Subject.	Present Value.	Value to be Substituted.
" 1. Braid Hills, . . .	£35 . . .	£670
2. Blackford Hill, . . .	56 . . .	475
3. Inverleith Park, . . .	113 . . .	590
4. Bruntsfield Links, . . .	6 . . .	280
5. East Meadows, . . .	42 . . .	270
6. West Meadows, . . .	57 . . .	250

" It was maintained on behalf of the complainer that the valuations put upon the public parks in question were inadequate, because (1) the sums entered merely represent grazing rents obtained for the parks, subject to their use by the public as recreation and pleasure grounds, and no value whatever has been put upon them as recreation and pleasure grounds; (2) said exemption from value as recreation and pleasure grounds is not according to law, and moreover, apart from the question of the incidence of taxation in the case of ratepayers dwelling in Edinburgh, as St Cuthbert's represents ratepayers in the county of Midlothian and in Leith outside the Edinburgh municipal boundary, it is unjust that the citizens of Edinburgh should be exempted in respect of their pleasure grounds from taxation at the expense of the ratepayers in the county and in Leith; (3) the property of the municipality is liable to valuation and assessment for poor-rates as fully as that of any private owner, and possesses no right of exemption or privilege in the matter; (4) a fair standard of the value of said public parks is the rent per acre which the corporation is paying for public parks rented by it; and (5) said rents are for Harrison Park £10 per acre, and for Stockbridge Park £9 per acre.

" The Assessor having been duly sworn, stated in reply that the valuations complained against were the actual rents paid for the grazings, and that he had accepted these grazing rents as the yearly value at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year."

The magistrates found the following facts proved:—

" 1. That the valuations complained of are the actual rents received by the Lord Provost, Magistrates, and Council for the subjects.

" 2. That immediately prior to the acquisition of the Braid Hills, the Blackford Hill, and Inverleith Park by the Lord Provost, Magistrates, and Council, for use as pleasure grounds for the public, the rents paid for the same were:—

Braid Hills, . . .	£115, or	17s. 2d. per acre.
Blackford Hill, . . .	160, or £1, 13s. 8d. per acre.	
Inverleith Park, . . .	220, or £3, 15s. 10d. per acre.	

"3. That Brunsfield Links and the East and West Meadows are of No. 200. the nature of public commons, and are intersected in numerous directions by public roads and public footpaths, and are otherwise open for the free use of the public."

July 20, 1892.
Ferrier v.
Assessor for
Edinburgh.

That by 7 and 8 Geo. IV. cap. 76, sec. 54, and 1 and 2 Will. IV. cap. 45, sec. 46, it was made incompetent for the corporation or any other person, without the sanction of Parliament, to build upon the Meadows or Brunsfield Links so far as the same belonged to the corporation.

The magistrates altered the valuations to—Braid Hills, £115; Blackford Hill, £160; Inverleith Park, £220; being the rents obtained when these were private property immediately before their acquisition by the corporation, and being the rents which, in their opinion, might be obtained if they were let and the public excluded. With regard to Brunsfield Links and East and West Meadows, they adhered to the Assessor's valuations, these being the actual grazing rents for the same paid to the corporation.

Counsel were heard upon the merits.

LORD WELLWOOD.—I do not think that we should interfere with the determination of the magistrates in regard to the valuation of the Braid Hills, Blackford Hill, and Inverleith Park. They have added to the value put upon these subjects by the Assessor by adopting the actual rents obtained when they were private property. This might not be sufficient to justify the valuation, because the subjects are now used for other purposes; but as they add that in their opinion those rents are the full rents which might be obtained if the subjects were let now, and the public excluded, I do not think that we should interfere with their deliverance, no question of principle being involved.

The other subjects stand in a different position. The magistrates have taken the actual grazing rents received for Brunsfield Links and the East and West Meadows; but they do not state in regard to those subjects that those rents are all that could be obtained if the subjects were let for other purposes. It may be, as regards Brunsfield Links, looking to the way in which they are intersected by paths, and especially if, as is probable, the public cannot be excluded or prevented from using them, that nothing but a grazing rent could be obtained; and if so, I should not be prepared to disturb the valuation. But the Meadows stand in a different position. The only restriction stated in the case is a statutory one against building on the Meadows. But, so far as appears from the case and the evidence, the magistrates are not precluded from letting or using the Meadows for any other purpose to which, in their present condition, they could be applied, unless the statement that they are of the nature of commons be intended to indicate that the public have a prescriptive right to use them. Of this, however, there is no evidence. As I understand, the way in which the magistrates prefer, and no doubt properly, to use them at present, is to give the public the use of them for purposes of recreation. The use of the Meadows for grazing is subsidiary to the purposes of recreation, and therefore the grazing rents by no means represent the letting value of the subjects.

It is no easy matter to arrive at the fair annual value of subjects which are held by a public body in trust for the public, and not let or used for purposes of profit. But I take it that the result of the decisions is that if such subjects are not actually let they must be valued on the footing of ascertaining the rent which a hypothetical tenant would give for them if he took them subject to all the restrictions under which they are held and administered by the public body.

No. 200.

July 20, 1892.
 Ferrier v.
 Assessor for
 Edinburgh.

In the present case the magistrates, instead of letting the subjects out and out, have thought fit to devote them primarily to the recreation of the public. That is much as if a private individual were to lend his mansion-house and policies to a friend, free of rent, and merely let the grazings of the surrounding parks. This would certainly not prevent the whole of the subjects from being valued for purposes of assessment at the rents which they would bring if let.

I therefore think that we should approve of the determination of the magistrates as regards the Braid Hills, Blackford Hill, and Inverleith Park, and remit to them to reconsider the valuation of the other subjects on the principles which I have above stated, while in doing so they will be entitled to take into consideration any restrictions under which they hold the subjects. I think that we should instruct them, if they hold that there are any other restrictions binding on them than the restriction against building imposed by the statute, to state specifically what those restrictions are, and the grounds of their opinion. For instance, I observe that in the case the magistrates state that not only Bruntsfield Links but the East and West Meadows are of the nature of commons, and open for the free use of the public. If that consideration affects their determination of the value, I think that they should state precisely what they mean by it. Do they mean that the public have acquired servitude rights over the Links and the Meadows, and if so, in what manner and to what extent? While, as I have indicated, Bruntsfield Links may have been so used for such a length of time as to make it impossible to exclude the public, I greatly doubt whether any such rights can have been acquired by the public in regard to the Meadows; and unless they have been acquired in some manner recognised by law, the magistrates must value those subjects as if no such restrictions existed.

LORD KYLLACHY.—I concur.

THE JUDGES returned the following opinion upon 15th March 1892:—“We are of opinion that the determination of the magistrates is right as regards the valuation of the Braid Hills, Blackford Hill, and Inverleith Park. As regards the other subjects, we remit to the magistrates to state in what sense and on what grounds they find that the Bruntsfield Links and the East and West Meadows are of the nature of public commons, and that they are open for the free use of the public, and in particular to state what are the burdens or restrictions, if any, on the proprietary rights of the corporation in (1) Bruntsfield Links, and (2) the said East and West Meadows; and whether the said burdens or restrictions, if any, are imposed by the corporation's title or by statute; and if not, in what other manner: Further, we remit to them to state, with reference to each of the said subjects, what would, in their judgment, be the maximum rent obtainable therefor, supposing the subjects were let from year to year for any purpose for which it is suitable, and with all the rights which the corporation could lawfully confer upon the supposed tenant.”

On 1st July thereafter, the magistrates reported—1st, As regarded Bruntsfield Links, that they were by the statutes above mentioned prohibited from erecting buildings of any kind thereon, and further that it appeared to the magistrates that the rights conferred on them had been materially qualified by long public use. “For, from time immemorial, and without

interruption or hindrance, the said Links have been resorted to, possessed, and enjoyed by the inhabitants of Edinburgh for the purpose of recreation and exercise. The name 'Bruntsfield Links' is first met with in 1644 in 'Balfour's Annals,' but they were probably first used for golf as early as 1603, if not much earlier. The public have besides been in the habit of walking and resting upon these Links, and certain parts have been devoted to many other useful purposes, including the beating of carpets and the drying and bleaching of clothes.

No. 200.
July 20, 1892.
Ferrier v.
Assessor for
Edinburgh.

"The magistrates are of opinion that the public appropriation from time immemorial of this ground for the above specified uses of the inhabitants of Edinburgh forms a burden on and qualification of the title of the magistrates, which they could not disregard. The magistrates believe that the Court would protect the Bruntsfield Links, even in a question between the corporation and the burgesses of the city, for the use and enjoyment of the inhabitants. This is the sense in which the magistrates stated in the appeal case that the Bruntsfield Links were of the nature of a public common, and open for the free use of the public, and the magistrates think that they find warrant for this view in the following authorities.*

"In these circumstances, the magistrates are of opinion that the maximum rent obtainable from Bruntsfield Links is the grazing rent at present received, which amounts to £6."

2d, As regarded the East and West Meadows, the magistrates reported:—

"The East and West Meadows were formerly covered by the Burgh Loch or the South Loch, which was within the bounds of the Burgh Moor or Common Moor. . . . In 1722 the Burgh Loch was let to Thomas Hope, on a lease for fifty-seven years, at a yearly rent of £800 Scots. In implement of the conditions of his lease Thomas Hope drained the loch and formed a walk round it, with a hedge on each side, and a row of trees and a walk across it from north to south. These walks were expressly stated to be for the use and benefit of the public of Edinburgh, and they were in fact largely used by the citizens, and are now represented by the promenade on the north side of the Meadows, the Melville Drive, and the Meadow Walk.

"Thomas Hope's lease expired in 1779, and from that time till 1855

* "*Kelly v. The Magistrates of Burntisland*, 1812, unreported, but explained in the interlocutor of the Lord Ordinary (Cunningham) in *Home v. Young*, 9 D. 293; *Sinclair v. Magistrates of Dysart*, M. 14,519, where it was held that the town of Dysart had, for the use of the burgesses and other inhabitants, acquired by immemorial usage and prescription a servitude or privilege of taking water from certain wells and drying and bleaching clothes on a certain green; *The Magistrates of Kilmarnock v. The Inhabitants*, Dec. 19, 1776, 5 Brown's Supplement, 406, where it was recognised that although the power of administration which the magistrates possess over the common good of a royal burgh includes a power of feuing, yet it was neither a proper nor a just act of administration to alienate a piece of ground which the inhabitants had always occupied and used for the purposes of washing, bleaching, and drying wool, and other purposes; *Dyce v. Hay*, July 10, 1849, 11 D. 1266, per Lord Justice-Clerk Hope, p. 1271, 21 Scot. Jur. 506, explaining *Cochran v. Fairholm*, Feb. 8, 1759, M. 14,518; *Sanderson v. Lees*, Nov. 25, 1859, 22 D. 24, 32 Scot. Jur. 14, where an inhabitant of Musselburgh was held entitled to interdict the magistrates from feuing any part of the links, which it was admitted the inhabitants had possessed from time immemorial for the purposes of amusement and recreation; *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066, Jan. 19, 1881, 8 R. 395, July 26, 1882, 9 R. (H. L.) 91, and L. R. 1882, 7 App. Cases. 547.

No. 200. July 20, 1892.
 Ferrier v.
 Assessor for
 Edinburgh.

the Meadows were let by the magistrates for grazing, and the public were excluded therefrom. In 1855 the Meadows were let by the magistrates to the Police Commissioners of the city for thirty-nine years from the term of Candlemas at a yearly rent of £72. . . . The first condition of the lease stipulated that the lessees should convert the subjects into a public park for the free use of the inhabitants of the city. The currency of the lease is from Candlemas 1855 to Candlemas 1894. . . .

"Although the public have enjoyed for about thirty-seven years the use of these Meadows as a public park they have done so as a condition of the aforesaid lease, which is still in existence. Since the ground was reclaimed the Corporation of Edinburgh have either exercised a power of excluding the public or have only permitted the public to use the Meadows as a public park *ex gratia*, and it seems to the magistrates that, in spite of the use which the public have had of the Meadows since the date of the lease, they have acquired for themselves (apart from the stipulation in their favour contained in the lease) no such rights over the Meadows as they seem to the magistrates to possess over the Bruntsfield Links. It appears, therefore, to the magistrates, that they must modify their statements in the appeal case to the extent of admitting that the Meadows cannot be regarded as a public common. . . .

"The magistrates and council regard themselves as bound, at least until the expiry of the said lease in 1894, to permit the public to have free access to the Meadows. It seems to follow that they could only let the Meadows as they now do subject to this free use on the part of the public. In the opinion of the magistrates and council, while such a state of matters continues, the Meadows can only suitably be used as grazing ground for sheep. The Meadows are in fact let from year to year by public roup as grazing ground for sheep, and the magistrates and council accordingly are of opinion that they are justified in regarding the present rent of £99 as the maximum rent obtainable therefor. . . . It is thought that the highest rent that could now be obtained, supposing that the public were entirely excluded, would be £3, 10s. per acre, or £192, 10s. for the whole area of the East and West Meadows."

ON 20th July the Judges returned this opinion:—"We are of opinion that the determination of the Magistrates is right as regards the valuation of Bruntsfield Links, and that the valuation of East and West Meadows should be entered at £192, 10s., being at the rate of £3, 10s. per acre."

SMITH & MASON, S.S.C.—W. WHITE MILLAR, S.S.C.—Agents.

No. 201.
 July 20, 1892.*
 Watson v.
 Board of
 Trade.

THOMAS WATSON, Appellant.—*Dickson—Aitken.*
 THE BOARD OF TRADE, Respondents.—*Johnston—C. K. Mackenzie.*

Ship—Shipping casualty appeal—Sufficient and proper instructions for safe navigation of vessel—Procedure before Court of investigation.—The decision of the Board of Trade Court of inquiry as to the stranding of a steamship off Seiero Point on the coast of Denmark was that the stranding in question "was due to the default of the master in respect of his failure to give the second officer sufficient and proper instructions for the safe navigation of the ship before leaving the bridge; and also of the second mate in not calling the master at once, when he could see that the course steered was taking the vessel dangerously close to the rocks," and the Court of inquiry therefore suspended the certificates of both officers for three months.

No. 201.

July 20, 1892.

Watson v.
Board of
Trade.

The master appealed.

From the evidence it appeared that the casualty occurred early in the morning during the second mate's watch. The master deponed that before going below he had instructed the second mate to keep the vessel on her course, and to "give me a call before you come to that light," meaning the Seiero light, which was then visible about ten miles off. The second mate deponed that the master had not given him any instructions to call him, but the master's evidence was corroborated by A, the man at the wheel. The Court of inquiry, however, disregarded the evidence of A, stating that "the Court is unable to attach that weight to the testimony of the witness which it might otherwise have done, as it appeared that while the ship was at Copenhagen (ten days after the accident) the master, without any notice to the second mate, caused," the witness in question, "to sign a statement to the effect above mentioned in the official log-book. In these circumstances the Court does not consider that it would be justified in holding the evidence sufficient to prove that the order in question was given by the master." No questions were put to the master regarding this entry in the log-book. It further appeared that it was a standing order on board the ship for the officer of the watch to let the master know before any light came on a four-point bearing.

The Court *reversed* the decision of the Court of inquiry as regarded the master's certificate, holding (1) that nothing had been proved to discredit A's evidence, and that the master had instructed the second mate to keep the vessel on her course and to call him before coming to the Seiero light; (2) that this instruction was to be read in connection with the standing order, and meant, therefore, that the master was to be called before the light came on a four-point bearing; and (3) that the instruction was, in the circumstances, a proper and sufficient instruction.

Observed that when a shipmaster is on trial for charges which may involve the loss of his certificate, it is right that questions should be put to him when being examined as a witness, as to the several matters which are charged against him, and that there should be no attempt to draw inferences from the evidence of other people when he has not had an opportunity of giving his account of the matters of which he has the most intimate knowledge.

At an investigation under the Merchant Shipping Acts 1854 to 1876, 1st Division, held in January 1892 in the Sheriff Court, Edinburgh, before the Sheriff-substitute (Rutherford), assisted by two nautical assessors, into the circumstances attending the stranding of the s.s. "Corunna" of Leith, in the Belt, off Seiero Point, Denmark, on 30th October 1891, the Court reported "That the stranding of the 'Corunna' on the date mentioned was due to the default of the master, in respect of his failure to give the second officer sufficient and proper instructions for the safe navigation of the ship before leaving the bridge; and also of the second mate in not calling the master at once, when he could see that the course steered was taking the vessel dangerously close to the rocks. The Court therefore suspends the certificate of the master, Thomas Watson, No. 06,123, and the certificate of the second mate, No. 022,353, for the period of three months from this date."

The master appealed.

From the proof it appeared that at 4 A.M. on the day in question the second officer came on watch. At 5.25 A.M. the master, who had hitherto been on the bridge with the second mate taking bearings, went below leaving certain orders, as to the precise nature of which there was a conflict of evidence. Seiero Light was at this time visible to the southward, about ten miles off on the port bow, the weather fine and very clear, and the sea smooth, and the ship going full speed (about nine or ten knots an hour). On this point the master deponed,—"(Q.) Before going below what instructions did you give him (the second mate)? (A.) To call me before

No. 201.
 July 20, 1892.
 Watson v.
 Board of
 Trade.

he came to that light (Seiero), and let me know at once. (Q.) Give us the exact words you used? (A.) To 'give me a call before you come to that light, and let me know if you see another.' I expected to see Rosnaes a little further ahead. I told him to keep the same course, and keep a look-out that she was making her course, 'and do not go anything to the south at all.' These were all the instructions I gave to him."

The second mate deponed,—“The master went below shortly after passing Schultz Light, but before going below he gave me no orders at all. (Q.) Did he not say to keep your course? (A.) Yes, a little before he went below he said to keep her S. by W. $\frac{1}{2}$ W., and not let her go to the south. He said nothing to me about calling him.”

David Rosie, able seaman, deponed that he was at the wheel on the morning in question,—“The master was frequently on the bridge between four and until he went below. I heard the master say something to the second mate about calling him when he went below. I am not sure about the time, but it was on the bridge. He went below after he gave orders to the second mate to call him. He told him to call him when he came up to a certain light, and if he sighted any other light to let him know immediately. The skipper's words were, 'Call me before you come to that light, and if you sight any other light let me know immediately.' 'That light' was a light on the port bow.”

The official log of the vessel contained this entry:—“30/10/91. Copenhagen, 9/11/91. Did you or did you not hear me give the 2nd mate orders before I left the bridge, and him answer, to give me a call before we came to that light, which was Seiero, and call me at once if he saw another light? THOS. WATSON, master. I, David Rosie, distinctly heard these orders given and answered. D. ROSIE.”

With reference to this Rosie deponed,—“The captain asked me about this casualty after it happened. It was at Copenhagen, in the chart-room. The mate was there, but not the second mate. The master took me there to see what was wrong with me. I fell down the hold, and he wanted to know what like a state I was in. He was going to send me to the hospital. (Q.) What did the master say about this stranding? (A.) He asked me what I have already said—if I heard him give any orders to the second mate before he left the bridge, and I said Yes. I repeated then what I have now told you. . . . Nobody has instructed me to say that, or tell that story. The master never interfered with me, and told me to tell that story.”

The second mate deponed that he had never seen or heard of this entry in the log. No questions were put to the master regarding the entry or regarding Rosie's evidence.

The master further deponed,—“There were standing orders on board the ship to give me a call at all times if it became thick or hazy, or if the ship got among fishermen; also to let me know before any point, or land, or light came on a four-point bearing. I am certainly aware that my officers knew of that standing order.”

On this point the second mate deponed,—“(Q.) Are you aware that there was a general order on board the vessel that the master was to be called when any light was approached in dirty weather, or if you saw anything? (A.) That was the orders he left always, if it came on thick or if we saw anything. (Q.) Did not anything include a light? (A.) Yes.”

About 6.40, when, according to the second mate, the vessel was abeam of the Seiero Lighthouse, and there was a reef of rocks in full view about a point and half on the port bow, the second mate went down off the bridge and called the master, who was asleep, and told him that he thought they

were too close inshore. The master immediately came on deck, but almost immediately afterwards the vessel struck. No. 201.

Among the questions submitted on behalf of the Board of Trade, and answers thereto by the Court of inquiry, were the following:—"Question 6. Whether before going below the master left proper and sufficient instructions with the second officer as to the navigation of the vessel, and as to being called; and whether instructions should have been given in writing?" July 20, 1892.
Watson v.
Board of
Trade.

Answer 6. The master before going below at 5.25 A.M. did not leave sufficient instructions with the second officer as to the navigation of the ship, but merely told him to keep her S. by W. $\frac{3}{4}$ W. and nothing to the southward. There is a conflict of evidence as to whether the master left orders to be called or not. He himself stated that he left orders to be called before the ship reached Seiero Light, which was then in sight a little on the port bow; but the second mate's testimony is at direct variance with this statement. The man at the wheel, David Rosie, corroborates the master's evidence, but the Court is unable to attach that weight to the testimony of this witness which it might otherwise have done, as it appeared that while the ship was at Copenhagen the master, without any notice to the second mate, caused Rosie to sign a statement to the effect above-mentioned in the official log-book. In these circumstances the Court does not consider that it would be justified in holding the evidence sufficient to prove that the order in question was given by the master."

The appeal was heard by the First Division, assisted by two Elder Brethren of Trinity House, as assessors.

LORD PRESIDENT.—Thomas Watson, the master of the "Corunna," challenges the judgment of the Court of inquiry into the loss of that vessel, in so far as they by their judgment have reported that the stranding of the "Corunna" was due to the default of the master in respect of his failure to give the second officer sufficient and proper instructions for the safe navigation of the ship before leaving the bridge.

Now, the first question is, What instructions were given by the master to the second officer before the master left the bridge? The master says that he gave these instructions:—"To call me before he came to the Seiero light, and let me know at once. (Q.) Give us the exact words you used? (A.) To 'give me a call before you come to that light, and let me know if you see another.' I told him to keep the same course, and keep a look-out that she was making her course, 'and do not go anything to the south at all.' These were all the instructions I gave to him." The second mate gives evidence in direct contradiction to that statement. His account is this,— "The master went below shortly after passing Schultz light, but before going below he gave me no orders at all. (Q.) Did he not say to keep your course? (A.) Yes, a little before he went below he said to keep her S. by W. $\frac{3}{4}$ W., and not let her go to the south. He said nothing to me about calling him." There is therefore a direct conflict of evidence on this vital question upon which the judgment of the Court below has proceeded. Now, it happens that while those two persons are both incriminated, and have interests which are in conflict, there is an available witness who has given his deposition, who is free from the observation which attaches to anyone who is directly concerned in the issue at proof. I refer to the witness David Rosie. Now, Rosie says,— "I heard the master say something to the second mate about calling him when he went below. I am not sure about the time, but it was on the bridge. He went below after he gave

No. 201. orders to the second mate to call him. He told him to call him when he came up to a certain light, and if he sighted any other light, to let him know immediately. The skipper's words were 'Call me before you come to that light, and if you sight any other light let me know immediately.' 'That light' was a light on the port bow."

July 20, 1892.
Watson v.
Board of
Trade.

Now, that is the whole evidence upon the subject, and when you have oath against oath, but one supported by an independent witness, I cannot for my part see how the Court could avoid coming to the conclusion that the corroborated oath was to be preferred to the uncorroborated. But the Court below have held that this man Rosie's evidence is to be rejected and disregarded, and upon what ground? upon the ground that he had shortly after this occurrence written in the log-book a statement—not to the contrary effect—but to the same effect as the evidence which he gave on oath before the Court of inquiry. It is said that because this statement in the log-book was made at the instance of the master, and in answer to a written inquiry of the master, therefore Rosie's evidence is to be disregarded. I cannot find any justification for that conclusion. I can quite understand that it might be a good reason for rejecting Rosie's evidence if it had been made out as matter of fact that he was suborned by the captain, and that this writing was obtained from him contrary to his knowledge and belief at the time; but that is a matter which would require to be made out affirmatively, and it certainly is not established by the mere fact that the man wrote down shortly after the time an account exactly in accordance with his sworn deposition before the Court of inquiry. But the Board of Trade—I am afraid I must ascribe it to them—in conducting what is really a prosecution, have most singularly and unaccountably abstained from putting to Watson, the captain, whose conduct was the main subject of this investigation, these most invidious and damaging charges of subornation. And, accordingly, they have asked us, as they have succeeded in getting the Court below to do, to disregard the evidence of Rosie upon the mere imagination or conjecture that his statement in writing was illegitimately obtained. I find it entirely impossible to arrive at that conclusion, and therefore I come back to the comparatively simple question of evidence—why should we discredit two witnesses and give the preference to one witness, when nothing is made out to affect the credibility of the two as against the one? It is obvious that there is danger to the credibility of one of the witnesses. Most certainly the evidence of the second mate, when it turns out to be wrong in the sense of being disproved by the evidence of Rosie on one material point, is not entitled to our implicit acceptance on other points in which he is in conflict with the master. Therefore, I hold it to be proved that the captain did give the instructions to the second mate which he has sworn to in his deposition.

The next question is, whether these instructions were sufficient. With reference to this matter, I find that the captain says,—“There were standing orders on board the ship to give me a call at all times if it became thick or hazy, or if the ship got among fishermen; also to let me know before any point, or land, or light came on a four-point bearing. I am certainly aware that my officers knew of that standing order.” That being a standing order, it throws a considerable light upon the specific instructions which were given on the occasion in question, because, while the instructions which Watson says he gave on the occasion in question were merely to “give me a call before you come to the light,” that, read in connection with the standing orders which were in force on the ship, meant this, that he was to

let him know before he came on a four-point bearing. Now, we have had the advantage of the assistance of the assessors who sit with us on the bench, and I am not expressing my own opinion only but theirs, when I say that these instructions were adequate instructions, and that they would have resulted in the second mate calling the captain up to his post in sufficient time to avert the disaster which actually occurred.

Upon these grounds, I am of opinion that this judgment cannot stand.

The only other observation which I have to make is as regards the conduct of this inquiry. I do not wish to speak in a tone of censure, but I think it right to point out that, when an officer is on trial on so grave a charge, and with consequences impending of so serious a nature, it is in every way right that questions should be put to him when being examined as a witness, as to the several matters which are charged against him, and that there should be no attempt to draw inferences from the evidence of other people when he has not had an opportunity of giving his account of the matters of which he has the most intimate knowledge. I make these remarks, because the suggested subornation of Rosie is a very serious matter, and also because it has to be borne in mind that it is a duty as well for the proper conduct of the case as general fair play to the person who is accused, that he should be questioned as to the charges against him. But to turn to the immediate matter in hand, I am happy to think that in a matter of so great importance to the appellant, I have come to the conclusion that the judgment of the Court below cannot stand.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred in holding that the master's certificate ought not to have been suspended.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the appeal, and considered the cause, with the assistance of Captains George Charles Burne and Arthur Edward Barlow, assessors appointed in terms of the statute, Sustain the appeal, Recall the finding and sentence of the Sheriff-substitute of the Lothians and Peebles appealed against: Find that the stranding of the steamship 'Corunna' of Leith in the 'Belt' off 'Seiero Point' on 30th October 1891 was not due to the default of the appellant: Find that the appellant's certificate ought to be returned to him, and direct that it be returned to him accordingly: Find him entitled to the expenses of this appeal, and remit the account thereof to the Auditor to tax and to report: Further, direct that this judgment be reported to the Board of Trade in terms of the rules to that effect, and decern."

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—DAVID TURNBULL, W.S.—Agents.

THE BANKIER DISTILLERY COMPANY, Pursuers (Respondents).—

Ure—J. Wilson.

JOHN YOUNG & COMPANY, Defenders (Appellants).—*Asher—Dickson—*

N. J. Kennedy.

No. 202.

July 20, 1892.
Bankier Dis-
tillery Co. v
Young & Co.

River—Pollution—Right to have special purity of water preserved—Mines and minerals—Right to pump water from mine into river.—A mineowner is not, apart from contract or prescriptive right, entitled to discharge into a stream water pumped out of the mine, although the water may not make the stream unfitted for any of the primary purposes, but only for special purposes for which the water of the stream is by nature peculiarly adapted.

No. 202.

July 20, 1892.
Bankier Dis-
tillery Co. v.
Young & Co.

1st Division.
Sheriff of
Stirling and
Dumbarton.

IN August 1891 the Bankier Distillery Company, which carried on the business of whisky distillers at the Mill of Bankier, on the Doups Burn, near Bonnybridge, Stirlingshire, and James and John Risk, the sole partners of the company, James Risk being heritable proprietor of the mill and mill lands of Bankier, brought an action in the Sheriff Court at Stirling against John Young & Company, coalmasters, Banknock, near Bonnybridge, praying to have the defenders interdicted from discharging water from their coal workings at Banknock into the Doups Burn, "so as to pollute the water in said burn, and render it unfit for primary purposes, or for the purpose of distillation of whisky" at the pursuers' distillery, and for £250 as damages.

The pursuers averred that the Mill of Bankier had been converted into a distillery more than sixty years before and had ever since been used as such, that it was essential to the pursuers' business as whisky distillers that they should have an ample supply of pure soft water, that the Doups Burn in its natural state contained pure and soft water fit for primary purposes, and on account of its softness particularly suitable for the distillation of whisky, that it had been used for this purpose by the pursuers and their predecessors ever since the mill had been converted into a distillery; that (cond. 4) "The defenders became tenants of Banknock Colliery in 1887, and have been working it since that time . . . Since the defenders began to work the coal they have been discharging the water from their coal workings into a cut or ditch leading into the said burn at a point above Mr Risk's property, and the pit water is thus sent down the course of the burn to Bankier. The said water is very impure. Besides being very hard it is charged with mineral and other impurities, including sewage, from the workings. The volume of water sent into the burn was much increased about the beginning of 1890, when the defenders sank a new shaft, and since then a very large quantity has been constantly discharged. The natural water of the stream is thus polluted to such an extent as to be rendered quite unfit for primary purposes and for use in the distillation of whisky." (Cond. 6) "Through the illegal action of the defenders in thus contaminating the distillery water-supply with the pit water during the period above mentioned, which embraces the greater part of the brewing season, the pursuers suffered serious loss and damage. Their fermentations were interfered with, and a much smaller quantity of alcohol was obtained from the grain used than there ought to have been, and the product was inferior in quality. They further incurred considerable expense in cleansing their pipes, utensils, and other plant from impurities gathered from the contaminated water. Their loss may be moderately stated at the sum of £250." (Cond. 7) "The pursuers have repeatedly called upon the defenders to cease discharging the water from their workings into the Doups Burn, and have also demanded a settlement of the loss and damage they have sustained, but the defenders still continue the discharge, and refuse or delay to make any payment. The present action is thus necessary."

The defenders in answer stated, that under their lease of Banknock Colliery they had power to work, win, and carry away the coal, including power to carry the same through the lands of Bankier; that this power included the right to discharge the water pumped from the mineral workings into the Doups Burn, which was the only natural outlet for that water; that the defenders and their predecessors had so discharged the pumped water for more than the prescriptive period, and that the water discharged from the mineral workings was quite suitable for ordinary domestic and agricultural purposes.

The pursuers pleaded;—(1) The pursuer James Risk, as a riparian No. 202. proprietor, is entitled to have the water of the Doups Burn sent down to the lands unimpaired in quality. (2) The water of the stream having been used by the pursuers and their predecessors for the distillation of whisky for the prescriptive period, the defenders are not entitled so to affect its quality as to interfere with that use. (3) The defenders having illegally polluted the stream by the discharge of their pit water, so as to render it unfit for primary purposes and for the purpose of distillation, the pursuers are entitled to interdict as craved. (4) The pursuers having suffered loss and damage through the defenders' illegal pollution of their water supply are entitled to reparation therefor, and the sum sued for is fair and reasonable.

July 20, 1892.
Bankier Dis-
tillery Co. v.
Young & Co.

The defenders pleaded;—(1) The pursuers' averments are irrelevant. (3) The water rights which the pursuer James Risk is alleged to have acquired being rights which apply solely to driving machinery in connection with a grain mill, do not entitle the pursuers, nor are they or he entitled as riparian proprietors, to claim right to the water of the burn as fit for the purpose of distillation. (5) The proprietor of the coal in Banknock and Bankier, and the defenders as his tenants, and their predecessors, having discharged water from their mineral workings into the burn for the prescriptive period and prior to the mill and mill lands of Bankier having been feued out by the predecessors of the proprietor of the said coal, and the said burn being the only natural outlet for such water, they are entitled to continue to do so. (6) The pursuers not having suffered any loss or damage arising from the defenders' fault, or for which they are responsible, by the discharge of water from the defenders' mineral workings into the burn, the defenders are entitled to decree of absolvitor with expenses. In any case the sum claimed is excessive.

On 10th November 1891 the Sheriff-substitute (Buntine) allowed a proof.

The defenders appealed.

On 9th December 1891 the Court allowed a proof before answer. The evidence which was led before Lord M'Laren established that the water of the Doups Burn was, from its soft character, well adapted for the distillation of whisky; that the water pumped from the defenders' pit was hard, and therefore ill adapted for distilling purposes; that the discharge of this water into the Doups Burn, which was not a large stream, caused a material deterioration in its distilling properties; there was little evidence that the water pumped from the pit made the Doups Burn unfit for the primary purposes. A large part of the evidence and of the argument at the hearing was directed to the question of prescription raised by the defenders, and to the question of the amount of damage suffered by the pursuers. The nature of the evidence on these points sufficiently appears from the opinion of the Lord President.

On the general question of the right of a mineowner to pump water from his mine into an adjoining stream, the pursuers argued;—The water which the defenders pumped from their mine destroyed the water of this burn for the primary purposes, and lessened the value of the burn water for distilling purposes. The pursuers, therefore, were entitled to have the defenders interdicted from discharging this water into the burn. Even if the only injury to the burn water was to lessen its value as a distilling material, the pursuers were entitled to prevail, for they were entitled to have the burn water passed on to them in its natural condition; at all events, they had acquired such a right by prescription.¹ The

¹ Dunn v. Hamilton, March 11, 1837, 15 S. 853, 9 Scot. Jur. 382; Collins v. Hamilton, April 19, 1837, 15 S. 895; M'Gavin v. M'Intyre Brothers, May

No. 202.

July 20, 1892.
Bankier Dis-
tillery Co v.
Young & Co.

defenders, however, had, as mineowners, no right to pump this water into the stream. There was no authority for the proposition that a mineowner might add water pumped out of his mine to a neighbouring stream. The authority was the other way.¹ Of course if the addition caused no one any harm, probably no one would complain, but the mineowner took the risk of injuring the stream water, whether in respect of the primary purposes or otherwise. It was nothing to the point that this water might have reached the stream by natural gravitation had the mine not existed. In point of fact, it could now only reach the stream by artificial machinery, and no one was entitled so to add to the water of a stream. Nor was it to the purpose to say that the mine was being worked in the ordinary way, and that pumping was a natural incident of coal mine working. That might be, but so also was bringing down the surface a natural incident of coal working. Yet the mineowner was not entitled, apart from stipulation, to bring down the surface, however inconvenient the want of such a right might be to him.

Argued for the defenders;—The question here truly was, whether any lower heritor had the right to put a stop to the working of a mine situated such as this, for pumping was a natural incident of mineral working, and to prohibit the mineowner from using an adjoining stream as the channel for carrying away the pumped water might entail such an expenditure on his part as would make the profitable working of the mine impossible. Now coal mining was a legitimate use of land which contained coal, and if so the mineowner was entitled to work his mine according to the ordinary methods, including the discharge of pumped water into a neighbouring stream. It was the fair result of the authorities that where anyone used his land for an ordinary and legitimate operation—coal mining or other—and carried out the operation according to the recognised methods, he would not be liable in damages to a neighbouring proprietor although the result of the operation might be to lessen the value of the water of a stream for a special purpose for which that neighbouring proprietor had been using the water.² It would be different if the mineowner were carrying out unusual operations, and the cases cited on the other side were all cases of unusual or unnecessary operations. It would also be different if the injury was to the primary purposes, but the common law did not recognise special purposes, and an inferior heritor could not acquire a right by prescription to have the water sent to him fit for the special purposes, for the superior heritor could not object to the uses to which the inferior heritor might put the water of the stream.

30, 1890, 17 R. 818; *Clowes v. Staffordshire Potteries Waterworks Co.*, 1872, L. R., 8 Chanc. 125.

¹ *Duke of Buccleuch v. Cowan*, Dec. 21, 1866, 5 Macph. 214, 39 Scot. Jur. 152; *Blair v. Hunter, Finlay, & Co.*, Nov. 29, 1870, 9 Macph. 205, 43 Scot. Jur. 169; *Durham v. Hood*, Feb. 3, 1871, 9 Macph. 474, 43 Scot. Jur. 300; *Wilson v. Waddell*, Jan. 8, 1876, 3 R. 288, aff. Dec. 1, 1876, 4 R. (H. L.) 29; *Heggie v. Nairns*, March 8, 1882, 9 R. 704; *Irving v. Leadhills Mining Co.*, March 8, 1856, 18 D. 833, 28 Scot. Jur. 382; *Campbell v. Bryson*, Dec. 16, 1864, 3 Macph. 254, 37 Scot. Jur. 120; *Ersk. ii.* 9, 2; *Baird v. Williamson*, 1863, 15 Scott's Rep. C. B. (N. S.), 376; *Magor v. Chadwick*, 1840, 11 Ad. and Ell. 571; *West Cumberland Iron and Steel Co. v. Kenyon*, 1877, L. R., 6 Chanc. Div. 773.

² *Downie v. Earl of Moray*, Nov. 12, 1825, 4 S. 167; *Robertson v. Stewart and Livingston*, Dec. 6, 1872, 11 Macph. 189, 45 Scot. Jur. 115; *Armistead v. Bowerman*, July 3, 1888, 15 R. 814; *Rylands v. Fletcher*, 1868, L. R., 3 H. L. 330; *Pennsylvania Coal Co. v. Sanderson*, 1886, 57 American Reports, 89.

At advising,—

No. 202.

LORD PRESIDENT.—The pursuers of this action are proprietors of lands in Stirlingshire, along the western side of which there flows a stream called the Doups Burn. It is not disputed that they have the rights of riparian owners in this stream. They are distillers, and use their lands and the water mainly for the purposes of their distillery.

July 20, 1892.
Bankier Distillery Co. v. Young & Co.

The defenders are tenants of the minerals of lands also abutting on the burn above the lands of the pursuers. From their coal workings they are discharging into the burn water which is pumped from the mine. The pursuers seek to interdict the continuance of this discharge, and they claim damages for injury already done them.

Various questions of law and fact have been discussed, but in the view which I take the case of the pursuers is divided into two entirely separate heads.

The pursuers have, in the first place, treated the case as if it were an ordinary one of pollution,—that is to say, they have complained of the quality of the water sent down to them, just as they would have done if the water of the burn were simply used for some manufacture and then sent on. In this aspect of the case two questions are raised by the pursuers—(1) they allege that the water is unfit for primary purposes; and (2) they say that even if it is fit for primary purposes it is now unfit or less fit than formerly for distilling whisky, and that having for forty years used the burn for distilling on the lands in question they are entitled to prevent every use by the defenders which unfits or deteriorates the water for this special purpose. I am against the pursuers on both these points, on the former in fact, and on the latter in law.

I do not think that the pursuers have established that the infusion of this colliery water has rendered the burn unfit for primary purposes. The specific case on the fact of sewage pollution from the mine seems egregiously to fail, and the evidence, both scientific and general, as to the quality of the water is quite insufficient.

The claim based on prescriptive use to a higher degree of purity than that required for primary purposes is, in my opinion, entirely untenable in law. The fact that for any number of years the inferior heritor has used the water for special purposes cannot possibly affect the rights, or add to the obligations, of a superior heritor. The use of the water by the pursuers for their distillery was no invasion of the rights of the defenders, and the superior heritor cannot have additional burdens imposed on him by acts which he cannot check or interfere with. Prescription implies acquiescence, and a man cannot be held to acquiesce when he has not the option to dissent.

If, therefore, the case had to be decided on the ordinary footing of pollution cases—that is to say, if the defenders had been merely exercising the ordinary right of a riparian proprietor to use the water of the stream and then return it, I do not think that the resulting quality of the water is such as to prove an abuse of the right.

But when we turn to consider the acts of the defenders another and quite different chapter of legal discussion is opened. What the defenders have done is, not to use the water of the Doups Burn, but to introduce into that stream, by artificial means, water which would not reach it by natural means. The water is pumped up the mine from a seam many fathoms underground, and is then conducted into the burn; its quantity, relative to that of the burn, is very

No. 202.
July 20, 1892.
Bankier Dis-
tillery Co. v.
Young & Co.

great, and it is the water so introduced which is complained of as prejudicial to the distillery. That this water is prejudicial, by comparison with the water of the burn, hardly admits of dispute; it is very hard water, whereas the burn water is soft, and hard water is much less suitable for distilling than soft. The question then arises, have the defenders right to introduce this water into the burn to the prejudice of the pursuers?

That an inferior heritor is bound to receive such water from the superior property as descends by gravitation is certain, and this rule applies alike to surface water and to subterranean water. It is also true that the owners of a mine have right to work it in the usual and proper manner for the purpose of getting minerals, and they are not liable for any water which flows by gravitation from works so conducted. But it is another and different question whether the occupier of the mine on the superior property may interfere with the gravitation of the water, and be an active agent in sending it upon the inferior property. That is the case here. The water in question, with its peculiar hardness, if it ever reached the pursuers' property, would, if left to the operation of gravitation, only enter it in these subterranean parts in which its hardness would be innocuous, and would never reach the burn, where it is injurious. Are the defenders then entitled by their active agency to make this addition to the natural burden which is admittedly recognised by law?

The case of *Baird v. Williamson*, 15 C. B. (N. S.) 376, decides this question in the negative, where the water raised by pumping is discharged into a mine in the inferior estate. The judgment does not seem to depend on the circumstance that it was on a subterranean part of the inferior estate, and not on the surface, that the discharge took place. The principle I take to be that the superior heritor has not the right to interfere with the gravitation of the water so as by that interference to inflict injury on the lower proprietor. In the present case, the discharge of this mine water into the burn inflicts on the lower proprietor sensible injury, for it gives him water substantially less effective for the lawful manufacture which he conducts on his lands. I hold that the pursuers are not bound to submit to this merely because it is necessary for the working of the mine that the defenders should get rid of the water.

The defenders endeavoured to make out a case of prescriptive use, but in this I think they have failed. Even as regards the existence of the mine the dates do not support them, and the existence of the mine is all that there is to prove the pumping into the burn during the earlier period.

My opinion on the rights of the parties being thus far favourable to the pursuers, I turn to the prayer of their petition. At present the discharge of the mine water is at a point below the existing inlet to the distillery. On the other hand, the defenders have asserted right to discharge this water, and I think they have no such right; the pursuers might find it convenient to have another inlet lower down, and it appears to me that they would ultimately, and failing the removal of their grievance, be entitled to interdict.

The pursuers also seek damages, and on two grounds, the first being that the water has been injurious to his apparatus, and the second, that the difference in quality has diminished the production of whisky. I must own that *ab ante* I should have expected a more substantial case to be presented, but as the evidence stands, the second branch of the claim is very poorly supported. Indeed, I am unable to get over the point made by the defenders that the table framed and proved by the pursuers themselves shews that in one of the years presented by

way of contrast, the yield was almost identical with that of the period complained of. On the first head, viz., injury to apparatus, I think something has been proved, although not much. On the whole, I think we shall act safely in assessing the damages at £25.

I should propose that we decern for £25 and find that the defenders are not entitled to discharge water from their coal workings into the burn to the injury of the pursuers, and continue the cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers. Further, I propose that we find the pursuers entitled to two-thirds of their expenses.

LORD ADAM concurred.

LORD M'LAREN.—I concur in the opinion delivered by your Lordship in the *chair*, and it is only because of the novelty and importance of the question that I add some observations regarding the obligation of a mineowner who *claims* the use of the natural stream flowing on the surface for the discharge of the water which is pumped out of his mines. There is a well-settled rule regarding the use which may be taken of natural water-courses and their contents by riparian proprietors, but for reasons which have been stated that rule in my view has no application to the case we are considering. In the case of riparian proprietors all have a common interest in the running water, and it was stated by the late Lord President that the theoretical right of a riparian proprietor is to direct or take away as much of the water as he requires on condition of returning it undiminished in quantity and unimpaired in quality. But in order that each of the owners might get as much benefit as shall be consistent with the substantial interests of the other, this rule was qualified in its practical application and was held to be sufficiently complied with if the water was returned in a condition fitted for the primary uses of a running stream. Now, in the present case we are not engaged in determining or adjusting the relative rights of riparian owners, nor is there any relation of common interest in the water that I can discover between the mineowner and the proprietors of the bed of the stream. A nearer but, as I think, imperfect analogy is the right of a proprietor whose lands naturally drain into a stream to require the riparian proprietors to receive the drainage of his lands, and that right has been held to be qualified by the condition that this natural servitude must be exercised in the way which is least burdensome to the servient tenements. The water must be discharged at the most convenient point, regard being had to existing arrangements. But I am not able to put the right of the mineowner so high as that of the superior heritor, and, indeed, if one were to inquire very curiously into the matter it is difficult to see what natural right, or right other than such as may result from prescription or positive grant, can be asserted by a mineowner to use the nearest or most convenient stream as an aqueduct for the removal of mine water which he cannot prove to be water which would have found its way into the stream if the surface had been unbroken. But the defenders have not maintained the extreme proposition, that irrespective of quantity, quality, and situation they are not bound to receive the water. Their case is rested on the allegation of substantial injury, and we are considering whether they are obliged to submit to such injury. I agree with your Lordship that the water from the mine is not shewn to be contaminated by natural or artificial impurities in such degree as to render it unfit for the primary uses. But the water of the Doups burn before receiving the drainage of the appellants' mine is soft water, and

No. 202.

July 20, 1892.
Bankier Distillery Co. v.
Young & Co.

No. 202.

July 20, 1892.
Bankier Dis-
tillery Co. v.
Young & Co.

there is sufficient evidence that the admixture of the large quantity of hard water which comes from the mine would render the water of the stream less suited for the preparatory processes connected with distillation, in which it seems only pure water can be used.

Now, let me suppose it granted in argument that the water which the appellants pump from their workings would under other circumstances have found its way into the Doups Burn, and this is quite possible, because we know that the operations of mining have a tendency to dry up the natural springs and streams of the surface by providing a more ready outlet for the water at a low level. Such an admission might bar the respondents from complaining of the discharge of pure water into the stream in the mere assertion of a theoretical right. But it does not seem to me that the position of the appellants is tenable when they say,—Because the water would have found its way into the stream in a state of purity you are bound to receive it in its altered condition, because this is the result of the exercise of our right to work the minerals. This argument seems to prove too much, because the mineowner would then be within his rights even if the water were so contaminated as to be deleterious.

Again, I am unable to accept the proposed extension of the criterion of fitness for the primary uses to a case like the present case, because here the foundation for this relaxation of the strict rule is wanting. I mean we have not here the element of a common interest the enjoyment of which is to be regulated in a manner most convenient to the body of proprietors. I have not been able to satisfy myself that the mineowner has any right of the nature of a natural servitude, and in the absence of express grant or prescriptive title or the lower right flowing from acquiescence, I think the mineowner could only defend himself from an action of interdict on the principle that the Court will not grant an interdict which would be prejudicial to the defender where no real injury is proved, but will leave the pursuer to recover damages for the trespass by satisfying a jury (if he can) that he has sustained injury entitling him to pecuniary compensation.

LORD KINNEAR concurred.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the appeal, together with the proof, productions, and whole process, and heard counsel for the parties, Decern in favour of the pursuers for the sum of £25 sterling in name of damages: Find the defenders were not and are not entitled to discharge into the Doups Burn water pumped from their coal workings to the injury of the pursuers, and decern: Continue the cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers: Find the pursuers entitled to two-thirds of their expenses," &c.

G. MUNRO THOMSON, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 203.

July 20, 1892.*
Sawers v.
Clark.

JOHN SAWERS, Complainer (Respondent).—*W. Campbell—Salvesen.*
ANDREW CLARK, Respondent (Reclaimer).—*Party.*

Proof—Reference to oath—Reference to oath of agent.—Clark charged Sawers upon a decree which he held against Sawers, and the principal sum in which

had been paid, for payment of a sum in name of interest alleged to have accrued on the decree. Sawers brought a suspension, pleading *res judicata* in respect of an interlocutor pronounced in an action by Clark against him for payment of the interest. Clark denied that the question was *res judicata*, and averred that he had taken payment of the principal sum as an interim settlement and under reservation of his right to interest. The Lord Ordinary sustained the plea of *res judicata*, and suspended the charge. This interlocutor having become final, Clark lodged a minute of reference in which he referred it "to the oath of the complainer, whom failing, to his solicitor, . . . who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at, whether the payment made by the complainer to the respondent was an interim payment, and the settlement then arrived at an interim settlement." *Held* that the reference was incompetent, in respect that it was a reference to the oath of the complainer's agent, and (*per* the Lord President) on the further ground that the interlocutor of the Lord Ordinary sustaining the plea of *res judicata* was a judgment on a question of law and not on a question of fact.

Process—Reclaiming note—Reclaiming note against interlocutor refusing a reference to oath—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 52.—A reclaiming note against an interlocutor refusing a reference to oath is not an interlocutor which has the effect of submitting to review the whole prior interlocutors of the Lord Ordinary in terms of section 52 of the Court of Session Act, 1868.

ON 18th June 1890 John Sawers, of Parkfoot, Shotts, paid Andrew Clark, solicitor, Leith, who held two decrees against him, the sum of £220, for which Clark granted the following receipt:—"Leith, 18th June 1890. —Received from John Sawers, Esq., of Parkfoot, the sum of £220, being the principal sums contained in the two decrees at my instance against him."

Clark thereafter raised an action against Sawers for payment of £54, which was made up of the interest alleged to be due on the sums decerned for in the decrees, and the expenses of diligence thereon, and an account for services alleged to have been rendered by Clark as Sawers' agent. On 20th March 1891 the Lord Ordinary (Kyllachy), being of opinion that Clark's proper remedy was to proceed under the decrees decerning for the principal sums with interest, "found that Clark was 'not entitled to credit in this action for the sums of interest contained in or attaching to existing decrees,' and *quoad ultra* remitted Clark's accounts to the Auditor *qua* Accountant and Auditor; and by interlocutor dated 6th June 1891 the Lord Ordinary approved of the Auditor's report, and decerned against the defender for a sum of £19, 0s. 6d., and found the pursuer entitled to a modified sum of expenses." Sawers having reclaimed against this interlocutor, the First Division, on 21st October 1891, pronounced this interlocutor:—"The Lords having heard counsel on the reclaiming note for the defender against Lord Kyllachy's interlocutor of 6th June 1891, and considered the whole cause, recall the said interlocutor, assoilzie the defender, and decern: Find the defender entitled to expenses, and remit," &c.

In the meantime, pending the hearing on the reclaiming note, Clark charged Sawers under one of the decrees before mentioned to pay him a sum of £15, 9s. 11d., as the interest accrued thereon. Sawers brought a suspension of this charge, and founded, *inter alia*, upon the interlocutor of the First Division on 21st October 1891, and pleaded "*res judicata*."

Clark, in answer, denied that the question was *res judicata*, and averred that the following letter, dated 18th June 1890, had been delivered to the complainer and his agent, along with the receipt of the same date above quoted:—"In order to avoid, if possible, further litigation, an interim settlement to-day has been arrived at, whereby you have paid me the

No. 203.

July 20, 1892.

Sawers v. Clark.

No. 203. sum of £220, being the principal sums contained in the two decrees at my instance against you, but under reservation of my right to recover from you the interest and expenses detailed in the states of debt dated 18th curt., but sent to your agent Mr Gentle preparatory to a settlement on 16th curt., it being distinctly understood by both you and me that my right to recover said interest and expenses is expressly reserved, as also your objections thereto, and that the settlement arrived at does not imply any abatement or abandonment by me of said interest and expenses."

July 20, 1892.
Sawers v.
Clark.

On 6th January 1892 the Lord Ordinary, being of opinion that the terms of the interlocutor of 21st October 1891 were conclusive against the respondent's claim for interest under the decrees obtained by him against the complainer, sustained the reasons for suspension, suspended the charge, and decreed, finding the suspender entitled to expenses.

After this interlocutor had become final Clark lodged the following minute of reference:—"The respondent refers it to the oath of the complainer, whom failing, to his agent, Andrew Gentle, solicitor, Edinburgh, who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at, whether the payment made by the complainer to the respondent on 18th June 1890 was an interim payment, and the settlement then arrived at was an interim settlement, and whether the letter" (above quoted) "was delivered by the respondent to the complainer and to the said Andrew Gentle prior to the money being paid, and whether said letter correctly embodied the terms and conditions of the settlement then arrived at between the complainer and the respondent."

On 19th February 1892 the Lord Ordinary refused the reference to oath contained in the above minute.

The pursuer reclaimed, and argued, that a reference to the oath of an agent by whom a transaction was carried through was competent, and alternatively, that the reclaiming note had brought up the prior interlocutors in the cause, and consequently that it was open to the pursuer to ask the Court to consider the Lord Ordinary's interlocutor of 6th January 1892.¹

The defender's argument sufficiently appears from the opinions of the Court.²

LORD PRESIDENT.—The first question is, whether the Lord Ordinary decided rightly when, by his interlocutor of 19th February 1892, he refused the reference to oath contained in the minute. My opinion is that the Lord Ordinary did decide rightly in refusing that reference.

It is to be observed that the judgment previously given by the Lord Ordinary, which had become final by that time, was a judgment not upon fact, but upon the averments made on record, and accordingly was a judgment on relevancy and law. Now, the right which a party has after judgment to refer to the oath of his opponent is described by Mr Bell (Prin. sec. 2263) as "the last resource of a party who fails in or despairs of any other evidence." Accordingly, I do not think that the question whether the averments of a party are relevant is a proper matter for reference. Therefore the subject-matter of the reference which was here made is totally incompetent, looking to the quality and nature of the judgment previously pronounced.

¹ Dickson on Evidence, sec. 1433; Court of Session Act, 1868, sec. 52; Mackay's Practice, i. 552.

² Stirling Maxwell's Trustees v. Kirkintilloch Police Commissioners, Oct. 15. 1883, 11 R. 1; Tennents v. Romanes, June 22, 1881, 8 R. 824.

But the reference is shewn to be still more clearly incompetent when we turn to the terms of the minute of reference itself. The questions referred are "whether the payment made by the complainer to the respondent on 18th June 1890 was an interim payment, and the settlement then arrived at was an interim settlement, and whether the letter quoted was delivered by the respondent to the complainer and to the said Andrew Gentle prior to the money being paid, and whether said letter correctly embodied the terms and conditions of the settlement then arrived at between the complainer and the respondent." It is not therefore a reference of the whole cause, even if that were competent, but a reference of certain queries from which an inference might be drawn adverse to the party to whose oath the reference is proposed to be made. That appears to me to be a clearly incompetent reference.

No. 203.

July 20, 1892.
Sawers v.
Clark.

It is to be further observed that the reference is not to the opposing party alone, but to the "complainer, whom failing to his agent," and the qualification of the latter is thus described, "who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at." But again I turn to Professor Bell, who, in the section which I have already referred to, says,— "And it is not competent to refer to the oath of an agent, by whom an alleged contract was made for the party, the terms of the contract." That is directly in point, and accordingly there are a number of grounds, any one of which is sufficient to render this reference incompetent, and to place the Lord Ordinary's interlocutor refusing the reference beyond question.

But then it is said that the reclaiming note against this interlocutor brings up for review the Lord Ordinary's previous judgment on the merits. By the 19th of February that judgment had become final, and the question is, whether the respondent, having allowed it to become final, can now seek by the same act to do two things, first, to ask us to examine an interlocutor which has become final, and secondly, ask us to allow him to refer to the oath of the opposing party. A reference to oath is the resort of a party who gives up his case in so far as the judgment of the Court is concerned, and elects to refer the matter to his opponent's oath. How then is it possible to bring up together the two interlocutors, the one determining the cause on its merits and the other refusing to allow the reference? It is clear that the object of the provision contained in section 52 of the Act of 1868 was to sweep out of the way of the Court the difficulty of doing justice in the ordinary *cursum curiæ*. The two remedies here sought, the reference to oath and the examination of the Lord Ordinary's judgment on the merits, are clearly incompatible. In the one view, the cause is to be decided by the Court on grounds of law; in the other, all that is swept away, and the decision of the cause is referred to the oath of the opposing party.

I am therefore clearly of opinion that the previous interlocutor of the Lord Ordinary is not brought up by the reclaiming note against his interlocutor of 19th February 1892, and that we cannot enter upon an examination of the merits of the judgment of 6th January 1892.

LORD ADAM.—The Lord Ordinary's interlocutor of 6th January 1892 disposed of the whole merits of the case, and left nothing to be decided except what was called in the case of *Stirling Maxwell's Trustees* the "executorial" act of granting decree for expenses. The effect of allowing that interlocutor to become final was to end the proper process in the Court of Session. But it is the law that at any

No. 203.
 July 20, 1892.
 Sawers v.
 Clark.

time before extract a party has the privilege of stopping extract by a reference to the oath of his opponent. That is a proceeding apart and separate from, though no doubt arising out of, the original process. It is a judicial contract which a party had the right to require his opponent to enter into. Now it is an interlocutor refusing a reference of that nature with which we are here dealing, and the question is, whether such an interlocutor is an interlocutor of the kind referred to in the 52d section of the Court of Session Act. I do not think that it is. A reclaiming note whose object is to suspend the whole previous proceedings in the cause cannot be said to be a reclaiming note which shall have the effect of submitting to review the whole previous interlocutors. I am therefore of opinion with your Lordship that this reclaiming note does not submit to review the previous interlocutor of 6th January 1892.

On the merits of the question, for myself I am quite clear. The reference is a reference to the oath "of the complainer, whom failing, to his agent." That is a form of reference which is perfectly new to me, and I should require a great deal more authority than we have heard to satisfy me that it is a competent form of reference. I think the reference was properly refused.

LORD M'LAREN.—I agree that the reference is not expressed in such terms that the complainer was bound to accept it, and therefore that the Lord Ordinary rightly refused to sustain it.

On the other question, I concur in the view suggested by Lord Kinnear in the course of the discussion, and further developed by your Lordship in the chair, that it is not in accordance with the provisions of the Court of Session Act that a reclaiming note against an interlocutor refusing a reference to oath should be regarded as a reclaiming note on the merits of the case. A reference to oath puts an end to the case as a case in litigation. The object of the present reclaiming note is that the Court should sustain the reference to oath, and we are therefore disentitled from examining the Lord Ordinary's previous judgment on the merits. The opposite view seems to me to be entirely at variance with the language of the Court of Session Act.

LORD KINNEAR concurred.

THE COURT adhered.

GILL & PRINGLE, W.S.—PARTY—Agents.

INDEX OF MATTERS

IN

VOLUME XIX.

Cases decided in the House of Lords are printed in *Italics*.
 Cases decided in the Court of Justiciary will be found under the heads
 JUSTICIARY CASES, PUBLIC HEALTH, PUBLIC-HOUSE.

ACQUIESCENCE. See *Contract*, 9.

ADJUDICATION. See *Bankruptcy*, 6.

ADMINISTRATION OF JUSTICE. See *Justiciary Cases*, 18.

ADOPTION. *Homologation—Minor—Adoption of liability.*

The proprietor of an estate in Shetland, which had been formerly liferented by his father, was applied to shortly after reaching majority by A, one of a number of his father's tenants, who, in accordance with a custom in Shetland, had deposited money at interest with their landlord, for payment of his deposit. The proprietor wrote in reply that he would "attend to your request as soon as possible," but that his affairs had been left in a "muddle," and it would take some time to get them into order. "It would be better perhaps to have chosen some other time to have drawn your money, as, of course, you are aware these have on the whole been bad years for getting moneys." Shortly thereafter the proprietor was sequestrated. In the course of an application to get the sequestration recalled, his agent sent a circular to A, along with other depositors who were claimants in the sequestration, requesting him to assist him in this object, and enclosing a mandate in these terms:—"I, the undersigned, one of the depositors with the estate of Melby, being satisfied that Mr Scott's affairs can by good management and care be retrieved, hereby consent to the recall of his sequestration, and am willing that he should have time to pay his deposits." A did not accede to this request. In an action by A against the proprietor, who did not represent his father and who was not liable for his debts, for payment of the deposit, *held* that these letters did not import that the defender had after coming of age accepted liability for the deposit. *Henry v. Scott*, March 3, 1892, p. 545.

AGENT AND CLIENT. *Negligence—Employment—Title to sue.*

A person purchased a house intending that it should be a donation to his nephew, and it was arranged that the seller's agent should prepare the disposition in favour of the nephew. The purchaser informed his nephew of the purchase, that he thought it would be wise to get another agent to revise the titles, and that he proposed to employ B. The nephew having expressed himself as "agreeable" to that proposal, the uncle went to B and asked him to see that the title was properly completed. The titles were sent to B, who made no search for incumbrances. It turned out eventually that there was a bond on the property. The nephew having been evicted from the subjects by the bondholder, raised an action of damages against the law-agent's representatives. *Held* that, as the uncle alone had employed the law-agent, the pursuer had no title to sue.

Held, by Lord Kyllachy, that a person becoming a partner in a law-agent's business at a certain date will be liable for his partner's neglect of

AGENT AND CLIENT—*Continued.*

duty to a client in carrying through a transaction after that date, although the employment began prior to the date of the partnership. *Opinions reserved in the Inner-House.*

Question, whether a claim by a purchaser of heritage who has been evicted upon a bond previously granted by the seller, against his law-agent for damages for failing to search for incumbrances is barred by his not having given notice to the law-agent upon the discovery of the bond, so as to give him an opportunity of removing the burden. *Tully v. Ingram*, Nov. 10, 1891, p. 65.

See *Process*, 8.

AGENT AND PRINCIPAL. *Agency for a business during a fixed period—Obligation of principal to continue the business for the period.*

1. Where two parties contract the one to employ the other as his sole agent in a certain business at a certain place for a period named, it is an implied condition of the contract that it may be brought to an end by the business being discontinued. *Patmore & Co. v. B. Cannon & Co., Limited*, July 14, 1892, p. 1004.

Contract—Sponsio ludicra—Betting.

2. The plea of *sponsio ludicra* does not apply to an action by a betting commission-agent against his principal for recovery of sums disbursed by him for behoof of his principal on account of bets lost. *Knight & Co. v. Stott*, July 6, 1892, p. 959.

Process—Relevancy—Specification.

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ALIMENT. *Arrears of aliment—Application for warrant to imprison—Civil Imprisonment (Scotland) Act, 1882.*

1. It is competent for a woman holding a decree for aliment of her bastard child to enforce payment of arrears of the aliment against the debtor by an application for warrant of imprisonment under the Civil Imprisonment (Scotland) Act, 1882. *Cain v. M'Colm*, May 31, 1892, p. 813.
2. An application under the Civil Imprisonment (Scotland) Act, 1882, by a creditor in a decree for the aliment of a bastard child, is to be disposed of summarily by the Sheriff with reference to the circumstances of the debtor at the date of the application. It is not competent for the Sheriff, after having satisfied himself that the debtor is unable to pay the aliment, to continue the application for a definite period on the chance of the debtor's circumstances improving. *Cain v. M'Colm*, May 31, 1892, p. 813.

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1. A party who obtains repayment of expenses paid by him to his opponent, in consequence of the judgment of the Court of Session being reversed in the House of Lords, is not entitled to recover the interest which had accrued in the interval on the sum so paid. *Young v. Hermand Oil Co., Limited*, June 15, 1892, p. 867.

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APPEAL—*Continued.**Effect of service of an order.*

4. Service of an order by the House of Lords on a petition for appeal stops all further procedure in the Court of Session, even where the Court have refused leave to appeal. *Edinburgh Northern Tramways Company v. Mann*, Oct. 27, 1891, p. 24.

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ARBITRATION. *Reference of all differences as to provisions of certain sections of private Act—Jurisdiction—Glasgow Central Railway Act, 1888.*

By the Glasgow Central Railway Act, 1888 (sec. 39), a railway company were empowered temporarily to stop up certain streets for the purpose of the construction of the railway, and during such construction to "use and appropriate" any of the streets so stopped up, provided, *inter alia*, that they should not "at any one time be entitled to enclose, for the construction of the said railways and works and operations, a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide, with intervals of not less than 200 yards between each such enclosure, within which intervals no enclosure shall be placed (except with consent of the corporation . . .)." Such consent was subsequently given to the effect of reducing the intervals between the enclosures to 100 yards. The Act further enacted (sec. 41) "that if the corporation and the company shall differ upon or with reference to any of the provisions of this and the two next preceding sections of this Act, every such difference shall, on the application of the company or of the corporation, be referred to the determination of an arbitrator." In the course of the work the company claimed to be entitled to occupy portions of Argyle Street with their materials in addition to the parts occupied by their enclosures. The corporation maintained that this was outwith the Act, and also contrary to a local Police Act, which required all places so occupied to be enclosed. *Held (dub. Lord Justice-Clerk)* that a difference had arisen which must be referred to the arbitrator, and that an application to the Courts of law for interdict against the company so occupying portions of the street beyond the 50 feet enclosures at 100 yards intervals was incompetent. *Magistrates of Glasgow v. Caledonian Railway Co.*, June 17, 1892, p. 874.

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AGENT AND CLIENT—Continued.

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BANKRUPTCY—*Continued.*

to the husband, Lord Rutherford Clark holding that no *bona fide* sale had been proved. *Anderson v. Anderson's Trustee*, March 18, 1892, p. 681.

Effect of—Illegal preference—Lease—Act 1696, c. 5.

2. By agreement purporting to be a "minute of lease" entered into in 1879 trustees "let" to A certain pawnbroking premises, together with the stock of pledges therein of the value of £1100, A being bound to pay rent for the premises, and 5 per cent on the value of the stock. It was provided that A should keep books shewing his intromissions with the business, and that in the event of the stock falling below the value at which it had been handed over to him, the trustees should have a right to enter into possession of the premises and stock, and that A should be bound to cede possession thereof on receiving fourteen days' notice. On 24th April 1888, A executed a deed ceding possession of the premises and of the stock of pledges to the trustees, and they at once entered into possession of premises and stock. Four days later A was sequestered. In an action by the trustee in his sequestration against the trustees, *held* that under the agreement the trustees had only a personal obligation by the bankrupt to deliver to them in a certain event the pledges then in his possession; and therefore, even assuming the event which gave them a right of re-entry to have occurred, that the deed by which the stock of pledges was transferred to the trustees was ineffectual as having been granted within sixty days of bankruptcy in satisfaction of a prior debt, within the meaning of the Act 1696, c. 5. *Paterson's Trustee v. Paterson's Trustees*, Nov. 13, 1891, p. 91.

Sequestration—Contingent debt—Crofters Holdings Acts, 1886 and 1887.

3. In answer to an action by a landlord for payment of the arrears of rent of a house alleged by the pursuer to be an inn, the defender asked for a sist pending the disposal of an application he had made to the Crofter Commissioners on the footing that the house formed part of a "holding" within the meaning of the Crofters Act, 1886. The Lord Ordinary (Wellwood) *refused* to sist the action, and the defender afterwards withdrew this defence "without prejudice to his application to the Crofters Commission," and consented to decree being granted against him. On expiry of a charge on the extract decree without payment, the landlord's assignee presented a petition for sequestration of the tenant's estate under the Bankruptcy Act, 1856. The debtor objected on the ground that the debt was contingent until the Commission issued its determination. *Held (rev. judgment of Lord Kincairney, Ordinary)* that as the debt was constituted by a decree for payment of arrears of rent of an inn, it could not be held to be for the rent of a "holding" within the meaning of the Crofters Act; that the debt was not therefore contingent, and that sequestration must be awarded.

Held by Lord Wellwood (Ordinary), upon a construction of the Crofters Holdings (Scotland) Acts, 1886 and 1887, that a decree for payment of arrears of rent may be pronounced against a crofter notwithstanding the dependence of an application to the Commissioners to have a fair rent fixed. *Stuart & Stuart v. Macleod*, Dec. 8, 1891, p. 223.

Sequestration—Award of sequestration—Bankruptcy (Scotland) Act, 1856, sec. 30.

4. *Opinions per curiam* in conformity with opinion of Lord President Inglis in *Joel v. Gill*, 21 D. 929, that where all the conditions required by the Bankruptcy Act, 1856, have been complied with the Court has no discretion, but is bound to award sequestration. *Stuart & Stuart v. Macleod*, Dec. 8, 1891, p. 223.

Sequestration—Notice of meeting to elect trustee—Time—Bankruptcy Act, 1856, sec. 67.

5. *Held* that in order to comply with the provisions of the 67th section of the Bankruptcy (Scotland) Act, 1856, there must be an interval of six days after the close of the day of the *Gazette* notice of the award of a sequestra-

BANKRUPTCY—*Continued.*

tion, and the date to be fixed for the election of a trustee. *Wilson*, Dec. 1, 1891, p. 219.

Sequestration—Vesting of heritable property in trustee—Latent trust—Adjudication—Bankruptcy Act, 1856, sec. 102.

6. *The Bankruptcy Act, 1856, sec. 102, enacts that the Act and warrant of confirmation in favour of the trustee in a sequestration shall vest in him "the whole property of the debtor." Held (rev. judgment of First Division) that heritable property to which a bankrupt has an unqualified feudal title, but which does not belong to him, is not his property in the sense of the Act, and does not vest in his trustee.*

Opinion (per Lord Watson) that a creditor adjudging heritage held by his debtor subject to a latent trust can be in no better position in a question with the *cestui que trust* than if he had obtained a conveyance without value from his debtor. *Heritable Reversionary Co., Limited, v. Millar*, Aug. 9, 1892, H. L., p. 43.

Sequestration—Election of Trustee—Appeal—Competency—Bankruptcy Act, 1856, sec. 71.

7. At the election of a trustee in a sequestration, it was objected to an affidavit and claim that a bill by which it was vouched was prescribed, and that an acknowledgment of indebtedness indorsed on the bill, being holograph, did not prove its own date. The Sheriff disallowed the vote on the ground that the acknowledgment did not bear to be holograph. In an appeal on the ground that the Sheriff had exceeded his jurisdiction in giving effect to an objection which had not been stated, *held* that the Sheriff had not exceeded his jurisdiction, and that the appeal was incompetent under the 71st section of the Bankruptcy Act, 1856. *Smith v. Wilson*, Feb. 4, 1892, p. 428.

Sequestration—Meeting of creditors—Notice to trustee—Bankruptcy Act, 1856, sec. 98.

8. The Bankruptcy Act, 1856, sec. 98, enacts that "any commissioner, with notice to the trustee, may at any time call a meeting of the creditors." On 26th October one of the commissioners in a sequestration sent a notice to the *Gazette* calling a meeting of the creditors. The *Gazette* containing the notice was published on 27th October between 6 and 7 P.M. On the afternoon of the 27th October the commissioner sent a notice of the meeting to the trustee, but this notice was not delivered to the trustee till 10 A.M. on the 28th, in consequence of its being contained in a registered letter, which could not be delivered after business hours on the 27th, the trustee's office being then shut. In an appeal by the trustee against a resolution passed at the meeting, *held* that due notice had not been given to the trustee, and therefore that the meeting had not been duly called. *Lang's Trustee v. Steele*, Feb. 23, 1892, p. 488.

Sequestration—Provisions to children—Bond of provision—Surrogatum.

9. The proprietor of an estate, which he had disentailed, became bankrupt. At the date of his sequestration the estate was burdened with a bond for £6000 which he had granted to trustees "in trust, for payment to the children of" his "marriage surviving me who would not have succeeded" under the entail, "or in case of such of them as shall predecease me, their lawful issue or representatives claiming right in virtue of special settlement by marriage-contract of the sums to be received by them." The bond contained a declaration that if at the granter's death there should only be two of such children, issue or representatives, surviving, the obligation should be restricted to £5000, and if there should only be one, £4000, and that if there should be none the provision should lapse. The date of payment was to be the first term twelve months after the granter's death. In the sequestration the trustees for the children, of whom there were two, were ranked for £2510, as the value of their contingent claim on the estate, and received payment of that sum. In a special case the two children claimed the sum from the trustees as the value of their contingent right, or at

BANKRUPTCY—Continued.

least the interest of the fund. *Held* that the sum, with the interest thereon, fell to be held by the trustees till the first term a year after the grantor's death. *Maxwell Heron's Trustees v. Maxwell Heron*, June 23, 1892, p. 922.

Sequestration—Compensation—Lease—Sum payable by landlord on valuation—Arrears of rent.

10. A landlord on his tenant dying insolvent entered in terms of the lease into possession of the farm, and became liable for the value of the grain crop at a valuation. The tenant's estate was afterwards sequestered. In a question between the trustee and the landlord, *held* that the latter was entitled to set off his claim for arrears of rent against the trustee's claim for the value of the grain. *Davidson's Trustee v. Urquhart*, May 26, 1892, p. 808.

Trust for creditors—Title to sue—Inter vivos trust—Liability of trustees to account for their intrusions to creditors in a bond and disposition in security over the trust-estate.

11. By *inter vivos* deed of trust a trustor conveyed certain heritable property to trustees, directing them to pay therefrom any sums which they might borrow on the security of the trust-estate, with the interest accruing thereon, to pay the surplus of the rents to his wife during her life, and on her death to convey the trust-estate to his daughter. *Held* that the trust not being a trust for creditors the creditors in a bond and disposition in security granted by the trustees had no title to call them to account for their intrusions with the trust-estate. *Lucas' Trustees v. Beresford's Trustees*, June 29, 1892, p. 943.

Trust for behoof of creditors—Title of trustee to reduce illegal preferences.

12. The trustee under a voluntary trust-deed for behoof of creditors has no title to sue a reduction of illegal preferences unless he has a title derived from creditors. *Fleming's Trustees v. M'Hardy*, March 2, 1892, p. 542.

Cessio—Debtors Act, 1880, sec. 9—Discretion of Sheriff.

13. A journeyman joiner made an application for cessio. His assets were £3, 5s., his wages 34s. per week, and his liabilities £56, 7s. 3d. His principal creditor, who had received a dividend of 3s. per £1 on his claim for £27, 10s. 3d. under a trust-deed granted by the petitioner some years before (in respect of which payment the other creditors at that time granted discharges), and who had subsequently received 2s. per £1, objected to his obtaining decrea. There were four other creditors, and the applicant stated in his examination that he proposed, when able, to pay them in full, but not to make any arrangement with the objecting creditor, and that it was diligence used by him that had led to the presentation of the application. The Sheriff on this ground, and because there were practically no assets, refused the application. The Court *recalled* this judgment, and remitted to grant decree of cessio. *Sproul v. M'Cusker*, March 1, 1892, p. 539.

See *Expenses*, 12—*Succession*, 13, 14.

BILL OF EXCHANGE. Suspension of charge—Caution.

1. Circumstances in which (*rev.* judgment of Lord Low, Ordinary) the Court refused to allow suspension of a charge upon a bill without caution. *Renwick v. Stamford, Spalding, and Boston Banking Co., Limited*, Nov. 24, 1891, p. 163.
2. Cautioner—Liberation—Giving time. *C. & A. Johnstone v. Duthie*, March 15, 1892, p. 624.

BOUNDARY COMMISSIONERS. See Poor, 4.**BUILDING SOCIETY. Instrument of dissolution—Consent of members—Building Societies Act, 1874, sec. 32, subsec. 2.**

Held that the word "signatures" in the above enactment means signatures of the members themselves, and that signatures adhibited by the mandataries of members cannot be reckoned in calculating whether the instrument was signed by the requisite number of members. *Second Edinburgh and*

BUILDING SOCIETY—Continued.

Leith 493d Starr-Bowkett Building Society v. Aitken, March 11, 1892, p. 603.

BURGH. Magistrates, election of—Burgh of barony incorporated by Royal Charter—General Police and Improvement Act, 1862—Nobile officium.

1. A burgh of barony was in use to elect its magistrates and council, in terms of its crown charter, in September every third year, the electors being the male owners and tenants of subjects yielding £10 annually. The General Police Act, 1862, was adopted in the burgh in 1863, but the elections continued to be conducted in the burgh under the charter, the last having been held in September 1888. In November 1891, after the date of election for that year under both the charter and the Police Act had passed, the Court was asked to ordain the town-clerk of the burgh to make up the roll of electors in terms of the General Police Act, 1862, and subsequent statutes, and to appoint a returning officer to hold the election under the provisions of the Ballot Acts. The Court declined to do more under the petition than appoint a returning officer. Town-Council of Stromness, Dec. 1, 1891, p. 207.

Dean of Guild—Title to Sue—Edinburgh Municipal and Police Amendment Act, 1891, sec. 50—Open space—Ventilation—Saloon.

2. An application for warrant to convert the ground and basement stories of a house into business premises, and for the erection of a saloon of two stories for the manufacture of tobacco on an existing "open space" behind, was opposed by the proprietor of adjoining premises. The Dean of Guild granted the warrant. In an appeal *held* that, as the Dean of Guild was satisfied in regard to the ventilation of the new premises, the objector had no title under the above section to interfere with the discretion which was vested in the Dean to allow the conversion proposed and the erection of the saloon. *Scott's Trustees v. Shaw*, June 17, 1892, p. 895.

Common good—Harbour rates—Loan—Assignment and personal obligation in bond—Burgh Harbours Act, 1853, secs. 1, 17, 18, 19, and schedule B—3 Geo. IV. c. 91, sec. 11.

3. The town-council of a burgh which had adopted the Burgh Harbours Act, 1853, borrowed in terms of the Act a sum of money for the extension and improvement of the harbour of the burgh, and granted a bond and disposition in security to the lender, in the form of schedule B of the Act. The bond bore,—"We hereby bind the burgh to pay" to the lender the sum borrowed, ". . . and we hereby assign to him the rates authorised to be levied at the said harbour" by the Act. The harbour rates having become insufficient to pay the interest on the bond, and the town-council having declined to pay it out of the common good of the burgh, the lender charged the burgh for payment. In a suspension of the charge the complainers pleaded that the obligation in the bond was limited to the harbour rates. The Court *repelled* the reasons of suspension, holding that the burgh was liable for the debt. *Royal Burgh of Renfrew v. Murdoch*, June 2, 1892, p. 822.
4. Church—Minister—Stipend—Obligation to provide a "competent and legal stipend not under" a certain sum. *Peters v. Magistrates of Greenock*, March 16, 1892, p. 643.

See *Police*.

BYE-LAW. See *County Council*.

CARRIER. See *Railway—Ship*.

CAUTIONER. Judicial Factor.

1. An unmarried woman may be cautioner for a judicial factor. *Fraser's Judicial Factor*, Feb. 26, 1892, p. 500.

Septennial limitation of cautionary obligations—Act 1695, c. 5.

2. A bond for borrowed money dated in November 1881 contained an obligation by the borrower to repay the principal sum at Whitsunday 1882, and

CAUTIONER—*Continued.*

an obligation by the borrower, and by certain persons as cautioners, to pay at said term the interest then due and interest half-yearly thereafter during the non-payment of the principal sum. Interest was duly paid on the bond until Martinmas 1890. In an action against one of the cautioners for payment of his share of the interest from Martinmas 1890 the defender pleaded that the cautionary obligation had been extinguished by the Act 1695, c. 5. *Held* by a majority of seven Judges (the Lord President, Lord Young, Lord Rutherford Clark, and Lord M'Laren) (*rev.* judgment of Lord Stornmonth Darling) that as the interest sued for was not due till after the lapse of seven years from the date of the bond, the cautionary obligation to pay that interest was not affected by the Act. *Diss.* the Lord Justice-Clerk, Lord Adam, and Lord Trayner, who were of opinion that as payment of the principal sum and interest might have been enforced at any time within seven years from the date of the bond, after which no interest would have been due, the cautionary obligation was extinguished by the lapse of that time. *Molleson v. Hutchison*, March 9, 1892, p. 581.

Bill—Suspension of charge.

3. Circumstances in which (*rev.* judgment of Lord Low, Ordinary) the Court refused to allow suspension of a charge upon a bill without caution. *Renwick v. Stamford, Spalding, and Boston Banking Co., Limited*, Nov. 24, 1891, p. 163.

Liberation—Bill—Giving time.

4. A cautioner granted a letter guaranteeing to see A "duly paid for all goods you may supply from and after this date to the order of B." After the account had been closed—a considerable balance being due to A, an arrangement was made between A and B for payment of the balance by instalments. This arrangement was made known to the cautioner, who repudiated all liability. Some months thereafter A, without the cautioner's knowledge, drew two bills on B at three months' date for the whole balance of the debt. B having become bankrupt before the bills were met, A sued the cautioner for the balance. *Held* that the cautioner was liberated by A's action in taking the bills and thereby giving B time,—*diss.* Lord M'Laren, who held that, as the cautioner had repudiated liability, A was entitled to make the best terms he could with B.

Question, whether the arrangement to take payment by instalments liberated the cautioner. *C. & A. Johnstone v. Duthie*, March 15, 1892, p. 624.

See *Expenses*, 12—*Writ*, 1, 2.

CESSEO. See *Bankruptcy*, 13.

CHARITABLE INSTITUTION. *Responsibility of directors—Parent and Child—Custody of children.*

In a petition by a father against S., the original founder of a home for destitute children, and certain directors appointed by her, to have them ordained to restore his three children who had been taken by S. to Nova Scotia, the Court, on 7th June 1889, ordained the defenders to deliver the children to their father on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order. The directors (who alone compared in the petition) thereupon instituted proceedings in the Supreme Court of Nova Scotia against S., from which she was ultimately discharged, it being held that she had taken all the steps which could be expected of her to find the children, without success. A detective officer, who was afterwards employed by the directors, having reported that his search for the children had been fruitless, and that he saw no practical way of following it up, the respondents, on 20th October 1891, moved that, in respect that they had done everything in their power to recover the children, the interlocutor of 7th June 1889 ought to be recalled. The Court *held* that the respondents had done everything which could in the circumstances be expected of them to recover the children, but *sisted* procedure in the petition *hoc*

CHARITABLE INSTITUTION—*Continued.*

statu in order that either party might move further in it in the event of fresh information being obtained in regard to the children. *Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge*, Oct. 20, 1891, p. 8.

CHARITY. *Administration—Nobile officium—Church.*

1. Certain funds—the proceeds of a sale of work, contributed by the ladies of a parish church, for the purpose of providing an infant school in room of one then discontinued owing to the Disruption—were afterwards held in trust by the kirk-session, and not being sufficient for the intended purpose, part of the revenue was applied in clothing and paying the school fees of the young children of poor deserving persons. The fund having increased, and having been claimed by the school board, who proposed to devote it to educational purposes, a petition was presented to the Court by the kirk-session for authority to apply it towards the erection of a hall to be used as a Sunday school and for congregational purposes in connection with the parish church. The Court, after a remit, rejected a scheme for paying the annual revenue to the school board, to be applied in increasing the efficiency of the teaching staff, on the ground that such an application of the fund would virtually be in relief of the education rates, and approved of the scheme of the petitioners as being more nearly in accordance with the original purpose for which the fund was established. *Kirk-Session of Prestonpans v. School Board of Prestonpans*, Nov. 28, 1891, p. 193.

Sale of trust property.

2. In 1885 a working-men's institute was established by voluntary subscription in a small town, the constitution of the institute being embodied in a trust-deed, under which the property of the buildings was vested in trustees. The institute was maintained by annual subscriptions from the members. In 1889 a native of the place, who was resident abroad, died leaving the residue of his estate to the magistrates for the purpose of establishing and maintaining an institution also for the benefit of working-men. The trustees of the earlier institute, believing that it would be impossible for their institute to coexist along with the new endowed institution, entered into an arrangement with the magistrates under which the institute buildings were sold to the magistrates at their cost price, the magistrates undertaking in the disposition to continue the buildings in their former uses. Thereafter certain working-men of the town brought an action against the institute trustees and also against the magistrates, as trustees under the bequest, for reduction of the sale, on the ground that it was *ultra vires* of both sets of trustees, and for interdict against the institute trustees distributing the price among the subscribers. In defence the institute trustees stated, *inter alia*, that they had no intention of distributing the price except with the authority of the Court. The Court *dismissed* the action, holding that the sale was legal and proper in the circumstances, and that, in respect of the statement of the institute trustees, interdict should not be granted. *Simpson v. Trustees of Moffat Working-Men's Institute*, Jan. 19, 1892, p. 389.

Cy près—Nobile officium.

3. A testator left lands and the residue of his estate to trustees to found an orphanage for orphans belonging to a certain district between the ages of eight and fourteen, so soon as the residue and accumulations of rent amounted to £6000, directing that accommodation should be provided for as many children as the revenue would support. The residue, at the date of the testator's death, greatly exceeded that sum, and the trustees erected an orphanage with accommodation for sixty children. As few applications for admission were received, the trustees presented a petition to the Court for authority to reduce the limit of age from eight to five that the homes might be filled, a preference, however, being given to children of the age of eight and upwards. The Court *granted* the prayer of the petition. *Trustees of Carnegie Park Orphanage*, March 12, 1892, p. 605.

CHEQUE. *Curator bonis to incapax—Bank cheque granted by incapax.*

Held (1) that an incapax to whom a curator bonis had been appointed was not entitled to grant a cheque in payment of expenses incurred to his law-agent in opposing the petition; and (2) that a reclaiming note against the interlocutor making the appointment had not the effect of suspending the appointment so as to validate the cheque. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

CHURCH. *Minister—Stipend—Burgh—Obligation to provide a "competent and legal stipend not under" a certain sum.*

In an action by the minister of a parish against Magistrates and Councillors, *held* (1) that a decree of disjunction and erection embodied a judicial contract to which the predecessors of the defenders were parties, and that it fell to be construed according to its terms; and (2) that on a just construction thereof the defenders were bound to provide the pursuer and his successors in office with a "legal and competent stipend suited to the circumstances of the time and the position and duties of the benefice," *disa.* Lord Young, who was of opinion that the pursuers of the action of disjunction were merely trustees holding certain funds for the benefice, and had no power to undertake any obligation except in regard to these funds, and that the magistrates had no liability beyond the trust funds; and (2) that if there had been an obligation on the burgh *ex contractu* to provide a competent stipend not under 950 merks, a Court of law could not fix or enforce payment of a stipend beyond that sum. *Peters v. Magistrates of Greenock*, March 16, 1892, p. 643.

See *Charity*, 1—*Reparation*, 31.

COMPANY. *Capital—Reduction—Creation of new capital under colour of a resolution to reduce capital—Companies Act, 1867, secs. 9 to 19—Companies Act, 1877, secs. 3 and 4.*

1. A limited company, registered under the Companies Acts, with a capital of £2000, in 2000 £1 shares, all issued and fully paid up, presented a petition for the confirmation of a resolution to reduce its capital. The resolution bore that the company, on the narrative that its capital had been lost to the extent of £500, had resolved to reduce its paid-up capital from £2000 to £1500, by converting its £1 shares fully paid up into £1 shares, with only 15s. paid up. The Court *refused* the petition, holding that it was not a proper resolution to reduce capital. *W. Morrison & Co., Limited*, July 19, 1892, p. 1049.

Capital—Reduction of capital—Process—Procedure in vacation—Companies Act, 1886, sec. 5.

2. *Held* that the Lord Ordinary on the Bills has, under the above section, jurisdiction to entertain in vacation a petition for confirmation of reduction of capital, and that although no remit has been made to a permanent Lord Ordinary. *Niddrie and Benhar Coal Co., Limited*, May 31, 1892, p. 820.

Director—Qualification—Register—Beneficial interest—Companies Act, 1862.

3. In an action by a company registered under the Companies Acts, 1862-86, against a shareholder for payment of a call, the defender pleaded that the call had not been validly made, on the ground that the directors who made the call had not the requisite qualification, in respect that their shares, although registered in their own names, were truly held in trust for another. *Held* that the defence was *irrelevant*, inasmuch as the directors were *ex facie* of the register the holders of the shares, and must be held entitled to all the privileges of shareholders, as they were liable to all the obligations. *The Galloway Saloon Steam Packet Co. v. Wallace*, Dec. 12, 1891, p. 330.

Director—Qualification—Articles of association—Construction—"Ostensible holder."

4. The 6th article of association of a company registered under the Companies Acts, 1862-86, provided that any two of the directors should be a quorum, and that any member holding ten shares should be eligible as a director.

COMPANY—*Continued.*

The 4th article provided that "in case any share or interest in this concern shall be held in the name of a company or firm, only one individual partner of that company shall be entitled to attend and vote at the general meetings, and to give proxy, . . . whose name shall be entered in the books of the company as the ostensible holder." *Held* that the 4th article did not apply to the case of persons registered as individual shareholders, although they held in trust for a company. *The Galloway Saloon Steam Packet Co. v. Wallace*, Dec. 12, 1891, p. 330.

General Meeting—Voting—Special resolution—Companies Act, 1862, sec. 51.

5. By the 51st section of the Companies Act, 1862, a majority of "not less than three-fourths" of such members, "for the time being entitled to vote, as may be present in person or by proxy," is required to pass a special resolution of the company; and it is provided that "a declaration by the chairman that the resolution has been carried shall be conclusive evidence of the fact without proof of the number or proportion of the votes." Where an amendment was put against a special resolution for the voluntary winding-up of a company, the minute, which was signed by the chairman, bore that, "a shew of hands being taken, there voted for the former four and for the latter eight. The resolution therefore became the decision of the meeting, and the chairman declared it carried." *Held* that as the minute shewed that the resolution had not been passed by the requisite statutory majority, the resolution could not receive effect. *Cowan v. Scottish Publishing Co.*, Feb. 4, 1892, p. 437.

Income—Income-Tax—Profits—Deduction—Bonus—Income-Tax Act, 1842, Schedule D, First Case, Rules III. and IV. and sec. 159.

6. A company borrowed a large sum of money, and undertook, along with repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent thereon. *Held* that, in estimating the balance of profits and gains chargeable under Schedule D, the company were not entitled to deduct the amount of the bonus from the profits of the year in which it was paid. *Arizona Copper Co. v. Surveyor of Taxes*, Nov. 20, 1891, p. 150.

Shareholder—Rescission of voidable contract to take shares—Offer and acceptance.

7. A company offered at a premium, and succeeded in allotting, a new issue of shares. Some months afterwards the directors issued to the new shareholders a circular informing them that they had discovered that the prospectus for new shares contained material misrepresentations, and that the true state of the company at the date of the prospectus had been that the paid-up capital and "premium reserve" fund had been lost, and that dividends in past years had been paid out of capital. This circular, which was dated 12th May 1891, further stated that the directors were advised that they ought, under section 35 of the Companies Act, 1862, to present a petition to the Court for authority to remove from the register of members the names of the new shareholders, and to return their money, and that they were about to present a petition for that purpose which would be served upon them. W. and D., two of the new shareholders, replied to the circular, the one on the 14th and the other on the 20th, intimating that they should be glad to have their names removed, and to have their money returned. On 18th May the directors called a meeting of the company to consider resolutions for a voluntary winding-up. On 20th May the directors presented a petition for authority to remove the names of the new shareholders from the register, and to repay their money. On 26th May certain of the original shareholders presented a petition for a winding-up order. A winding-up order having eventually been obtained on this petition, 26th May became the date of the liquidation. No answers were lodged to the petition of 20th May. In the liquidation a number of the new shareholders objected to being placed on the list of contributories, maintaining that their contract to take shares, being voidable for misrepresentation, had been rescinded by the circular of 12th May, and, in any view, by the

COMPANY—*Continued.*

petition of 20th May prior to the winding-up. The Court, *holding* that the circular of 12th May was an offer to rescind the contract, which required to be expressly accepted, and that the presentation of the petition of 20th May could not avail shareholders who had not expressly become parties thereto prior to the 26th May, and might therefore have elected to retain their shares, *settled* the new shareholders on the list, excepting W. and D., but *removed* the names of W. and D. who had, prior to liquidation, expressly agreed to the rescission of their contract. Liquidators of Edinburgh Employers, &c. Co. v. Griffiths, March 4, 1892, p. 550.

Shareholder—Application for shares—Acceptance—Letter of allotment—Proof.

8. In January 1891 a person applied for shares in a public company, and in August withdrew his application. In a petition presented by him for removal of his name from the register of shareholders he alleged that he had received no letter of allotment. There was no conclusive evidence that he had received such a letter, but it was proved that the shares had been allotted to him in January, and that in February he had received a circular to attend the first general meeting of the company, and that in March he had been orally informed by the secretary of the company that the shares had been allotted. *Held* that the petitioner had received sufficient notice that his application had been granted to preclude him from withdrawing his application, and that his name was properly on the register. Chapman v. Sulphite Pulp Co., Limited, June 7, 1892, p. 837.

Shareholder—Shareholder suing in name of two different companies—Accumulation of defenders against whom different grounds of action—Competency—Community of interest.

9. A shareholder in two limited tea companies brought an action against the directors of the companies, the companies themselves, and two private firms of B. & Co., and F. & Co. to have it declared that a sale by B. & Co. to the companies respectively of certain tea-gardens in India "was and is null and void," and that the defenders, the directors, were not entitled to enter into the sale; and further, that the two firms should be ordained jointly and severally to repay to the companies, in the proportion in which the companies were respectively interested, the sum of £79,000; or otherwise that the directors of the companies all jointly and severally should be ordained to pay to the companies the sum of £79,000. The pursuer averred that the two firms were represented in the directorate of the two companies; that B. & Co. were largely indebted to F. & Co.; that the partners of the firms, with a view to reduce this debt, made agreements on behalf of the two companies with B. & Co. whereby the tea-gardens, which belonged to B. & Co., and which were practically worthless, were sold to the companies in certain proportions to each at the exorbitant price of £79,000; that the money so received by B. & Co. was applied in reduction of their debt to F. & Co., and that this was a fraudulent scheme carried out by the directors (three of whom the pursuer admitted knew nothing about the scheme) to the loss and damage of the companies. *Held* that the action was incompetent in respect (1) that the first alternative conclusion was founded upon two distinct and separate wrongs, one against one corporation and another against another corporation; (2) that the second alternative conclusion must be regarded as a conclusion for damages in which a lump sum was sought to be obtained for separate losses sustained by two separate corporations; and (3) that the pursuer sought to recover the price without offering restitution of the subjects bought. Smyth v. Muir, Nov. 13, 1891, p. 81.

Liquidation—Companies Act, 1886, secs. 5 and 6—Companies Act, 1862, sec. 35.

10. Although in a winding-up interlocutors by a Lord Ordinary settling a list of contributories and giving decree for payment of calls have been allowed to become final, this will not preclude a contributory included in them

COMPANY—Continued.

from presenting a petition to have his name removed from the register of the company in terms of section 35 of the Companies Act of 1862. *Stocker v. Liquidators of the Coustonholm Paper Mills Co., Limited*, Oct. 24, 1891, p. 17.

Liquidation—Inability to pay debt—Companies Act, 1862, sec. 79.

11. In a petition for the judicial winding-up of a limited company which was admittedly deemed solvent, the petitioners founded upon a judgment debt for £58 awarded to them under a decree-arbitral, the *inducia* of a charge upon the extract decree having expired without payment. The company admitted that £43 of the £58 was due, and in order to make good their objection to the remaining portion, it would have been necessary to suspend the decree and reduce the decree-arbitral. *Held* that no sufficient ground had been shewn why the prayer of the petition should not be granted. *Cowan v. Scottish Publishing Co.*, Feb. 4, 1892, p. 437.

Liquidator—Removal—Voluntary liquidation—Companies Act, 1862, sec. 141.

12. The shareholders of a public company, whose liability was limited by shares, unanimously resolved that the company should be wound up voluntarily, on the ground of its inability to carry on business owing to its liabilities; and appointed as liquidator one of their own number, who had formerly been a director. Subsequently a petition was presented for a supervision order, and for confirmation of the liquidator's appointment. A creditor of the company lodged answers objecting to the confirmation of the liquidator's appointment, on the ground of his connection with the company as a shareholder and a former director. It appeared that his shares were fully paid up, and also that all the creditors of the company, except the objector, had expressed their approval of the appointment. The Court *confirmed* the appointment, holding that due cause in the sense of the 141st section of the Companies Act, 1862, had not been shewn for the removal of the liquidator. *M'Knight & Co., Limited, v. Montgomerie*, Feb. 27, 1892, p. 501.

COMPENSATION. See *Bankruptcy*, 10—*Expenses*, 10.

COMPROMISE. See *Trust*, 8.

CONTRACT. *Constitution—Personal obligation of married woman—Novation.*

1. Testamentary trustees, as directed by the testator, divided the residue of his estate among his son A and three daughters, each receiving over £4000. Ten years afterwards a claim was made upon the deceased's estate by a bank upon a cash-credit bond for £5000, in which the testator had become bound as cautioner for his son's firm of A and B, along with B's father. A new transaction was then entered into in which A paid £2500 to the bank for B's share of the firm business, and a new cash-credit bond for £2500 was granted to the bank for A's behoof, which was signed by A, by the husbands of two of his sisters, and by the third sister, with consent and concurrence of her husband. The new bond proceeded on the narrative that the prior bond had been discharged, and the latter was delivered up by the bank. A having become bankrupt, his two brothers-in-law who had signed the £2500 bond paid that sum to the bank, and obtained an assignation to the bond. In an action by the assignees against the testator's third daughter for declarator that she and her separate estate were bound to relieve the pursuers of her share of the bond, *held (diss. Lord Young)* (1) that the £5000 bond had been discharged, and (2) that the defender having been a married woman when she signed the bond for £2500, it was not binding upon her. *Jackson v. MacDiarmid*, March 1, 1892, p. 528.

Constitution—Sale of heritage—Unilateral agreement.

2. In an action by A B for declarator that the defender had sold a house to the pursuer, the pursuer founded on the following document subscribed by the defender before witnesses, and delivered by her to the pursuer,—“I have agreed to sell my house . . . for one hundred and fifty pounds

CONTRACT—Continued.

to A. B." The Court *assolizied* the defender, holding that the document did not import a unilateral obligation by the defender to sell the house to the pursuer at a certain price, which would have been effectual without writing on the part of the pursuer, but imported merely one side of a bilateral contract of sale of heritage, which could have no effect until completed in writing by the other party. *Malcolm v. Campbell*, Dec. 9, 1891, p. 278.

Pactum Illicitum—Gaming—Contract for payment of differences.

3. Evidence upon which it was held that it had not been established that certain transactions in stocks were not what the written documents expressed, —viz., contracts of sale enforceable by law,—and decree given accordingly. *Liquidator of the Universal Stock Exchange Co., Limited, v. Howat*, Nov. 20, 1891, p. 128.

Sponsio ludicra.

4. The plea of *sponsio ludicra* does not apply to an action by a betting commission-agent against his principal for recovery of sums disbursed by him for behoof of his principal on account of bets lost. *Knight & Co. v. Stott*, July 6, 1892, p. 959.

Delivery—Unforeseen accidents preventing delivery.

5. Where a person has contracted to deliver goods, which are not part of his own stock in trade, and are known not to be, and has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circumstances, such as strikes, or sickness among workmen. *Taylor v. Maclellans*, Oct. 21, 1891, p. 10.

Breach of contract—Damages—Loss of profits.

6. A manufacturing company in this country entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignment of huts sent in pursuance of this contract was sold by the merchants at a profit, but subsequent consignments were rejected by them as being disconform to contract. In an action by the merchants against the manufacturers for damages, it was proved that the pursuers were justified in their rejection of the huts. The Court, in assessing the damages due by the defenders for their breach of contract, *held* that the pursuers were entitled to payment of a reasonable allowance for loss of profits, the ordinary rule whereby damage is assessed at the difference between the contract price and the market price when the breach of contract is ascertained being, in the circumstances, inapplicable. *Duff & Co. v. Iron and Steel Fencing and Buildings Co.*, Dec. 1, 1891, p. 199.

Lease—Obligation to keep subjects in repair—Reparation.

7. A lease of works and machinery provided that the tenants should uphold the works in good condition to the satisfaction of A. S., an engineer, and that in the event of A. S. being of opinion that the works were not being kept in good condition, and in the event of the tenants failing to execute the necessary repairs, the proprietor should be entitled to do so, and to recover from the tenants the cost thereof, as certified by A. S. On the tenants leaving the works, prior to the expiration of the lease, the proprietor obtained from A. S. a finding to the effect that the works and machinery were not in good tenantable and working condition in certain respects specified. In an action against the tenants *held* that the proprietor was not restricted to the remedy of executing the repairs and suing for the expense, but might claim damages. *Allan's Trustee v. Allan & Sons*, Dec. 1, 1891, p. 215.

Jus tertii—Reparation.

8. A workman in the employment of a firm of engineers, who were engaged in fitting up engines in a ship which was lying in a dry dock, fell from the gangway, which was the only means of access to the ship, and was injured.

CONTRACT—Continued.

He raised an action of damages against the ship carpenters, who had docked the vessel and put up the gangway, averring that they had been employed to dock the vessel by the shipbuilders; that they had undertaken this work, and had performed it; and that the gangway which it was their duty to provide, and which they did provide, was defective. He also averred that the shipbuilders had no connection with the engineers in whose employment he was. *Held* that he had stated no relevant grounds for damages, the failure to supply a sufficient gangway, if it truly were insufficient, being not a delict, but a breach of the contract between the ship-carpenters and the shipbuilders, with which neither the pursuer nor his employers had any concern. *Campbell v. A. & D. Morrison*, Dec. 10, 1891, p. 282.

Acquiescence.

9. A entered into a contract with B to purchase from him all the steel he required for a work on which he was engaged. A subsequently ordered a quantity of steel rivets from C, who applied to B for rivet bars, informing him that they were to be made into rivets for A. After some discussion with A, B agreed to supply C with the rivet bars, and he continued to make him additional supplies until he had supplied him in all with 1200 tons. He thereafter, while continuing to fulfil C's orders, intimated to A that he reserved his claim of damages against him. In an action of damages for breach of contract by B against A, *held* that B had waived his rights under the contract only as regarded the 1200 tons. *Steel Co. of Scotland v. Tancred, Arrol, & Co.*, July 20, 1892, p. 1062.

Delay in taking delivery—Rescission—Ship—Charter-party.

10. In answer to an action of damages for breach of contract in failing to deliver a steamer intended for summer passenger traffic, under a charter-party, which stipulated no special period of delivery, the owner pleaded (1) that time was of the essence of the contract; and (2) that the pursuer's conduct was such as to justify the defender in believing that he did not intend to fulfil the contract. *Held* (1) that there had been no breach of contract on the pursuer's part; (2) that there was nothing to justify the defender in resiling from the contract; and (3) that the pursuer was entitled to damages for loss of profit. *Collard v. Carswell*, July 12, 1892, p. 987.

Company.

11. Contract to take shares in public company—Rescission. Liquidators of Edinburgh Employers, &c. Co. v. Griffiths, March 4, 1892, p. 550.
See Donation, 2—Lease—Sale.

COUNTY COUNCIL. Bye-law for suppression of nuisance—Local Government Act, 1889, sec. 57.

1. Terms of a bye-law which was *held* to be beyond the powers given to County Councils by section 57 of the Local Government Act, 1889, to suppress by means of a bye-law nuisances not already punishable in a summary manner, by virtue of any Act in force throughout a county. *Eastburn v. Wood*, July 14, 1892, Just. Cases, p. 100.

"Regulation"—Local Government Act, 1889, sec. 83.

2. *Held* that a resolution of the County Council to have the Valuation-roll printed is not a "regulation" requiring the approval of the Treasury in the sense of the 83d section of the Local Government Act, 1889. *County Council of Lanarkshire v. Lord Advocate*, March 15, 1892, p. 617.

*CROFTER. See Lease, 12, 13.**CROWN. Property—Trust for public—Sea below low-water mark—Sea water intra fauces terræ—Three mile limit—Territorial waters.*

The Crown has a right in the water and the solum of sea lochs *intra fauces terræ* below low-water mark such as will entitle it to prevent any person from using them for purposes other than the recognised public uses, and that without any allegation of injury, actual or prospective, to these public uses.

CROWN—*Continued.*

The rule applied to prevent the Clyde Navigation Trustees from depositing dredgings from the Clyde in Loch Long.

Opinions that the right of the Crown to the *solum* of sea lochs *intra fauces terræ* is a proprietary right, and not a mere trust for public uses.

Opinions (*per* Lord Young and Lord Kyllachy) that the Crown has also a proprietary right in the *solum* of the sea from low-water mark as far as the three mile limit, upon the open coast. *Lord Advocate v. Clyde Navigation Trustees*, Nov. 25, 1891, p. 174.

See *Valuation Acts*, 1.

CULPA. See *Reparation*.

CURATOR BONIS. See *Judicial Factor*, 2 to 7.

CUSTOM. See *Ship*, 1 to 5.

CY PRES. See *Charity*.

DEAN OF GUILD. See *Burgh*, 2.

DILIGENCE. See *Reparation*, 32, 33.

DISCHARGE. *Reparation—Payment by one of several persons sued.*

A workman in the employment of a firm of engineers, who were fitting up engines in a ship which was lying in a dry dock, fell from a gangway connecting the ship with the shore and was injured. He raised an action of damages in the Sheriff Court against (1) his own employers, (2) the builders of the ship, and (3) the ship-carpenters who had docked the ship and put up the gangway. This action was dismissed for want of jurisdiction. The workman accepted two small sums from his own employers and from the builders, acknowledging receipt of the payment by the former as "in full of expenses incurred . . . in connection with his alleged claim for damages," and discharging the latter in consideration of the payment "of and from all claims of reparation, and for payment of legal and other expenses now or hereafter competent to me." He then raised an action of damages for £500 in the Court of Session against the ship-carpenters. *Held* (*per* Lord Low, Ordinary) that he was not barred from doing so by these payments or the terms of his discharges. *Opinions reserved* in the Inner House. *Campbell v. A. & D. Morrison*, Dec. 10, 1891, p. 282.

DOMICILE. See *Jurisdiction*, 1.

DONATION. *Donatio inter vivos—Deposit-receipt—Proof—Presumption.*

1. A son after his mother's death cashed a deposit-receipt in her name for £240. She had lived with him, and was sixty-three years of age at her death. The deposit-receipt was indorsed by a cross, and bore the signature of the son and of his sister as witnesses attesting this cross as the mother's mark. In an action by one of the mother's next of kin the son alleged that he had acquired the deposit-receipt by donation *inter vivos*. Evidence which held insufficient to overcome the presumption against donation. *Dawson v. M'Kenzie*, Dec. 8, 1891, p. 261.

Donation inter vivos.

2. In an action for payment of £223 the pursuers averred that their father having executed a trust-deed for behoof of his creditors, the defender purchased their father's business from the trustee; that by a written agreement between the defender and their father the former took the latter into his service in connection with the business at a weekly wage, and, "without coming under any obligation on the subject which can be enforced by" the father, "records his intention to apply in such way and manner as he may think most expedient to, or for the benefit of" the father "and his family a proportion equal to one-half, more or less, of the free profits, if any, that may be derived from the said business, so long as the said" father "remains in his service"; that thereafter the defender annually credited the father

DONATION—Continued.

in the books of the business with one-half the profits; that the total sum so credited amounted at their father's death to £750; that on the death of their father the pursuers went to live with their grandmother, and that the defender arranged to pay her £100 a-year for their board, clothing, and education, until the sum then standing at the credit of their father's account in the firm's books was exhausted; that he subsequently sent a statement of his account with the pursuers, which opened with a credit of £750 in their favour; that thereafter he wrote to the grandmother in these terms:—"Regarding the money, that I from feelings of friendship at the time set aside for the benefit of your grandchildren, I shall continue to remit to you regularly every quarter the sum fixed on for their board, &c., until both the principal and interest are exhausted," but that he ultimately declined to pay the sum of £223 still remaining of the £750 originally credited. The pursuers pleaded that either by crediting the £750 in the books, or at all events by his subsequent actings and letters, the defender had come under obligation to pay that sum to them. The defender pleaded that the pursuers' averments were irrelevant, in respect that they did not import that he had come under any legal obligation. He averred further, that £750 had been an overstatement of half the profits by the sum of £223 owing to an error induced by the carelessness of the pursuers' father, and he therefore pleaded that he was, in any event, entitled to rectify this error. The Court *repelled* the defender's plea of irrelevancy, holding that the terms of the letters founded on, and their delivery, imported a legal obligation by defender to the pursuers. *Opinions* that the special averments in defence were irrelevant. *Shaw v. Muir's Executrix*, July 13, 1892, p. 998.

See *Trust*, 7.

ELECTION LAW. *County Franchise—Sale of subjects on which claim based—Reform Act, 1832, sec. 7.*

1. In order to support a claim for registration under section 7 of the Reform Act, 1832, it is necessary that the claimant shall not have ceased to be proprietor of the subjects upon which he claims the franchise at the date at which the Sheriff proceeds to consider the claim in the Registration Court. *M'Kenzie v. Comrie*, Dec. 10, 1891, p. 292.

County Franchise—Property qualification—Absolute disposition qualified by back-bond—Representation of the People Act, 1868, sec. 5.

2. Certain bankrupts who had entered into a composition arrangement with their creditors disposed certain subjects to the person who had become cautioner for the composition. By the disposition, which expressly proceeded upon a narrative of this fact, the bankrupts disposed the subjects in the cautioner's favour, "and his heirs and assignees whomsoever, heritably and irredeemably." The deed, which contained the usual clauses of assignation of rents and writs and of warrandice, then declared that the subjects were disposed to him in real security and for payment to him of all sums paid by him to the creditors, or in reference to such sequestration expenses, insuring the property and collecting the rents. Power of sale was also conferred on the disponee, and he was taken bound to account for his intromissions, and to pay over any balance to the bankrupts. *Held* that the disponee, being in fact a security holder merely, was not entitled to be put upon the roll as "proprietor" of the subjects disposed, under section 5 of the Representation of the People (Scotland) Act, 1868. *M'Kenzie v. Watt*, Dec. 10, 1891, p. 297.

Service Franchise—"Inhabitant occupier"—Representation of the People Act, 1884, sec. 3.

3. A draper's warehouse consisted of a tenement of several flats, the ground flat being devoted to the business premises, while the upper flats were devoted to sitting-rooms and bed-rooms for the firm's servants. The manager occupied rooms on the second flat, and a butler occupied for his exclusive use a bedroom on an upper flat. The flats were all reached by a common

ELECTION LAW—*Continued.*

stair. There was no other communication between the flat occupied by the manager and that occupied by the butler. The manager was entrusted with a general supervision of the whole domestic arrangements provided for the servants, and had power to dismiss the domestic servants, including the butler. *Held* that the butler was entitled to be regarded as an "inhabitant occupier" of a dwelling-house in the sense of the 3d section of the Representation of the People Act, 1884, in respect (1) that the premises he occupied were not inhabited by the manager, and (2) that he did not serve under the manager in the sense of the Act. *Falconer v. M'Guffie*, Dec. 10, 1891, p. 295.

Claim—Statement of qualification—Burgh Occupation Franchise—Representation of the People Act, 1884, sec. 5.

4. A person who claimed to be enrolled as a voter stated the nature of his qualification thus:—"Occupier. Occupied whole of the house last year, This year joint tenant (half and half) with J. A. L." *Held* that he had sufficiently specified the nature of his qualification. *Lindsay v. Falconer*, Dec. 10, 1891, p. 290.

Claim—Statement of qualification—Partner of firm—Burgh Voters Act, 1856.

5. A person claiming to be enrolled as a voter in respect of certain subjects stated in his claim the nature of his qualification thus,—“Sole partner of M. Brothers, printers, in possession of said interest.” *Held* that he was not entitled to be put upon the roll, in respect his claim did not sufficiently specify the nature of his qualification. *Falconer v. Macleod*, Dec. 10, 1891, p. 291.

Claim—Signature of claim for another—No mandate—Burgh Voters Act, 1856, sec. 36.

6. *Held* that a claim to be enrolled on the register of voters, which was signed on behalf of the claimant by a person who held no mandate, written or oral, from the claimant, was not valid. *Burns v. Cassells*, Dec. 10, 1891, p. 287.

Notice of objection—Time—Burgh Voters Act, 1856, secs. 4 and 9—Representation of the People Act, 1868, sec. 20.

7. The Burgh Voters Act, 1856, sec. 4, as amended by the Representation of the People Act, 1868, and applied to counties by the Reform Act, 1884, sec. 8 (6), provides, that every person objecting to any entry on the roll shall, “on or before the 21st day of September, give, or cause to be given to the person so objected to, or leave or cause to be left at his place of abode as described in such list, a notice . . .” Sec. 9 provides that “it shall be sufficient if such notice be sent by the post, postage paid, addressed with a sufficient direction, to the person to whom the same ought to be given at his usual place of abode.” A notice of objection, addressed to the person objected to at his residence at Shotts, was posted at Motherwell on the evening of 21st September after the last despatch for that day. *Held* (*diss.* Lord Adam) that the notice was not timeously given. *Neilson v. Robertson*, Dec. 10, 1891, p. 301.

Notice of objection sent to the Assessor—Form of—Burgh Voters Act, 1856, sec. 4 and Schedule No. 4.

8. *Held* that a notice of an objection sent to the Assessor under sec. 4 of the Burgh Voters Act, 1856, which omitted to state the qualification of the person objected to as appearing in the Assessor's list of voters, was not disconform to the statute. *Neilson v. Robertson*, Dec. 10, 1891, p. 301.

Case—Names of persons objected to—Representation of the People Act, 1868, sec. 22.

9. *Held* that the regulations of this clause regarding the appending to a special case the names of persons whose cases depend upon the same question of law as is stated in the special case are applicable to cases raising questions as to qualifications by new claimants, and not to objections to those already on the roll. *Neilson v. Robertson*, Dec. 10, 1891, p. 301.

ENTAIL. Disentail—Valuation of expectancies—Deduction of improvement expenditure—Entail (Scotland) Act, 1882, sec. 6.

1. At the date of a petition for disentail a sum borrowed for improvement expenditure was secured by a terminable rent charge. Under the Entail Act, 45 and 46 Vict. cap. 53, sec. 6, the heir in possession is entitled, when one-fourth of the capital sum is repaid, to grant a bond over the estate for the remaining three-fourths. In the valuation in 1890 of the expectancies of the second and third heirs-substitute they objected to more than three-fourths of the original sum being deducted from the value of the estate on the ground that only three-fourths could be made a permanent burden on the estate. *Held* that the whole sum remaining unpaid at the date of the execution of the instrument of disentail fell to be deducted from the value of the estate. *Pringle v. Pringle*, June 28, 1892, p. 926.

Disentail—Valuation of expectancies—Deduction of succession-duty.

2. *Held* that the succession-duty which a substitute heir would have to pay on succeeding to an entailed estate was not a proper element of deduction from the value of his expectancy in the case of a disentail. *Pringle v. Pringle*, June 28, 1892, p. 926.

Disentail—Date of valuation of expectancies.

3. The date of execution of the instrument of disentail is the date at which the value of the expectancies of the substitute heirs is to be calculated, and they are not entitled to interest on that value until it is consigned or secured. *Pringle v. Pringle*, June 28, 1892, p. 926.

Disentail—Valuation of expectancies—Average life.

4. *Opinion* (per the Lord President) that there may be circumstances in which the Court, in valuing the expectancy of a substitute heir, ought to take account of the fact that his prospect of life is better than the average.

Averments which it was *held* did not amount to the statement of a case of an exceptionally good life of an officer in the Indian army. *Pringle v. Pringle*, June 28, 1892, p. 926.

Disentail—Expenses.

5. Observations on the liability for expenses of persons opposing petitions for disentail. *Pringle v. Pringle*, June 28, 1892, p. 926.

Disentail—Disentail of a portion of an entailed estate—Entail Amendment Act, 1848—Entail Amendment Act, 1875—Entail Act, 1882.

6. The provisions of the Entail Acts authorising the Court to dispense with the consents of the succeeding heirs apply, although the application is for authority to disentail a part only of an entailed estate.

Opinions that in the disentail of part of an entailed estate the part should be valued at the loss to the entailed estate by the separation, and not merely at its intrinsic value. *Duke of Sutherland v. Marquess of Stafford*, Feb. 27, 1892, p. 504.

Disentail—Agreement—Effect of supervening legislation.

7. In 1878 the Duke of Sutherland, heir of entail in possession of an entailed estate under an entail dated in 1835, entered into an agreement with his son and nearest heir for the time, which proceeded upon the narrative that it was "desirable for the preservation of the dignity and honour of the earldom of Sutherland that the estate should be secured by fetters of entail, so far as legally may be done, from being alienated from the earldom of Sutherland, or wasted or charged with debt except as after mentioned." The parties therefore agreed that the estate should be disentailed, and that the Duke should be bound to execute "a valid deed of strict entail" on certain heirs. The Duke further agreed to bring within the entail certain estates held by him in fee-simple, and to renounce his right to charge the estate with a large sum expended by him in improvements, while his son agreed that his father should have power to charge the fee of the estates to a considerable amount. The agreement also circumscribed the limits within which the heirs of entail would have been entitled under the Aberdeen Act to grant provisions to husbands and wives. In pursuance of this agreement, the estates were disentailed and, along with the fee-simple lands,

ENTAIL—Continued.

were re-entailed. At the date of the agreement the Duke could not under the Entail Acts then in force have disentailed without the consent of his son. In a petition for disentail of part of the entailed estate presented by the Duke in 1891, *held* that the petitioner was not barred by the agreement from taking advantage of the provisions of the Entail (Scotland) Act, 1882, which empowered heirs of entail in possession to disentail without the consent of the nearest heirs. *Duke of Sutherland v. Marquess of Stafford*, Feb. 27, 1892, p. 504.

EXECUTOR. Appointment—Right of surviving husband.

1. A surviving husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next of kin. *Campbell v. Falconer*, March 5, 1892, p. 563.

Appointment—Competition—Trustees appointed to manage estate—Curator bonis—A. S., Feb. 13, 1730.

2. Under a mutual settlement by husband and wife, the survivor was appointed "sole trustee and executor of the predeceaser." By subsequent codicil executed at sea, on 14th June 1890, to which the wife was not a party, the husband directed,—"I wish my estate to be managed by the same trustees as my brother John, dead or alive, including to my wife." The husband died on 21st June 1890. After the husband's death competing petitions were presented (1) by the curator bonis of the wife, who had become insane, and (2) by the persons named as trustees under the settlement of the testator's brother John, dated 18th April and recorded 21st May 1891, the former claiming to be appointed executor-dative as representing his ward, and the latter claiming confirmation as executors-nominate under the codicil. *Held* (1) that upon a construction of the testamentary writings the unlimited power conferred by the codicil on the persons therein designated to manage the estate along with the wife, who had previously been nominated trustee and executor, implied their nomination as executors as well as trustees, and that they had a title to be confirmed executors-nominate; (2) that the curator bonis had under the Act of Sederunt, February 13, 1730, no title to be appointed executor-dative, other persons having a title having offered to confirm; and therefore (3) that the trustees were entitled to confirmation.

Opinions that a testamentary conveyance to certain persons as trustees or with a direction to manage does not necessarily imply their appointment as executors. *Martin v. Ferguson's Trustees*, Feb. 16, 1892, p. 474.

Removal—Agreement by executor adverse to executry estate—Judicial Factor.

3. Where a majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate, the Court, in a petition at the instance of certain of the next of kin of the deceased (including the minority of the executors), sequestrated the estate and appointed a judicial factor. *Birnie v. Christie*, Dec. 16, 1891, p. 334.

EXPENSES. Judicial Factor—Curator Bonis—Expenses of opposing appointment.

1. The Court, in affirming an interlocutor of the Lord Ordinary on the Bills making the appointment of a curator bonis on the ground of mental incapacity, pronounced no order as to expenses. On appeal the House of Lords affirmed the interlocutor on the merits, and found the law-agents who acted for the incapax entitled to their expenses in the House out of the estate. The Court, on a note by the curator bonis, *held* that the law-agents were also entitled to their expenses in the Court of Session out of the estate. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.
2. Law-agents, who had acted for an alleged incapax in unsuccessfully opposing the appointment of a curator bonis, *held* not entitled to claim against the estate for expenses incurred in prosecuting an action in a Sheriff Court for delivery of documents belonging to the alleged incapax in the hands of the curator bonis, the action having been raised after the appointment of the

EXPENSES—Continued.

curator bonis by the Lord Ordinary, but before the hearing on a reclaiming note. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Entail—Disentail.

3. Observations on the liability for expenses of persons opposing petitions for disentail. *Pringle v. Pringle*, June 28, 1892, p. 926.

Tender—Extrajudicial tender.

4. An action was raised for payment of £169 as the amount remaining due to the pursuers on a contract to perform certain work. After service of the summons, but before it was called, the defender extrajudicially offered £155, but no expenses. This being declined, and the summons called, he offered in his defences £50, but made no offer of expenses. After proof, the pursuer was found entitled to £44. The Court, holding that the defender's conduct had been reasonable, and the action unnecessary, found the defender entitled to expenses. *Mavor & Coulson v. Grierson*, June 16, 1892, p. 868.

Interest—Appeal to House of Lords.

5. A party who obtains repayment of expenses paid by him to his opponent, in consequence of the judgment of the Court of Session being reversed in the House of Lords, is not entitled to recover the interest which had accrued in the interval on the sum so paid. *Young v. Hermand Oil Co., Limited*, June 15, 1892, p. 867.

Dominus litis—Action by daughter with consent of father—Conjunct and several liability.

6. A girl of nineteen, with consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister of the congregation to which they belonged. The Sheriff assoilized the defender, finding that the statements alleged to have been made by him were true, and had been made by him solely in the discharge of his duty as minister; and further, found the girl and "her father, her curator and administrator-in-law, liable, conjunctly and severally, in expenses." The Sheriff proceeded upon the ground that the father had not only as her curator and administrator-in-law, but personally, taken a prominent and leading part in the litigation. *Held* that the Sheriff was entitled, in his discretion, to award the expenses against the father. *Fraser v. Cameron*, March 8, 1892, p. 564.

Taxation—Fees to Counsel.

7. The fact that the hearing of a case has been continued from one day to another is not in itself a reason why an additional fee should be sent to counsel, but the circumstance that the case has not been heard on a single day is an element to be taken into account in fixing the amount of the fee to which counsel is entitled as an adequate equivalent for his trouble. *Baird & Stevenson v. Malloch*, July 20, 1892, p. 1061.

Process—Appeal—Amendment of record.

8. In an appeal for jury trial in an action of damages for personal injuries, the Court were prepared to find the averments irrelevant, and to dismiss the action, and the pursuer was allowed to amend his record only upon payment of the expenses in the cause from the date of closing the record. *Gallagher v. Pattison*, Nov. 10, 1891, p. 79.

Process—Appeal—Competency.

9. In an appeal in a Sheriff Court action the Court assoilized the defender and found the pursuer liable "in the expenses in this Court." The Sheriff having subsequently given decree in favour of the defender for expenses in the Sheriff Court, the pursuer appealed. *Held* (1) that the interlocutor of the Court had exhausted the cause, and that the interlocutors subsequently pronounced in the Sheriff Court were incompetent; and (2) that it was competent to appeal against them. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Process—Appeal—Compensation—Agent-Disburser.

10. Where one of the parties in an action has obtained decree for certain

EXPENSES—Continued.

expenses in the action, the agent of the other party is not entitled to decree in his own name for expenses to which his client has subsequently been found entitled. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Process—Separate discussion on expenses.

11. *Per Lord Young*,—"I think that the most expedient course is that we should consider and decide the question of expenses when we are forming and expressing our opinion on the merits." *Allan's Trustees v. Allan & Sons*, Oct. 23, 1891, p. 15.

Process—Caution for expenses—Undischarged bankrupt.

12. An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to the Sheriff. *Held* that the claimant could not be allowed to proceed without finding caution for expenses. *Dunsmore's Trustee v. Stewart*, Oct. 17, 1891, p. 4.

FISHINGS. River—Tidal and navigable—Foreshore—Obstruction in alveo.

The proprietor of the lands of S had a Crown grant of the salmon-fishings *ex adverso* of his lands in a tidal navigable river, the banks of which at ebb tide consisted of low mud flats, covered at every tide. The tenant of the fishings erected, with the sanction of the proprietor, a platform, based on shingle and piles, to facilitate his fishing. The foundations of the platform were, in part at least, in the *alveus* of the river. In an action brought by the proprietor of lands and fishings on the other side of the river for removal of the platform, it was proved that a substantial part of the erection was *in alveo*, and that it was injurious to the pursuer's fishings. *Held* that the pursuer was entitled to have the whole erection removed.

Opinion (per the Lord Justice-Clerk) that a riparian proprietor upon a private or tidal river is entitled to prevent an opposite proprietor from making any alteration *in alveo*, or where an alteration has been made, to insist on restoration without proving that the operation has caused or must cause damage to his side of the river. *Ross v. Powrie & Pitcaithley*, Dec. 11, 1891, p. 314.

See *Justiciary Cases*, 16, 17.

FOREIGN. Obligation ex delicto.

A person suing for damages *ex delicto* in respect of an act committed abroad has no action unless that act is by the law of the place where it is committed a wrong inferring a legal remedy. *Rosses v. H. H. Sir Bhagvat Sinhjee*, Oct. 29, 1891, p. 31.

See *Judicial factor*, 8—*Jurisdiction—Parent and Child*, 3, 10—*Process*, 5.

FRAUD. See *Company*, 9.

GAMING. See *Contract*, 3, 4.

GOODWILL. See *Trade Name*.

GUILD, DEAN OF. See *Burgh*, 2.

HARBOUR. Harbour rates—Burgh—Common good—Loan—Assignment and personal obligation in bond—Burgh Harbours Act, 1853.

1. The town-council of a burgh which had adopted the Burgh Harbours (Scotland) Act, 1853, borrowed in terms of the Act a sum of money for the extension and improvement of the harbour of the burgh, and granted a bond and disposition in security to the lender, in the form of schedule B of the Act. The bond bore,—“We hereby bind the burgh to pay” to the lender the sum borrowed, “. . . and we hereby assign to him the rates authorised to be levied at the said harbour” by the Act. The harbour rates having become insufficient to pay the interest on the bond, and the town-council having declined to pay it out of the common good of the burgh, the lender charged the burgh for payment. In a suspension of the charge the complainers pleaded that the obligation in the bond was limited to the harbour rates. The Court *repelled* the reasons of suspen-

HARBOUR—Continued.

sion, holding that the burgh was liable for the debt. *Royal Burgh of Renfrew v. Murdoch*, June 2, 1892, p. 822.

Harbourmaster—Ship—Reparation.

2. *A schooner sailing up the River Dee to Kirkcudbright harbour was steered by the master, with the assistance of two local fishermen acting as pilots. On the vessel reaching a point within the harbourmaster's jurisdiction, one of the pilots hailed the harbourmaster, who was standing at the head of the west pier, for instructions when to drop the anchor. The harbourmaster made signs for the vessel to come on. The master thereupon changed his course from the mid-channel to one leading directly to the head of the pier. The harbourmaster, after the course was changed, continued to make signs for the vessel to advance. The vessel continued in her course till she grounded on a bank near the pier. The harbourmaster in giving the orders was in the belief that the tide was full, while in fact it had ebbed three inches. In an action of damages brought by the owner of the vessel against the harbour trustees, the First Division held that the harbourmaster was in fault, but that there was contributory negligence on the part of those in charge of the vessel in changing its course. In an appeal held (rev. the judgment) (1) that the accident was caused by the fault of the harbourmaster in directing the vessel to take a wrong course; and (2) that the shipmaster was not in fault in following that course, as he was bound to obey the harbourmaster's orders. Renney v. Magistrates of Kirkcudbright, March 31, 1892, H. L., p. 11.*

HOMOLOGATION. See *Adoption*.

HOTEL. See *Trade Name*.

HUSBAND AND WIFE. Constitution of marriage—Proof.

1. Where a man and woman had mutually exchanged written declarations acknowledging each other to be husband and wife, in a declarator of marriage by the woman against the man, which was founded upon the declarations, *held* that the pursuer was bound to prove the circumstances in which the writings had been exchanged, and that they were consistent with the matrimonial intention expressed in the writings.

Circumstances in which it was held that the declarations had been exchanged with the intention of constituting marriage, and that the contract of marriage was thereby proved. Imrie v. Imrie, Nov. 26, 1891, p. 185.

Terce—Brieve—Appeal—Competency—Act 1503, cap. 77—Act 1681, cap. 10.

2. The heir-at-law is not entitled to obtain a sist of the proceedings under a brieve of service and cognition to terce on the ground that he is about to bring a declarator of the invalidity of the marriage, or on the ground that he is about to raise an action for declarator that the widow is barred from claiming terce by reason of having accepted a conventional provision out of heritage abroad belonging to the deceased.

Opinion (per Lord M'Laren) that under a brieve of terce it is competent for the inquest to consider whether the widow is barred from claiming terce by reason of having accepted a conventional provision.

Opinions that a brieve of service and cognition to terce may be removed to the Court of Session by appeal at any time before trial before the Sheriff.

Observations as to the competency of an appeal after trial and verdict. Craik v. Penny, Dec. 18, 1891, p. 339.

Personal obligation of married woman—Novation.

3. Testamentary trustees, as directed by the testator, divided the residue of his estate among his son A and three daughters, each receiving over £4000. Ten years afterwards a claim was made upon the deceased's estate by a bank upon a cash-credit bond for £5000, in which the testator had become bound as cautioner for his son's firm of A and B, along with B's father. A new transaction was then entered into in which A paid £2500 to the bank for B's share of the firm business, and a new cash-credit bond for £2500 was granted to the bank for A's behoof, which was signed by A, by the husbands of two of his sisters, and by the third sister, with consent and concurrence

HUSBAND AND WIFE—Continued.

of her husband. The new bond proceeded on the narrative that the prior bond had been discharged, and the latter was delivered up by the bank. A having become bankrupt, his two brothers-in-law who had signed the £2500 bond paid that sum to the bank, and obtained an assignment to the bond. In an action by the assignees against the testator's third daughter for declarator that she and her separate estate were bound to relieve the pursuers of her share of the bond, *held (diss. Lord Young)* (1) that the £5000 bond had been discharged, and (2) that the defender having been a married woman when she signed the bond for £2500, it was not binding upon her. *Jackson v. MacDiarmid*, March 1, 1892, p. 528.

Business carried on by spouses jointly—Earnings—Married Women's Property Act, 1877, sec. 3.

4. A carter on his marriage in 1875 with a fish-hawker gave up his own business and along with his wife carried on the fish-hawking business. They had two carts, which bore the husband's name. Each of them worked a separate district, and each bought the fish for his or her cart. The wholesale merchants who had previously supplied the wife, at the request of both spouses rendered their accounts in the husband's name. The earnings of both spouses were lodged in bank in name of both of them or either or the survivor. On the wife's predecease in 1891, her executor claimed as against the husband the wife's share in the proceeds of the business at her death, as "earnings" in the sense of section 3 of the Married Women's Property Act, 1877. *Held* that the wife was to be regarded merely as her husband's agent in the management of the business, and that therefore the Act was inapplicable. *M'Ginty v. M'Alpine*, June 28, 1892, p. 935.

Bankruptcy—Property of wife entrusted to husband—Married Women's Property Act, 1881, sec. 1, subsec. (4).

5. The Married Women's Property Act, 1881, enacts with regard to a wife's separate estate on the occasion of bankruptcy of the husband (sec. 1, subsec. 4), that any estate of the wife, "lent or entrusted to the husband," shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend after the claims of other creditors have been satisfied. A husband whose wife had separate estate delivered to his wife a sale-note whereby, on the narrative that from time to time he had received from her separate estate sums amounting in all to £225, he sold to her in consideration of that sum the whole furniture in the house they occupied, conform to inventory. About seven months afterwards the husband's estates were sequestered. The wife then sought to interdict the husband's trustee from interfering with the furniture. After a proof the Court *refused* interdict, the Lord Justice-Clerk, Lord Young, and Lord Trayner holding that, on the assumption of a *bona fide* sale by the husband to the wife, the furniture was estate of the wife entrusted to the husband, Lord Rutherford Clark holding that no *bona fide* sale had been proved. *Anderson v. Anderson's Trustee*, March 18, 1892, p. 684.

Title to sue—Title of deserted wife to sue for aliment of illegitimate child.

6. *Held* that a married woman whose husband had gone abroad, and had not been heard of for several years, had a title to sue for aliment of an illegitimate child. *M'Quillan v. Smith*, Jan. 15, 1892, p. 375.

Executor—Appointment—Right of surviving husband.

7. A surviving husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next of kin. *Campbell v. Falconer*, March 5, 1892, p. 563.

Divorce—Domicile—Matrimonial domicile—Separation—Capacity of separated wife to acquire separate domicile—Jurisdiction—Foreign.

8. *Held (diss. Lord Young)* that where a Scotsman has retained his domicile of origin the fact that he has married the native of a foreign country, and has had his home there for years, does not deprive the Scots Courts of jurisdiction in a question of divorce. *Low v. Low*, Nov. 19, 1891, p. 115.

See *Partnership*, 3.

INCOME-TAX. See *Revenue*, 1, 2, 3.

INHABITED HOUSE DUTY. See *Revenue*, 4.

INSANITY. See *Judicial Factor*, 2 to 7—*Poor*, 1, 2, 5.

INSURANCE. *Marine insurance—Time policy—Stamp-duty—Customs and Inland Revenue Act*, 1867, sec. 1, *Schedule B*, and sec. 4—*Interpretation Act*, 1889, sec. 1 (b).

1. *Held* that a time policy of insurance embracing a number of vessels with separate sums insured on each was properly stamped at the duty corresponding to the aggregate sum insured. *Great Britain Steamship Premium Association v. Whyte*, Nov. 17, 1891, p. 109.

Life insurance—Insurance against accident—Bodily injury caused by "violent, accidental, external, and visible means."

2. In an action on an accident insurance policy under which the insurance company were liable in the event of the death of the insured through "bodily injury caused by violent, accidental, external, and visible means," it was proved that the insured had complained of feeling a pain as of something having "given way inside," when he was in the act of pulling on his stockings. He died about thirty-six hours afterwards. The medical men who had attended him examined his body *post-mortem*, and pronounced that the proximate cause of death was failure of the heart's action through pressure on the heart caused by distension of the colon, which had become obstructed. There was no evidence of disease in any of the organs, and the medical men who had made the examination could give no reason why the colon had become obstructed on the morning in question, except that the deceased, who was a stout man, must have used some extra force when in the act of stooping down to draw on the stocking, and so twisted the colon out of position; but the deceased in his account of what took place, as deposed to by those who heard him, did not mention that he had made any unusual movement when pulling on his stocking. The Court (*rev. judgment of Lord Kyllachy*) *assuolized* the defenders, holding that it had not been proved that the death was due to bodily injury caused by violent, accidental, external, and visible means. *Clidero v. Scottish Accident Insurance Co., Limited*, Jan. 12, 1892, p. 355.

Insurance of tramway company against loss by accident—Double insurance—Contribution—Title to sue.

3. An insurance company, after paying to a tramway company a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance company for contribution on the ground that it had insured the same risk. *Held* by Lord Low, Ordinary, that the pursuers had a title to sue. *Sickness and Accident Assurance Association, Limited, v. General Accident Assurance Corporation, Limited*, July 12, 1892, p. 977.

Agreement to insure from fixed date on payment of premium—Insurance "from" a certain day.

4. An insurance company entered into an agreement to insure a tramway company against accidents caused by their vehicles to third parties for twelve months from 24th November 1888 inclusive, subject to the condition that no insurance should be effected until the premium was paid. An accident occurred on 24th November before the policy had been issued or the premium paid, and immediately the representatives of the insurance company informed the representative of the tramway company that they would take care not to accept the premium "except from 24th November in consequence of the accident." On 26th November the premium was paid, and the insurance company acknowledged receipt of it as premium for the risk "from the 24th inst." In an action raised against the insurance company by another insurance company, which had paid the loss, for contribution, the Court *assuolized* the defenders, holding (1) that the preliminary contract to grant an insurance to cover risk of accident on 24th November on payment of the premium was no longer binding after the accident had happened; and (2) that the terms of the receipt did not import

INSURANCE—Continued.

liability except for accidents occurring after the lapse of that day. *Sickness and Accident Assurance Association, Limited, v. General Accident Assurance Corporation, Limited*, July 12, 1892, p. 977.

Fire insurance—Title to sue.

5. A person whose property is injured by fire through the fault of another is not deprived of his title to sue by having his property fully insured. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 608.

INTERDICT. See *Trade Name*.

INTEREST. See *Appeal*, 1—*Succession*, 19.

ISSUE. See *Process*, 17, 18, 19, 21, 22.

JUDICIAL FACTOR. Cautioner.

1. An unmarried woman may be cautioner for a judicial factor. *Fraser's Judicial Factor*, Feb. 26, 1892, p. 500.

Curator bonis to incapax—Title to charge upon a warrant in a heritable bond.

2. The debtor in a heritable bond was taken bound to repay the loan to the lender, his executors and assignees whomsoever. The lender was an insane person to whom a curator bonis had been appointed by the Court. In a charge, proceeding upon the warrant in the bond, and bearing to be at the instance of the ward, the debtor was charged to make payment to the curator bonis. In a suspension the debtor pleaded that the charge was wrongous as bearing to proceed at the instance of an incapax. The Court *repelled* the plea, holding that the curator was entitled to use the ward's name. *Yule v. Alexander*, Nov. 25, 1891, p. 167.

Curator bonis to incapax—Title to be appointed as executor—A.S., Feb. 13, 1730.

3. *Held* that a curator bonis had no title under the A.S., Feb. 13, 1730, to be appointed executor-dative on the estate of the deceased husband of his ward, other persons having a title having offered to confirm. *Martin v. Ferguson's Trustees*, Feb. 14, 1892, p. 474.

Curator bonis to incapax—Voluntary annuity out of ward's estate—Increase of amount—Nobile officium.

4. While the Court may authorise the curator bonis to a person incapax to continue the payment of a voluntary annuity to a third party which the ward previous to incapacity had been in the habit of paying, it will not grant authority to increase the amount of the annuity, although the exigencies of the annuitant may have become greater. *Bowers v. Pringle Pattison's Curator Bonis*, June 28, 1892, p. 941.

Curator bonis to incapax—Bank cheque granted by incapax.

5. *Held* (1) that an incapax to whom a curator bonis had been appointed was not entitled to grant a cheque in payment of expenses incurred to his law-agent in opposing the petition; and (2) that a reclaiming note against the interlocutor making the appointment had not the effect of suspending the appointment so as to validate the cheque. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Curator bonis to incapax—Expenses of opposing appointment.

6. The Court, in affirming an interlocutor of the Lord Ordinary on the Bills making the appointment of a curator bonis on the ground of mental incapacity, pronounced no order as to expenses. On appeal the House of Lords affirmed the interlocutor on the merits, and found the law-agents who acted for the incapax entitled to their expenses in the House out of the estate. The Court, on a note by the curator bonis, *held* that the law-agents were also entitled to their expenses in the Court of Session out of the estate. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Curator bonis to incapax—Expenses.

7. Law-agents, who had acted for an alleged incapax in unsuccessfully opposing the appointment of a curator bonis, *held* not entitled to claim against the

JUDICIAL FACTOR—Continued.

estate for expenses incurred in prosecuting an action in a Sheriff Court for delivery of documents belonging to the alleged incapax in the hands of the curator bonis, the action having been raised after the appointment of the curator bonis by the Lord Ordinary, but before the hearing on a reclaiming note. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Trust—Removal of trustees.

8. In a petition by the next of kin of a domiciled Scotsman for removal of his testamentary trustees and the appointment of a judicial factor, the only allegation against the testamentary trustees was that they intended to remove the trust-estate from Scotland to the prejudice of the petitioners, who stated that they were about to bring a reduction of the settlement on the ground of incapacity and undue influence. The trustees having stated that they had no intention of removing the estate from Scotland, the Court refused the petition. *Bowman v. Russell's Trustees*, Dec. 1, 1891, p. 205.

Executor—Removal—Agreement by executor adverse to executry estate.

9. Where a majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate, the Court, in a petition at the instance of certain of the next of kin of the deceased (including the minority of the executors), sequestrated the estate and appointed a judicial factor. *Birnie v. Christie*, Dec. 16, 1891, p. 334.

Trust—Administration of trust.

10. Where the administration of a testamentary trust could not be carried on in consequence of the trustees being equally divided in opinion, the Court, on the petition of the liferenter, sequestrated the trust-estate and appointed a judicial factor. *Stewart v. Morrison*, July 14, 1892, p. 1009.

Trust—Appointment—Expenses.

11. Circumstances in which certain testamentary trustees, who had unsuccessfully opposed the appointment of a judicial factor, were found liable in expenses. *Stewart v. Morrison*, July 14, 1892, p. 1009.

JURISDICTION. Foreign—Divorce—Domicile—Matrimonial domicile—Separation—Capacity of separated wife to acquire separate domicile.

1. Held (*diss.* Lord Young) that where a Scotsman has retained his domicile of origin the fact that he has married the native of a foreign country, and has had his home there for years, does not deprive the Scots Courts of jurisdiction in a question of divorce. *Low v. Low*, Nov. 19, 1891, p. 115.

Arrestment jurisdictionis fundandæ causa.

2. Arrestments *ad fundandam jurisdictionem* were used against a foreigner in the hands of his shipping-agents in Leith. The defender pleaded no jurisdiction, alleging that at the date of the arrestment the arrestees were not his debtors. The pursuers denied this averment, and a proof was allowed. The evidence shewed that at the date of the arrestment the balance on an accounting was in favour of the arrestees. The pursuers maintained that it was enough that at the date of the arrestment there was a relationship between the defender and arrestees which made the latter liable to an accounting, even though ultimately it should be found that there was a debit balance against the defender. The Court *sustained* the plea of no jurisdiction. *Napier, Shanks, & Bell v. Halvorsen*, Jan. 29, 1892, p. 412.

Forum non conveniens.

3. The plea of *forum non conveniens* will not be sustained, unless the Court is satisfied that there is a Court in another country which has jurisdiction to try the action and in which it ought to be tried as being more convenient for all the parties and more suitable to the ends of justice. *Sim v. Robinow*, March 17, 1892, p. 665.

See *Arbitration—Foreign—Justiciary Cases*, 1, 2, 7, 9, 10, 17, 20, 22—*Poor*, 4—*Sheriff*, 1, 2, 3, 4.

JUS TERTII. See Reparation, 2.

JUSTICIARY CASES. *Review—Sheriff—Jurisdiction—Small-Debt Act, 1837, sec. 31.*

1. A defender in the Small-Debt Court having objected to the Sheriff-substitute's jurisdiction upon the ground that she had no residence within the county, he, after a proof, repelled her objection, and decerned against her. *Held* (1) that the defender was entitled to appeal to the High Court under the 31st section of the Small-Debt Act, 1837, on the ground of "defect of jurisdiction" of the Sheriff-substitute, and (2) that the case should be remitted to the Sheriff to inquire into the facts, and to report. *Russell & Co. v. Murray*, March 9, 1892, Just. Cases, p. 61.

Review—Jurisdiction—Finality clause—Merchant Shipping Act, 1854, sec. 542.

2. *Held* that sec. 542 of the above Act, declaring that all orders, decrees, and sentences pronounced under the authority of the Act should be final and not subject to suspension, except on the ground of corruption or malice, did not exclude a suspension on the ground that the prosecutor had no authority under the statute to prosecute, and that the complaint and conviction were not in terms authorised by the statute. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Review—Suspension—Public-Houses Act Amendment Act, 1862.

3. A person who had been convicted of an offence against the Public-Houses Acts by trafficking in spirits without a certificate brought a suspension of the conviction, alleging that the holder of a licence for the premises in question had executed a trust for creditors, that the licence was in force, that the trustee had put him (the complainer) in charge of the business till a purchaser for it should be obtained, and that he was simply acting as the trustee's servant. He pleaded that the facts involved no contravention, and that the proceedings were oppressive. The Court *refused* the suspension, on the ground that by the Public-Houses Act Amendment Act, 1862, the judgment of the magistrate was final on the facts, and that if the magistrate thought the facts warranted a conviction, there was no oppression.

Observed that if the complainer wished to raise the legal question whether the facts proved warranted the charge of contravention he should have asked the magistrate to state a case. *Rattray v. White*, Dec. 18, 1891, Just. Cases, p. 23.

Review—Appeal—Competency—"Penalty"—"Cause"—Public Health (Scotland) Act, 1867, secs. 16 and 17—Summary Prosecutions Appeals (Scotland) Act, 1875, secs. 2 and 3.

4. A local authority petitioned a Sheriff under the Public Health Act, 1867, to have a person ordained to remove from certain premises a nuisance, "and failing his doing so within such period as the Court shall appoint, to find him liable in a penalty not exceeding 10s. per day during his failure to comply with the order of Court, and to find him liable in expenses." The Sheriff granted decree, finding that the nuisance existed at the date of the presentation of the petition: "Finds that the said nuisance having now been removed, it is unnecessary to dispose of the prayer of the petition; therefore dismisses the same: Finds the defender liable in expenses," and remitted to the Auditor to tax and report. The defender craved but was refused a case under the Summary Prosecutions Appeals Act, 1875, and appealed to the High Court. *Held* that the appeal was incompetent on the ground that if the petition was a "cause" within the meaning of section 2 of the Act, it had not been "finally determined" in the sense of section 3.

Opinion per curiam that in any view an appeal under the Summary Prosecutions Appeals Act, 1875, was incompetent in respect that the petition was not a "proceeding for the recovery of a penalty" within the meaning of section 2 of the Act. *Torrance v. Miller*, May 23, 1892, Just. Cases, p. 85.

Review—Appeal—Statement of case—"F frivolous"—Summary Prosecutions Appeals Act, 1875, sec. 4.

5. The Court will be slow to interfere with the discretion of the inferior Judge

JUSTICIARY CASES—Continued.

who refuses to state a case on the ground that the application to him to do so is frivolous, if it appears that the facts of the case raise no question of law. *Ross v. McLeod*, Dec. 15, 1891, Just. Cases, p. 18.

Review—Appeal—Conditions of—Payment of fees—Summary Prosecutions Appeals Act, 1875, sec. 3 (1) (2).

6. The 3d section of the Summary Prosecutions Appeals Act, 1875, provides, (1) "The appellant shall not be entitled to have a case stated and delivered to him unless within . . . three days he shall . . . (2) pay the Clerk of Court his fees for preparing the case." *Held* that the condition was absolute, and that the Court had no power to dispense with implement of it. *Robertson v. Malcolm*, Dec. 15, 1891, Just. Cases, p. 18.

Review—Suspension—Oppression—Severity of sentence—Jurisdiction of High Court to interfere—Summary Procedure Act, 1864, sec. 29.

7. A person accused of disorderly conduct was after a trial convicted and sentenced by the Sheriff-substitute to sixty days' imprisonment with hard labour. He brought a suspension of the sentence as oppressive, considering that the offence charged was only a breach of the peace and a first offence, stating that the Sheriff-substitute had not given him the option of a fine, but had inflicted the highest penalty which he could competently inflict.

The Court *refused* the bill, holding that no adequate reason had been stated for interference.

Question whether the Court may suspend a sentence of an inferior Judge on the ground of undue severity. *Rodgers v. Henderson*, Feb. 1, 1892, Just. Cases, p. 40.

Review—Suspension—Oppression.

8. *Opinions* that certain circumstances attending a conviction of a seaman for an offence against the provisions of the Merchant Shipping Act, 1854, did not amount to oppression on the part of the Board of Trade. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Review—Suspension—Oppression—Selling spirits without certificate, but with temporary Inland Revenue licence—Public-Houses Amendment Act, 1862, sec. 5.

9. An innkeeper, whose licence expired on 15th May, but whose occupancy of the inn, in virtue of the Removal Terms (Burghs) Act, 1886 (49 and 50 Vict. c. 50), sec. 4, did not expire till the 28th, presented an application to the Commissioners of Inland Revenue, with concurrence of two local Justices of the Peace, craving authority to sell exciseable liquors from the 15th till the 28th. The application was granted upon his paying a quarter's licence-duty. On receiving notice from the chief constable that he was not entitled to sell without a certificate, he ceased to do so after the 17th. On the 20th he was charged and subsequently convicted by a magistrate who was one of the Justices of the Peace who had concurred in the application to the Commissioners for the offence of selling liquor on the 17th without a certificate. The Court *sustained* an appeal by him, holding that the prosecution was, in the circumstances, oppressive. *Miller v. White*, July 18, 1892, Just. Cases, p. 104.

Review—Appeal—Oppression—Severity of sentence—Right of accused to adjournment of trial—Summary Procedure Act, 1864, sec. 11—Glasgow Police Act, 1866, secs. 132 and 135, art. 5.

10. In an appeal the following statements were made by the appellant: The appellant, a lad of nineteen, was apprehended in the streets of Glasgow shortly after midnight and taken to prison. Next morning he was brought before the magistrate, and asked to plead to a charge of riotous and disorderly behaviour under sec. 135 of the Glasgow Police Act, 1866, under which section (art. 5) the penalty for conviction of the offence was ten pounds, or alternatively without payment, imprisonment for sixty days. He pleaded not guilty, and after evidence led, he was convicted, and sentenced by the magistrates to fourteen days' imprisonment. This was his first offence. He appealed under sec. 132 of the Glasgow Police Act,

ENTAIL—Continued.

were re-entailed. At the date of the agreement the Duke could not under the Entail Acts then in force have disentailed without the consent of his son. In a petition for disentanglement of part of the entailed estate presented by the Duke in 1891, *held* that the petitioner was not barred by the agreement from taking advantage of the provisions of the Entail (Scotland) Act, 1882, which empowered heirs of entail in possession to disentail without the consent of the nearest heirs. *Duke of Sutherland v. Marquess of Stafford*, Feb. 27, 1892, p. 504.

EXECUTOR. Appointment—Right of surviving husband.

1. A surviving husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next of kin. *Campbell v. Falconer*, March 5, 1892, p. 563.

Appointment—Competition—Trustees appointed to manage estate—Curator bonis—A. S., Feb. 13, 1730.

2. Under a mutual settlement by husband and wife, the survivor was appointed "sole trustee and executor of the predeceaser." By subsequent codicil executed at sea, on 14th June 1890, to which the wife was not a party, the husband directed,—"I wish my estate to be managed by the same trustees as my brother John, dead or alive, including to my wife." The husband died on 21st June 1890. After the husband's death competing petitions were presented (1) by the curator bonis of the wife, who had become insane, and (2) by the persons named as trustees under the settlement of the testator's brother John, dated 18th April and recorded 21st May 1891, the former claiming to be appointed executor-dative as representing his ward, and the latter claiming confirmation as executors-nominate under the codicil. *Held* (1) that upon a construction of the testamentary writings the unlimited power conferred by the codicil on the persons therein designated to manage the estate along with the wife, who had previously been nominated trustee and executor, implied their nomination as executors as well as trustees, and that they had a title to be confirmed executors-nominate; (2) that the curator bonis had under the Act of Sederunt, February 13, 1730, no title to be appointed executor-dative, other persons having a title having offered to confirm; and therefore (3) that the trustees were entitled to confirmation.

Opinions that a testamentary conveyance to certain persons as trustees or with a direction to manage does not necessarily imply their appointment as executors. *Martin v. Ferguson's Trustees*, Feb. 16, 1892, p. 474.

Removal—Agreement by executor adverse to executry estate—Judicial Factor.

3. Where a majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate, the Court, in a petition at the instance of certain of the next of kin of the deceased (including the minority of the executors), sequestrated the estate and appointed a judicial factor. *Birnie v. Christie*, Dec. 16, 1891, p. 334.

EXPENSES. Judicial Factor—Curator Bonis—Expenses of opposing appointment.

1. The Court, in affirming an interlocutor of the Lord Ordinary on the Bills making the appointment of a curator bonis on the ground of mental incapacity, pronounced no order as to expenses. On appeal the House of Lords affirmed the interlocutor on the merits, and found the law-agents who acted for the incapax entitled to their expenses in the House out of the estate. The Court, on a note by the curator bonis, *held* that the law-agents were also entitled to their expenses in the Court of Session out of the estate. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.
2. Law-agents, who had acted for an alleged incapax in unsuccessfully opposing the appointment of a curator bonis, *held* not entitled to claim against the estate for expenses incurred in prosecuting an action in a Sheriff Court for delivery of documents belonging to the alleged incapax in the hands of the curator bonis, the action having been raised after the appointment of the

EXPENSES—Continued.

curator bonis by the Lord Ordinary, but before the hearing on a reclaiming note. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Entail—Disentail.

3. Observations on the liability for expenses of persons opposing petitions for disentail. *Pringle v. Pringle*, June 28, 1892, p. 926.

Tender—Extrajudicial tender.

4. An action was raised for payment of £169 as the amount remaining due to the pursuers on a contract to perform certain work. After service of the summons, but before it was called, the defender extrajudicially offered £155, but no expenses. This being declined, and the summons called, he offered in his defences £50, but made no offer of expenses. After proof, the pursuer was found entitled to £44. The Court, holding that the defender's conduct had been reasonable, and the action unnecessary, found the defender entitled to expenses. *Mavor & Coulson v. Grierson*, June 16, 1892, p. 868.

Interest—Appeal to House of Lords.

5. A party who obtains repayment of expenses paid by him to his opponent, in consequence of the judgment of the Court of Session being reversed in the House of Lords, is not entitled to recover the interest which had accrued in the interval on the sum so paid. *Young v. Hermand Oil Co., Limited*, June 15, 1892, p. 867.

Dominus litis—Action by daughter with consent of father—Conjunct and several liability.

6. A girl of nineteen, with consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister of the congregation to which they belonged. The Sheriff assoilzied the defender, finding that the statements alleged to have been made by him were true, and had been made by him solely in the discharge of his duty as minister; and further, found the girl and "her father, her curator and administrator-in-law, liable, conjunctly and severally, in expenses." The Sheriff proceeded upon the ground that the father had not only as her curator and administrator-in-law, but personally, taken a prominent and leading part in the litigation. *Held* that the Sheriff was entitled, in his discretion, to award the expenses against the father. *Fraser v. Cameron*, March 8, 1892, p. 564.

Taxation—Fees to Counsel.

7. The fact that the hearing of a case has been continued from one day to another is not in itself a reason why an additional fee should be sent to counsel, but the circumstance that the case has not been heard on a single day is an element to be taken into account in fixing the amount of the fee to which counsel is entitled as an adequate equivalent for his trouble. *Baird & Stevenson v. Malloch*, July 20, 1892, p. 1061.

Process—Appeal—Amendment of record.

8. In an appeal for jury trial in an action of damages for personal injuries, the Court were prepared to find the averments irrelevant, and to dismiss the action, and the pursuer was allowed to amend his record only upon payment of the expenses in the cause from the date of closing the record. *Gallagher v. Pattison*, Nov. 10, 1891, p. 79.

Process—Appeal—Competency.

9. In an appeal in a Sheriff Court action the Court assoilzied the defender and found the pursuer liable "in the expenses in this Court." The Sheriff having subsequently given decree in favour of the defender for expenses in the Sheriff Court, the pursuer appealed. *Held* (1) that the interlocutor of the Court had exhausted the cause, and that the interlocutors subsequently pronounced in the Sheriff Court were incompetent; and (2) that it was competent to appeal against them. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Process—Appeal—Compensation—Agent-Disburser.

10. Where one of the parties in an action has obtained decree for certain

EXPENSES—*Continued.*

expenses in the action, the agent of the other party is not entitled to decree in his own name for expenses to which his client has subsequently been found entitled. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Process—Separate discussion on expenses.

11. *Per Lord Young*,—"I think that the most expedient course is that we should consider and decide the question of expenses when we are forming and expressing our opinion on the merits." *Allan's Trustees v. Allan & Sons*, Oct. 23, 1891, p. 15.

Process—Caution for expenses—Undischarged bankrupt.

12. An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to the Sheriff. *Held* that the claimant could not be allowed to proceed without finding caution for expenses. *Dunsmore's Trustee v. Stewart*, Oct. 17, 1891, p. 4.

FISHINGS. *River—Tidal and navigable—Foreshore—Obstruction in alveo.*

The proprietor of the lands of S had a Crown grant of the salmon-fishings *ex adverso* of his lands in a tidal navigable river, the banks of which at ebb tide consisted of low mud flats, covered at every tide. The tenant of the fishings erected, with the sanction of the proprietor, a platform, based on shingle and piles, to facilitate his fishing. The foundations of the platform were, in part at least, in the *alveus* of the river. In an action brought by the proprietor of lands and fishings on the other side of the river for removal of the platform, it was proved that a substantial part of the erection was *in alveo*, and that it was injurious to the pursuer's fishings. *Held* that the pursuer was entitled to have the whole erection removed.

Opinion (per the Lord Justice-Clerk) that a riparian proprietor upon a private or tidal river is entitled to prevent an opposite proprietor from making any alteration *in alveo*, or where an alteration has been made, to insist on restoration without proving that the operation has caused or must cause damage to his side of the river. *Ross v. Powrie & Pitcaithley*, Dec. 11, 1891, p. 314.

See *Justiciary Cases*, 16, 17.

FOREIGN. *Obligation ex delicto.*

A person suing for damages *ex delicto* in respect of an act committed abroad has no action unless that act is by the law of the place where it is committed a wrong inferring a legal remedy. *Rosses v. H. H. Sir Bhagvat Sinhjee*, Oct. 29, 1891, p. 31.

See *Judicial factor*, 8—*Jurisdiction—Parent and Child*, 3, 10—*Process*, 5.

FRAUD. See *Company*, 9.

GAMING. See *Contract*, 3, 4.

GOODWILL. See *Trade Name*.

GUILD, DEAN OF. See *Burgh*, 2.

HARBOUR. *Harbour rates—Burgh—Common good—Loan—Assignment and personal obligation in bond—Burgh Harbours Act, 1853.*

1. The town-council of a burgh which had adopted the Burgh Harbours (Scotland) Act, 1853, borrowed in terms of the Act a sum of money for the extension and improvement of the harbour of the burgh, and granted a bond and disposition in security to the lender, in the form of schedule B of the Act. The bond bore,—“We hereby bind the burgh to pay” to the lender the sum borrowed, “. . . and we hereby assign to him the rates authorised to be levied at the said harbour” by the Act. The harbour rates having become insufficient to pay the interest on the bond, and the town-council having declined to pay it out of the common good of the burgh, the lender charged the burgh for payment. In a suspension of the charge the complainers pleaded that the obligation in the bond was limited to the harbour rates. The Court *repelled* the reasons of suspen-

HARBOUR—Continued.

sion, holding that the burgh was liable for the debt. *Royal Burgh of Renfrew v. Murdoch*, June 2, 1892, p. 822.

Harbourmaster—Ship—Reparation.

2. A schooner sailing up the River Dee to Kirkcudbright harbour was steered by the master, with the assistance of two local fishermen acting as pilots. On the vessel reaching a point within the harbourmaster's jurisdiction, one of the pilots hailed the harbourmaster, who was standing at the head of the west pier, for instructions when to drop the anchor. The harbourmaster made signs for the vessel to come on. The master thereupon changed his course from the mid-channel to one leading directly to the head of the pier. The harbourmaster, after the course was changed, continued to make signs for the vessel to advance. The vessel continued in her course till she grounded on a bank near the pier. The harbourmaster in giving the orders was in the belief that the tide was full, while in fact it had ebbed three inches. In an action of damages brought by the owner of the vessel against the harbour trustees, the First Division held that the harbourmaster was in fault, but that there was contributory negligence on the part of those in charge of the vessel in changing its course. In an appeal held (rev. the judgment) (1) that the accident was caused by the fault of the harbourmaster in directing the vessel to take a wrong course; and (2) that the shipmaster was not in fault in following that course, as he was bound to obey the harbourmaster's orders. *Rennet v. Magistrates of Kirkcudbright*, March 31, 1892, H. L., p. 11.

HOMOLOGATION. See *Adoption*.

HOTEL. See *Trade Name*.

HUSBAND AND WIFE. Constitution of marriage—Proof.

1. Where a man and woman had mutually exchanged written declarations acknowledging each other to be husband and wife, in a declarator of marriage by the woman against the man, which was founded upon the declarations, held that the pursuer was bound to prove the circumstances in which the writings had been exchanged, and that they were consistent with the matrimonial intention expressed in the writings.

Circumstances in which it was held that the declarations had been exchanged with the intention of constituting marriage, and that the contract of marriage was thereby proved. *Imrie v. Imrie*, Nov. 26, 1891, p. 185.

Terce—Brieve—Appeal—Competency—Act 1503, cap. 77—Act 1681, cap. 10.

2. The heir-at-law is not entitled to obtain a sist of the proceedings under a brieve of service and cognition to terce on the ground that he is about to bring a declarator of the invalidity of the marriage, or on the ground that he is about to raise an action for declarator that the widow is barred from claiming terce by reason of having accepted a conventional provision out of heritage abroad belonging to the deceased.

Opinion (per Lord M'Laren) that under a brieve of terce it is competent for the inquest to consider whether the widow is barred from claiming terce by reason of having accepted a conventional provision.

Opinions that a brieve of service and cognition to terce may be removed to the Court of Session by appeal at any time before trial before the Sheriff.

Observations as to the competency of an appeal after trial and verdict.

Craik v. Penny, Dec. 18, 1891, p. 339.

Personal obligation of married woman—Novation.

3. Testamentary trustees, as directed by the testator, divided the residue of his estate among his son A and three daughters, each receiving over £4000. Ten years afterwards a claim was made upon the deceased's estate by a bank upon a cash-credit bond for £5000, in which the testator had become bound as cautioner for his son's firm of A and B, along with B's father. A new transaction was then entered into in which A paid £2500 to the bank for B's share of the firm business, and a new cash-credit bond for £2500 was granted to the bank for A's behoof, which was signed by A, by the husbands of two of his sisters, and by the third sister, with consent and concurrence

HUSBAND AND WIFE—Continued.

of her husband. The new bond proceeded on the narrative that the prior bond had been discharged, and the latter was delivered up by the bank. A having become bankrupt, his two brothers-in-law who had signed the £2500 bond paid that sum to the bank, and obtained an assignation to the bond. In an action by the assignees against the testator's third daughter for declarator that she and her separate estate were bound to relieve the pursuers of her share of the bond, *held (diss. Lord Young)* (1) that the £5000 bond had been discharged, and (2) that the defender having been a married woman when she signed the bond for £2500, it was not binding upon her. *Jackson v. MacDiarmid*, March 1, 1892, p. 528.

Business carried on by spouses jointly—Earnings—Married Women's Property Act, 1877, sec. 3.

4. A carter on his marriage in 1875 with a fish-hawker gave up his own business and along with his wife carried on the fish-hawking business. They had two carts, which bore the husband's name. Each of them worked a separate district, and each bought the fish for his or her cart. The wholesale merchants who had previously supplied the wife, at the request of both spouses rendered their accounts in the husband's name. The earnings of both spouses were lodged in bank in name of both of them or either or the survivor. On the wife's predecease in 1891, her executor claimed as against the husband the wife's share in the proceeds of the business at her death, as "earnings" in the sense of section 3 of the Married Women's Property Act, 1877. *Held* that the wife was to be regarded merely as her husband's agent in the management of the business, and that therefore the Act was inapplicable. *M'Ginty v. M'Alpine*, June 28, 1892, p. 935.

Bankruptcy—Property of wife entrusted to husband—Married Women's Property Act, 1881, sec. 1, subsec. (4).

5. The Married Women's Property Act, 1881, enacts with regard to a wife's separate estate on the occasion of bankruptcy of the husband (sec. 1, subsec. 4), that any estate of the wife, "lent or entrusted to the husband," shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend after the claims of other creditors have been satisfied. A husband whose wife had separate estate delivered to his wife a sale-note whereby, on the narrative that from time to time he had received from her separate estate sums amounting in all to £225, he sold to her in consideration of that sum the whole furniture in the house they occupied, conform to inventory. About seven months afterwards the husband's estates were sequestrated. The wife then sought to interdict the husband's trustee from interfering with the furniture. After a proof the Court *refused* interdict, the Lord Justice-Clerk, Lord Young, and Lord Trayner holding that, on the assumption of a *bona fide* sale by the husband to the wife, the furniture was estate of the wife entrusted to the husband, Lord Rutherford Clark holding that no *bona fide* sale had been proved. *Anderson v. Anderson's Trustee*, March 18, 1892, p. 684.

Title to sue—Title of deserted wife to sue for aliment of illegitimate child.

6. *Held* that a married woman whose husband had gone abroad, and had not been heard of for several years, had a title to sue for aliment of an illegitimate child. *M'Quillan v. Smith*, Jan. 15, 1892, p. 375.

Executor—Appointment—Right of surviving husband.

7. A surviving husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next of kin. *Campbell v. Falconer*, March 5, 1892, p. 563.

Divorce—Domicile—Matrimonial domicile—Separation—Capacity of separated wife to acquire separate domicile—Jurisdiction—Foreign.

8. *Held (diss. Lord Young)* that where a Scotsman has retained his domicile of origin the fact that he has married the native of a foreign country, and has had his home there for years, does not deprive the Scots Courts of jurisdiction in a question of divorce. *Low v. Low*, Nov. 19, 1891, p. 115.

See *Partnership*, 3.

INCOME-TAX. See *Revenue*, 1, 2, 3.

INHABITED HOUSE DUTY. See *Revenue*, 4.

INSANITY. See *Judicial Factor*, 2 to 7—*Poor*, 1, 2, 5.

INSURANCE. *Marine insurance*—*Time policy*—*Stamp-duty*—*Customs and Inland Revenue Act*, 1867, *sec. 1, Schedule B*, and *sec. 4*—*Interpretation Act*, 1889, *sec. 1 (b)*.

1. *Held* that a time policy of insurance embracing a number of vessels with separate sums insured on each was properly stamped at the duty corresponding to the aggregate sum insured. *Great Britain Steamship Premium Association v. Whyte*, Nov. 17, 1891, p. 109.

Life insurance—*Insurance against accident*—*Bodily injury caused by "violent, accidental, external, and visible means."*

2. In an action on an accident insurance policy under which the insurance company were liable in the event of the death of the insured through "bodily injury caused by violent, accidental, external, and visible means," it was proved that the insured had complained of feeling a pain as of something having "given way inside," when he was in the act of pulling on his stockings. He died about thirty-six hours afterwards. The medical men who had attended him examined his body *post-mortem*, and pronounced that the proximate cause of death was failure of the heart's action through pressure on the heart caused by distension of the colon, which had become obstructed. There was no evidence of disease in any of the organs, and the medical men who had made the examination could give no reason why the colon had become obstructed on the morning in question, except that the deceased, who was a stout man, must have used some extra force when in the act of stooping down to draw on the stocking, and so twisted the colon out of position; but the deceased in his account of what took place, as deposed to by those who heard him, did not mention that he had made any unusual movement when pulling on his stocking. The Court (*rev. judgment of Lord Kyllachy*) *assolized* the defenders, holding that it had not been proved that the death was due to bodily injury caused by violent, accidental, external, and visible means. *Clidero v. Scottish Accident Insurance Co., Limited*, Jan. 12, 1892, p. 355.

Insurance of tramway company against loss by accident—*Double insurance*—*Contribution*—*Title to sue*.

3. An insurance company, after paying to a tramway company a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance company for contribution on the ground that it had insured the same risk. *Held* by Lord Low, Ordinary, that the pursuers had a title to sue. *Sickness and Accident Assurance Association, Limited, v. General Accident Assurance Corporation, Limited*, July 12, 1892, p. 977.

Agreement to insure from fixed date on payment of premium—*Insurance "from" a certain day*.

4. An insurance company entered into an agreement to insure a tramway company against accidents caused by their vehicles to third parties for twelve months from 24th November 1888 inclusive, subject to the condition that no insurance should be effected until the premium was paid. An accident occurred on 24th November before the policy had been issued or the premium paid, and immediately the representatives of the insurance company informed the representative of the tramway company that they would take care not to accept the premium "except from 24th November in consequence of the accident." On 26th November the premium was paid, and the insurance company acknowledged receipt of it as premium for the risk "from the 24th inst." In an action raised against the insurance company by another insurance company, which had paid the loss, for contribution, the Court *assolized* the defenders, holding (1) that the preliminary contract to grant an insurance to cover risk of accident on 24th November on payment of the premium was no longer binding after the accident had happened; and (2) that the terms of the receipt did not import

INSURANCE—Continued.

liability except for accidents occurring after the lapse of that day. *Sickness and Accident Assurance Association, Limited, v. General Accident Assurance Corporation, Limited*, July 12, 1892, p. 977.

Fire insurance—Title to sue.

5. A person whose property is injured by fire through the fault of another is not deprived of his title to sue by having his property fully insured. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 608.

INTERDICT. See *Trade Name*.

INTEREST. See *Appeal*, 1—*Succession*, 19.

ISSUE. See *Process*, 17, 18, 19, 21, 22.

JUDICIAL FACTOR. Cautioner.

1. An unmarried woman may be cautioner for a judicial factor. *Fraser's Judicial Factor*, Feb. 26, 1892, p. 500.

Curator bonis to incapax—Title to charge upon a warrant in a heritable bond.

2. The debtor in a heritable bond was taken bound to repay the loan to the lender, his executors and assignees whomsoever. The lender was an insane person to whom a curator bonis had been appointed by the Court. In a charge, proceeding upon the warrant in the bond, and bearing to be at the instance of the ward, the debtor was charged to make payment to the curator bonis. In a suspension the debtor pleaded that the charge was wrongous as bearing to proceed at the instance of an incapax. The Court *repelled* the plea, holding that the curator was entitled to use the ward's name. *Yule v. Alexander*, Nov. 25, 1891, p. 167.

Curator bonis to incapax—Title to be appointed as executor—A.S., Feb. 13, 1730.

3. *Held* that a curator bonis had no title under the A.S., Feb. 13, 1730, to be appointed executor-dative on the estate of the deceased husband of his ward, other persons having a title having offered to confirm. *Martin v. Ferguson's Trustees*, Feb. 14, 1892, p. 474.

Curator bonis to incapax—Voluntary annuity out of ward's estate—Increase of amount—Nobile officium.

4. While the Court may authorise the curator bonis to a person incapax to continue the payment of a voluntary annuity to a third party which the ward previous to incapacity had been in the habit of paying, it will not grant authority to increase the amount of the annuity, although the exigencies of the annuitant may have become greater. *Bowers v. Pringle Pattison's Curator Bonis*, June 28, 1892, p. 941.

Curator bonis to incapax—Bank cheque granted by incapax.

5. *Held* (1) that an incapax to whom a curator bonis had been appointed was not entitled to grant a cheque in payment of expenses incurred to his law-agent in opposing the petition; and (2) that a reclaiming note against the interlocutor making the appointment had not the effect of suspending the appointment so as to validate the cheque. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Curator bonis to incapax—Expenses of opposing appointment.

6. The Court, in affirming an interlocutor of the Lord Ordinary on the Bills making the appointment of a curator bonis on the ground of mental incapacity, pronounced no order as to expenses. On appeal the House of Lords affirmed the interlocutor on the merits, and found the law-agents who acted for the incapax entitled to their expenses in the House out of the estate. The Court, on a note by the curator bonis, *held* that the law-agents were also entitled to their expenses in the Court of Session out of the estate. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Curator bonis to incapax—Expenses.

7. Law-agents, who had acted for an alleged incapax in unsuccessfully opposing the appointment of a curator bonis, *held* not entitled to claim against the

JUDICIAL FACTOR—*Continued.*

estate for expenses incurred in prosecuting an action in a Sheriff Court for delivery of documents belonging to the alleged incapax in the hands of the curator bonis, the action having been raised after the appointment of the curator bonis by the Lord Ordinary, but before the hearing on a reclaiming note. *Mitchell & Baxter v. Cheyne*, Dec. 12, 1891, p. 324.

Trust—Removal of trustees.

8. In a petition by the next of kin of a domiciled Scotsman for removal of his testamentary trustees and the appointment of a judicial factor, the only allegation against the testamentary trustees was that they intended to remove the trust-estate from Scotland to the prejudice of the petitioners, who stated that they were about to bring a reduction of the settlement on the ground of incapacity and undue influence. The trustees having stated that they had no intention of removing the estate from Scotland, the Court refused the petition. *Bowman v. Russell's Trustees*, Dec. 1, 1891, p. 205.

Executor—Removal—Agreement by executor adverse to executry estate.

9. Where a majority of executors entered into an agreement binding themselves to use their powers as executors to further the claims of one of the claimants to the estate, the Court, in a petition at the instance of certain of the next of kin of the deceased (including the minority of the executors), sequestrated the estate and appointed a judicial factor. *Birnie v. Christie*, Dec. 16, 1891, p. 334.

Trust—Administration of trust.

10. Where the administration of a testamentary trust could not be carried on in consequence of the trustees being equally divided in opinion, the Court, on the petition of the liferenter, sequestrated the trust-estate and appointed a judicial factor. *Stewart v. Morrison*, July 14, 1892, p. 1009.

Trust—Appointment—Expenses.

11. Circumstances in which certain testamentary trustees, who had unsuccessfully opposed the appointment of a judicial factor, were found liable in expenses. *Stewart v. Morrison*, July 14, 1892, p. 1009.

JURISDICTION. *Foreign—Divorce—Domicile—Matrimonial domicile—Separation—Capacity of separated wife to acquire separate domicile.*

1. Held (*diss.* Lord Young) that where a Scotsman has retained his domicile of origin the fact that he has married the native of a foreign country, and has had his home there for years, does not deprive the Scots Courts of jurisdiction in a question of divorce. *Low v. Low*, Nov. 19, 1891, p. 115.

Arrestment jurisdictionis fundandæ causa.

2. Arrestments *ad fundandam jurisdictionem* were used against a foreigner in the hands of his shipping-agents in Leith. The defender pleaded no jurisdiction, alleging that at the date of the arrestment the arrestees were not his debtors. The pursuers denied this averment, and a proof was allowed. The evidence shewed that at the date of the arrestment the balance on an accounting was in favour of the arrestees. The pursuers maintained that it was enough that at the date of the arrestment there was a relationship between the defender and arrestees which made the latter liable to an accounting, even though ultimately it should be found that there was a debit balance against the defender. The Court sustained the plea of no jurisdiction. *Napier, Shanks, & Bell v. Halvorsen*, Jan. 29, 1892, p. 412.

Forum non conveniens.

3. The plea of *forum non conveniens* will not be sustained, unless the Court is satisfied that there is a Court in another country which has jurisdiction to try the action and in which it ought to be tried as being more convenient for all the parties and more suitable to the ends of justice. *Sim v. Robinow*, March 17, 1892, p. 665.

See *Arbitration—Foreign—Justiciary Cases*, 1, 2, 7, 9, 10, 17, 20, 22—*Poor*, 4—*Sheriff*, 1, 2, 3, 4.

JUS TERTII. See *Reparation*, 2.

JUSTICIARY CASES. *Review—Sheriff—Jurisdiction—Small-Debt Act, 1837, sec. 31.*

1. A defender in the Small-Debt Court having objected to the Sheriff-substitute's jurisdiction upon the ground that she had no residence within the county, he, after a proof, repelled her objection, and decerned against her. *Held* (1) that the defender was entitled to appeal to the High Court under the 31st section of the Small-Debt Act, 1837, on the ground of "defect of jurisdiction" of the Sheriff-substitute, and (2) that the case should be remitted to the Sheriff to inquire into the facts, and to report. *Russell & Co. v. Murray*, March 9, 1892, Just. Cases, p. 61.

Review—Jurisdiction—Finality clause—Merchant Shipping Act, 1854, sec. 542.

2. *Held* that sec. 542 of the above Act, declaring that all orders, decrees, and sentences pronounced under the authority of the Act should be final and not subject to suspension, except on the ground of corruption or malice, did not exclude a suspension on the ground that the prosecutor had no authority under the statute to prosecute, and that the complaint and conviction were not in terms authorised by the statute. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Review—Suspension—Public-Houses Act Amendment Act, 1862.

3. A person who had been convicted of an offence against the Public-Houses Acts by trafficking in spirits without a certificate brought a suspension of the conviction, alleging that the holder of a licence for the premises in question had executed a trust for creditors, that the licence was in force, that the trustee had put him (the complainer) in charge of the business till a purchaser for it should be obtained, and that he was simply acting as the trustee's servant. He pleaded that the facts involved no contravention, and that the proceedings were oppressive. The Court *refused* the suspension, on the ground that by the Public-Houses Act Amendment Act, 1862, the judgment of the magistrate was final on the facts, and that if the magistrate thought the facts warranted a conviction, there was no oppression.

Observed that if the complainer wished to raise the legal question whether the facts proved warranted the charge of contravention he should have asked the magistrate to state a case. *Rattray v. White*, Dec. 18, 1891, Just. Cases, p. 23.

Review—Appeal—Competency—"Penalty"—"Cause"—Public Health (Scotland) Act, 1867, secs. 16 and 17—Summary Prosecutions Appeals (Scotland) Act, 1875, secs. 2 and 3.

4. A local authority petitioned a Sheriff under the Public Health Act, 1867, to have a person ordained to remove from certain premises a nuisance, "and failing his doing so within such period as the Court shall appoint, to find him liable in a penalty not exceeding 10s. per day during his failure to comply with the order of Court, and to find him liable in expenses." The Sheriff granted decree, finding that the nuisance existed at the date of the presentation of the petition: "Finds that the said nuisance having now been removed, it is unnecessary to dispose of the prayer of the petition; therefore dismisses the same: Finds the defender liable in expenses," and remitted to the Auditor to tax and report. The defender craved but was refused a case under the Summary Prosecutions Appeals Act, 1875, and appealed to the High Court. *Held* that the appeal was incompetent on the ground that if the petition was a "cause" within the meaning of section 2 of the Act, it had not been "finally determined" in the sense of section 3.

Opinion per curiam that in any view an appeal under the Summary Prosecutions Appeals Act, 1875, was incompetent in respect that the petition was not a "proceeding for the recovery of a penalty" within the meaning of section 2 of the Act. *Torrance v. Miller*, May 23, 1892, Just. Cases, p. 85.

Review—Appeal—Statement of case—"F frivolous"—Summary Prosecutions Appeals Act, 1875, sec. 4.

5. The Court will be slow to interfere with the discretion of the inferior Judge

JUDICIARY CASES—*Continued.*

who refuses to state a case on the ground that the application to him to do so is frivolous, if it appears that the facts of the case raise no question of law. *Ross v. McLeod*, Dec. 15, 1891, Just. Cases, p. 18.

Review—Appeal—Conditions of—Payment of fees—Summary Prosecutions Appeals Act, 1875, sec. 3 (1) (2).

6. The 3d section of the Summary Prosecutions Appeals Act, 1875, provides, (1) "The appellant shall not be entitled to have a case stated and delivered to him unless within . . . three days he shall . . . (2) pay the Clerk of Court his fees for preparing the case." *Held* that the condition was absolute, and that the Court had no power to dispense with implement of it. *Robertson v. Malcolm*, Dec. 15, 1891, Just. Cases, p. 18.

Review—Suspension—Oppression—Severity of sentence—Jurisdiction of High Court to interfere—Summary Procedure Act, 1864, sec. 29.

7. A person accused of disorderly conduct was after a trial convicted and sentenced by the Sheriff-substitute to sixty days' imprisonment with hard labour. He brought a suspension of the sentence as oppressive, considering that the offence charged was only a breach of the peace and a first offence, stating that the Sheriff-substitute had not given him the option of a fine, but had inflicted the highest penalty which he could competently inflict.

The Court *refused* the bill, holding that no adequate reason had been stated for interference.

Question whether the Court may suspend a sentence of an inferior Judge on the ground of undue severity. *Rodgers v. Henderson*, Feb. 1, 1892, Just. Cases, p. 40.

Review—Suspension—Oppression.

8. *Opinions* that certain circumstances attending a conviction of a seaman for an offence against the provisions of the Merchant Shipping Act, 1854, did not amount to oppression on the part of the Board of Trade. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Review—Suspension—Oppression—Selling spirits without certificate, but with temporary Inland Revenue licence—Public-Houses Amendment Act, 1862, sec. 5.

9. An innkeeper, whose licence expired on 15th May, but whose occupancy of the inn, in virtue of the Removal Terms (Burghs) Act, 1886 (49 and 50 Vict. c. 50), sec. 4, did not expire till the 28th, presented an application to the Commissioners of Inland Revenue, with concurrence of two local Justices of the Peace, craving authority to sell exciseable liquors from the 15th till the 28th. The application was granted upon his paying a quarter's licence-duty. On receiving notice from the chief constable that he was not entitled to sell without a certificate, he ceased to do so after the 17th. On the 20th he was charged and subsequently convicted by a magistrate who was one of the Justices of the Peace who had concurred in the application to the Commissioners for the offence of selling liquor on the 17th without a certificate. The Court *sustained* an appeal by him, holding that the prosecution was, in the circumstances, oppressive. *Miller v. White*, July 18, 1892, Just. Cases, p. 104.

Review—Appeal—Oppression—Severity of sentence—Right of accused to adjournment of trial—Summary Procedure Act, 1864, sec. 11—Glasgow Police Act, 1866, secs. 132 and 135, art. 5.

10. In an appeal the following statements were made by the appellant: The appellant, a lad of nineteen, was apprehended in the streets of Glasgow shortly after midnight and taken to prison. Next morning he was brought before the magistrate, and asked to plead to a charge of riotous and disorderly behaviour under sec. 135 of the Glasgow Police Act, 1866, under which section (art. 5) the penalty for conviction of the offence was ten pounds, or alternatively without payment, imprisonment for sixty days. He pleaded not guilty, and after evidence led, he was convicted, and sentenced by the magistrates to fourteen days' imprisonment. This was his first offence. He appealed under sec. 132 of the Glasgow Police Act,

JUSTICIARY CASES—*Continued.*

on the ground (1) that the sentence was oppressively severe, and (2) that the magistrate had failed, in terms of section 11 of the Summary Procedure Act, 1864, to inform him of his right to an adjournment for the purpose of preparing for his defence. *Held* (1) that the sentence was in the discretion of the magistrate, and could not be reviewed by the High Court on a mere statement that it was severe; (2) that there was nothing in the case to suggest to the magistrate that it was necessary as a matter of justice to inform the appellant of his right to an adjournment, and that the conviction could not be set aside on the ground that he had not done so. *Boyes v. Shaw*, Dec. 15, 1891, Just. Cases, p. 13.

Crimes and offences—Culpable homicide—Child-birth—Neglect to call for assistance—Indictment—Relevancy.

11. An indictment against a woman set forth that having been delivered of a child at a certain place she did then and there compress the throat of the child, and did suffocate and kill him; or otherwise, that being delivered of the child, she did refrain from calling for assistance when the time of her being delivered had arrived, in consequence whereof the child died. *Held* (*per* Lord Young) that the second alternative charge was *irrelevant*.

Opinion, that if a child dies of suffocation or other cause consequent upon the mother's reckless neglect at the time of her delivery to call for assistance which is at hand, she is guilty of culpable homicide.

Observed that injuries causing the death of a child which has breathed and cried may constitute the crime of culpable homicide, although at the time the injuries are inflicted the child is not completely born. *Her Majesty's Advocate v. Scott*, March 29, 1892, Just. Cases, p. 63.

Crimes and offences—Culpable homicide—Proof—Letters of panel.

12. In the course of the trial of a woman for the culpable homicide of her infant child her counsel proposed to put in evidence certain letters written by her to her mother prior to and during her pregnancy which shewed that she had suffered from irregularity of menstruation prior to and subsequent to her becoming pregnant. The object of the evidence was to shew that she was ignorant of the probable period of her confinement, and that her labour had come upon her unexpectedly. *Held* (*per* Lord Young) that the letters were *inadmissible* as evidence for the panel. *Her Majesty's Advocate v. Scott*, March 29, 1892, Just. Cases, p. 63.

Crimes and offences—Breach of the peace—Street preaching—Annoyance or disturbance of residents.

13. A police complaint charged that on a particular evening and on a street in Leith the accused persons "did loudly read, sing, pray, and preach, and did continue to do so for half-an-hour by which a large crowd was collected, and the residents and others in the neighbourhood were annoyed and disturbed." *Held* that this did not constitute a relevant charge of any offence at common law, and conviction following thereon *set aside*. *Hutton v. Main*, Nov. 5, 1891, Just. Cases, p. 5.

Prevention of Cruelty to Animals Act, 1850, sec. 2—Cock-fighting.

14. *Held* that a charge under sec. 2 of the above Act of encouraging, aiding, and assisting at the fighting or baiting of cocks in a plantation and an old road, was an irrelevant charge, in respect that these places were not said to be, and clearly were not, places "kept or used" for the purpose of cock-fighting. *Brown v. Renton*, Dec. 18, 1891, Just. Cases, p. 22.

Crimes and offences—Failure to educate child—Mother prosecuted in absence of father—Education Act, 1872, secs. 1 and 70.

15. A mother was charged on a complaint brought under the Education (Scotland) Act, 1872, with failing to provide efficient elementary education for her child. Her husband, who usually resided in family with her, was, at the date of the complaint, absent from home, having been for six months employed at work at a known address in another county. *Held* that, notwithstanding the absence of the husband, the wife was not liable under the above sections. *Macdonald v. Lamont*, Feb. 1, 1892, Just. Cases, p. 41.

JUDICIARY CASES—*Continued.*

Crimes and offences—Fishing—Salmon-fishing—Weekly close time, calculation of—Salmon Fisheries Act, 1862, sec. 7—Salmon Fisheries Act, 1868, sec. 24, and Schedule D, bye-law secs. 1 and 2.

16. The occupiers of a fishery in the Solway were charged with a contravention of the 24th section of the Act of 1868 and the above bye-laws, in so far as, during the weekly close time on a particular Saturday, they had failed to have two stake-nets and seven fly-nets thrown out of fishing order in terms of the bye-law. It was proved that at 5.30 on the evening in question the tide was at high water; that at 6 P.M. it was impossible to throw the nets out of fishing order so as to comply with the bye-law; that the earliest hour thereafter at which this could be done was about 8 P.M.; that the nets were then thrown out of fishing order; that this state of the tide occurred once every fourteen days; that when it occurred on a Saturday it would be necessary to throw the nets out of order about 8 A.M. of that day after fishing the previous tide, so that they might be out of fishing order at 6 P.M.; that being thrown out of fishing order at 8 P.M. the nets could at soonest have been and were put in fishing order again at the same state of the tide, *i.e.*, about 11 A.M. on Monday following, and thus were out of fishing order for upwards of thirty-six hours. *Held* that the Act of 1862 was unambiguous and imperative, and that therefore the accused must be held to have contravened it. *Irving v. Phyn*, Dec. 14, 1891, Just. Cases, p. 7.

Crimes and offences—Fishing—Salmon Fisheries (Scotland) Act, 1868, sec. 23—Occupier of fishing in England with landing place in Scotland.

17. A fisherman was convicted of a contravention of the Salmon Fisheries Act, 1868. It was proved that while he held a licence to fish in the Solway Firth in English waters his landing place (where his nets were found unsecured) was in Scottish waters of the Firth. The Court *quashed* the conviction, holding that, notwithstanding that his landing place was in Scotland, he was not an "occupier" of a Scottish fishery, to which alone the Salmon Fisheries (Scotland) Act, 1868, applied. *Houghton v. Phyn*, Feb. 1, 1892, Just. Cases, p. 37.

Procedure—Instance—Change of Lord Advocate—Criminal Procedure Act, 1887, sec. 3.

18. Section 3 of the Criminal Procedure Act, 1887, enacts that "the Lord Advocate and his Deputies shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments, and the Lord Advocate shall enter on the duties of his office immediately on receiving his appointment." An indictment was served on 3d October in name of Lord Advocate Robertson. It was objected that a new Lord Advocate had been appointed by 2d October, on which day notice of his appointment appeared in the *Gazette*. His commission was not issued till 13th October. Objection *repelled*. *Halliday v. Wilson*, Nov. 3, 1891, Just. Cases, p. 3.

Procedure—Instance—Board of Trade—Merchant Shipping Act, 1854, sec. 531.

19. *Held* that a complaint against a seaman for contravention of the 255th section of that Act was not competently brought at the instance of the Board of Trade with consent and concurrence of the procurator-fiscal. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Procedure—Warrant to apprehend—Indorsation—11 and 12 Vict. c. 42.

20. A warrant to arrest a man in Aberdeen upon a charge of conspiracy was granted by the Lord Mayor of the City of London upon sworn information under the Act 11 and 12 Vict. c. 42. Before the warrant reached Aberdeen, and was indorsed by the magistrate in Aberdeen in terms of section 14 of the Act, the police in Aberdeen, acting upon a telegram from the police in London, had arrested the man and imprisoned him. In a bill of suspension and liberation the complainer pleaded that his arrest and imprisonment were without warrant. The Court *refused* the bill, holding that while the complainer might have a civil action for illegal arrest he was now

JUSTICIARY CASES—*Continued.*

in custody upon a warrant. *M'Hattie v. Wyness*, May 27, 1892, Just. Cases, p. 95.

Procedure—Summary Procedure.

21. Definition of terms "Summary Procedure" and "Summary Prosecution." *Lamb v. Threshie*, May 23, 1892, Just. Cases, p. 78.

Procedure—Summary Procedure—Jurisdiction—Sheriff—Merchant Shipping Act, 1854, sec. 520.

22. A seaman was charged in the Sheriff Court of Renfrewshire with a contravention of the 255th section of the Merchant Shipping Act, 1854, in so far as he had at Brisbane and Melbourne respectively wilfully and fraudulently made a false statement of his own name to the masters of two ships, the one belonging to the port of Melbourne, and the other to the port of Glasgow. *Opinions* that under the provisions of the Merchant Shipping Act, 1854, the Sheriff had jurisdiction to entertain the charge. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Complaint—Summary Procedure Act, 1864, form 2, schedule A.

23. In a complaint under the Summary Procedure Acts, 1864 and 1881, and the Criminal Procedure Act, 1887, persons were charged with the statutory offence created by the Act 3 and 4 Vict. c. 74, sec. 1, of stealing oysters. The punishment provided by the statute is "imprisonment not exceeding the term of one year." The body of the complaint bore no reference to any punishment, but the prayer concluded "to convict" the persons named "of the crime charged, and to adjudge them to suffer the pains of the law." The Sheriff-substitute convicted the accused, and sentenced them to forty days' imprisonment. Conviction *suspended* on the ground that the complaint was irregular (1) as the prayer thereof was not in the form prescribed by the Summary Procedure Act for the case of a statutory offence, and (2) as the prayer did not limit the amount of punishment asked to the duration of imprisonment sanctioned by the Summary Procedure Act, viz., sixty days.

Question whether it was essential to specify in the body of the complaint the amount of punishment sanctioned by the statute. *Opinion* (*per* Lord Justice-Clerk) that it was not. *Blains v. Rankin*, May 27, 1892, Just. Cases, p. 96.

Procedure—Complaint—Public Health—Public Health Act, 1867, sec. 26—Possession of fish unfit for human food.

24. A complaint against a fish-merchant under the above section set forth that on a certain day "he had" in his shop "exposed for sale, or which there was probable cause for believing to be intended for human food," certain fish "which were unfit for human food, which fish were seized . . . by the sanitary inspector . . . whereby" the accused "has become liable to a penalty . . ." The accused was convicted "of the contravention charged." *Opinion* that the conviction was bad as a general conviction on an alternative complaint. *Phillips v. Auld*, Jan. 9, 1892, Just. Cases, p. 29.

Complaint—Conviction of an aggravation not charged.

25. A man was charged upon a complaint which set forth that he did drive a horse and van against a woman, "and knock her down and fracture her skull, to the danger of her life." The prayer was for conviction of the "said crime." A conviction followed, finding the accused "guilty of the crime charged, aggravated as charged." The Court *quashed* the conviction. *Donald v. Hart*, May 24, 1892, Just. Cases, p. 88.

Procedure—Competency—Lotteries Act, 1823, sec. 67—Summary Procedure (Scotland) Act, 1864, sec. 3, subsec. 2.

26. Held that offenders against the Lotteries Act, 1823, were liable to summary conviction in the sense of sec. 3, subsec. 2 of the Summary Procedure Act, 1864, and that therefore it was competent to prosecute them under the latter Act. *Lamb v. Threshie*, May 23, 1892, Just. Cases, p. 78.

Procedure—Alibi—Notice of—Summary procedure.

27. A person tried before a Court of summary jurisdiction is not required to give

JUDICIAL CASES—*Continued.*

notice of a defence of *alibi*. *Howman v. Ross*, Dec. 15, 1891, Just. Cases, p. 19.

Procedure—Summary procedure—Right of adjournment.

28. *Observed* that while there was no legal obligation on a magistrate to inform an accused of his right to an adjournment for forty-eight hours, there might be circumstances in particular cases which might render it proper that he should do so, and that his not having done so might be a material circumstance in considering whether a conviction should be set aside. *Boyce v. Shaw*, Dec. 15, 1891, Just. Cases, p. 14.

Procedure—Conviction—Sentence—Summary Procedure Act, 1864, sec. 18 (6).

29. A conviction against a seaman for a summary offence under the Merchant Shipping Act, 1854, which adjudged him to pay a penalty, "and in default of immediate payment thereof to be imprisoned," was objected to because it did not state that it was inexpedient to issue a warrant of pouncing and sale, as provided by the Summary Procedure (Scotland) Act, 1864, sec. 18 (6) sch. K. *Opinion* that the objection was fatal to the conviction. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Procedure—Conviction—Summary prosecution—Merchant Shipping Act, 1854, sec. 172.

30. In a prosecution under the Summary Jurisdiction Acts, 1864 and 1881, for a contravention of a provision of the Merchant Shipping Act, 1854, entailing a penalty, the Sheriff, without expressly convicting the accused of the offence charged, gave decree for a certain sum of penalty, and granted warrant for arrestment and pouncing. The Court *sustained* an appeal, on the ground that there was no conviction. *Sharp v. Todd*, Feb. 2, 1892, Just. Cases, p. 47.

Procedure—Sentence—Education Act, 1872, sec. 70—Education Act, 1883, sec. 9.

31. *Held* that under a complaint alleging a contravention under sec. 70 of the Education Act, 1872, it was incompetent for the Sheriff-substitute to find that the accused had failed to secure the regular attendance of his child at some public or inspected school after due warning, in terms of sec. 9 of the Education Act, 1883. *McDonald v. Duff*, Nov. 2, 1891, Just. Cases, p. 1.

Procedure—Lotteries Act, 1823, secs. 41, 62, and 67.

32. In a suspension of a conviction by two Justices of a contravention of the above Act it was contended that the Justices were only entitled to proceed in cases where the Court of Exchequer had already declared the accused to be a rogue and a vagabond. *Held* that the Justices had an independent jurisdiction to try offences against the Act under section 67, and that the conviction was valid. *Lamb v. Threshie*, May 23, 1892, Just. Cases, p. 78.

*See Police—Public Health—Public House.*LEASE. *Proof—Parole.*

1. In an action of damages for wrongful sequestration at the instance of a tenant against his landlord the pursuer averred that the sequestration for non-payment of rent was in breach of an agreement to give an abatement from the rent stipulated in the written lease. The alleged agreement was not said to be instructed by any writing. *Held* that it was incompetent to prove it by parole, and that an issue must be disallowed. *Turnbull v. Oliver*, Nov. 21, 1891, p. 154.

Proof—Valuation-roll—Reduction of rent.

2. *Opinion* that a return by a landlord to an assessor under the Valuation Act of the rent of a farm is not conclusive evidence as between landlord and tenant of an agreement to reduce the rent fixed in a written lease. *Rattray v. Leslie's Trustee*, June 11, 1892, p. 853.

Agricultural lease—Reservation of minerals—Severance damage.

3. The lease of a farm, which reserved to the proprietor full power to work the

LEASE—Continued.

minerals and to resume the land he might think necessary for that purpose, provided that the tenant should receive for any land so resumed an abatement from the rent in the proportion that the extent of ground resumed bore to the extent of the whole subjects let. *Held (dub. Lord McLaren)* that the tenant was not entitled to a sum in name of severance damage in addition to the abatement stipulated for. *Robertson v. Ross & Co.*, July 8, 1892, p. 967.

Reparation—Known danger.

4. The tenant of a house raised an action against the landlord to recover damages for injuries sustained by slipping upon an outside stair leading to the house on 9th March 1891. She averred,—“After Whitsunday 1890, when the pursuer entered into possession of the said house, she found that the steps, five in number, from the level of the street up to the outside door, were much worn and in a dangerous condition for her use as a tenant.” She further averred that she had complained to the defender’s factor of the defect, and that the defender had in the autumn of the same year announced his intention of putting in new steps. The Court *dismissed* the action as irrelevant, in respect that the pursuer’s averments shewed that knowing the danger she had for ten months continued to occupy the house and to use the steps.

Observed that if a tenant gives notice to his landlord of a serious defect in his house and the landlord fails within a reasonable time to remedy it, the tenant may leave the house or remain at his own risk. *Webster v. Brown*, May 12, 1892, p. 765.

Management—Consumption and application of straw and dung—Rights of landlord and tenant at expiry.

5. An agricultural tenant under a lease for a term of years, with entry at Martinmas, was bound by the lease to leave to the proprietor or incoming tenant at its expiry at Martinmas the dung that might be made after the 15th June immediately before the expiry, “at a price to be fixed by arbitration,” the lease requiring that all dung made previously should be applied to the lands. It was also stipulated that the tenant “shall not sell or remove from said farm any . . . straw . . . or dung of any kind that may be grown or made on the lands hereby let, but shall annually consume the same on said farm for manure, and shall apply such manure to the lands yearly.” In the district in which the farm was situated the green crop was the only crop to which manure was applied. According to the custom which prevailed when the lease was entered into, the straw crop, with the exception of a small portion reserved for the minor uses of the farm, was consumed in winter by cattle kept in courts (few cattle being kept in summer, and those on pasture) and the manure so made was applied to the next year’s crop. The tenant afterwards fed cattle in courts in summer, and to provide litter reserved half of the straw crop of the previous year, so that when he left the farm at Martinmas 1890 there was upon it a large amount of manure made after the immediately preceding 15th of June. In an action by the tenant for payment of the value of this manure under the first clause of the lease, the landlord pleaded that, in terms of the clause providing for the annual consumption and application of the straw, the tenant ought to have applied before 15th June 1890 the portion of the straw crop of 1889 which he had reserved for litter, that he had accumulated it in violation of the lease, and was therefore not entitled to be paid for the manure made therefrom. *Held (diss. Lord Adam)* (1) that on a reasonable construction of the lease the tenant had a period of twelve months for the consumption of the straw and a separate period for the application to the lands of the manure therefrom; (2) that the period of consumption of straw ran from harvest to harvest, and that though the tenant was bound to apply to the land by 15th June all the manure then available, he was not precluded by the lease from retaining a large part of the straw for consumption by stall-fed cattle during the summer and

LEASE—Continued.

autumn months, the manure produced being applicable to the land in the following spring; (3) that in this view he had not accumulated the straw in violation of the lease, and was entitled to receive payment for the manure made from it. *M'Duff v. Balfour*, Feb. 5, 1892, p. 440.

Contract—Obligation on tenant to keep subjects in repair—Reparation.

6. A lease of works and machinery provided that the tenants should uphold the works in good condition to the satisfaction of A. S., an engineer, and that in the event of A. S. being of opinion that the works were not being kept in good condition, and in the event of the tenants failing to execute the necessary repairs, the proprietor should be entitled to do so, and to recover from the tenants the cost thereof, as certified by A. S. On the tenants leaving the works, prior to the expiration of the lease, the proprietor obtained from A. S. a finding to the effect that the works and machinery were not in good tenantable and working condition in certain respects specified. In an action against the tenants *held* that the proprietor was not restricted to the remedy of executing the repairs and suing for the expense, but might claim damages. *Allan's Trustee v. Allan & Sons*, Dec. 1, 1891, p. 215.

Railway—Compulsory powers—Compensation—Tenant's interest—Notice—Lands Clauses Consolidation (Scotland) Act, 1845, secs. 17 and 115.

7. A railway company gave notice to an agricultural tenant that they intended to take part of his farm under the Lands Clauses Act, and that they required him to state his claim for compensation, and that they were willing to treat with him in regard to it, and at the same time demanded that if he claimed compensation under an unexpired lease he should produce the lease or other evidence along with his claim within twenty-one days, and that failing his doing so, he would be considered as a tenant from year to year in terms of section 115. *Held* that the railway company was not entitled under section 115 to demand production of the lease until a claim for compensation had been made by the tenant. *Forfar and Brechin Railway Co. v. Bell*, May 17, 1892, p. 786.

Compensation—Sufficiency of notice to landlord—Reference—Agricultural Holdings Act, 1883, sec. 7, and Schedule, part iii.

8. *Opinions* that the notice, under the above section, should contain specific information as to the various items, *e.g.*, the quantity, nature, quality, and date of application of manure, claimed as improvements within the schedule to the Act, such as will enable the landlord to judge whether he will entertain it or not.

Terms of a notice of claim, which in the opinion of the Court was insufficient. *Sinclair v. Brown*, May 17, 1892, p. 780.

Compensation—Reference—Agricultural Holdings Act, 1889, sec. 2, subsec. 3.

9. A petition for the appointment of a referee, under the above Act, was presented to a Sheriff on 27th July in vacation, and answers were lodged. At the first vacation Court, held on 18th August, the petitioner moved to have the appointment made. The Sheriff dismissed the petition, on the ground that appointment could only be made within fourteen days of the presentation of the application. The petitioner presented a second petition. *Held* that a second application for an appointment was not incompetent. *Sinclair v. Brown*, May 17, 1892, p. 780.

Decree of removing—Enforcement of charge upon decree—Delay.

10. *Held* that a charge upon a decree, dated 20th November 1890, ordaining a tenant to remove at Whitsunday following was timeously enforced three weeks after that term, and suspension on the ground of the lapse of time between the decree and its enforcement *refused*. *Taylor v. Earl of Moray*, Jan. 23, 1892, p. 399.

Holding—Agricultural Holdings Act, 1883, sec. 35.

11. *Held* that the Agricultural Holdings Act, 1883, did not apply to subjects of about three-quarters of an acre in extent, one-third of which was occupied as a dwelling-house and garden and the remainder as a grass-park,—

LEASE—Continued.

the rent of the whole being £3, and the annual value of the land 15a,—in respect that the house and garden were the principal subjects, and not accessories to the land, and could not be regarded as either agricultural or pastoral. *Taylor v. Earl of Moray*, Jan. 23, 1892, p. 399.

Crofter—Bankruptcy—Sequestration—Contingent debt—Crofters Holdings Acts, 1886 and 1887.

12. In answer to an action by a landlord for payment of the arrears of rent of a house alleged by the pursuer to be an inn, the defender asked for a sist pending the disposal of an application he had made to the Crofter Commissioners on the footing that the house formed part of a "holding" within the meaning of the Crofters Act, 1886. The Lord Ordinary refused to sist the action, and the defender afterwards withdrew this defence "without prejudice to his application to the Crofters Commission," and consented to decree being granted against him. On expiry of a charge on the extract decree without payment, the landlord's assignee presented a petition for sequestration of the tenant's estate under the Bankruptcy Act, 1856. The debtor objected on the ground that the debt was contingent until the Commission issued its determination. *Held (rev. judgment of Lord Kincairney)* that as the debt was constituted by a decree for payment of arrears of rent of an inn, it could not be held to be for the rent of a "holding" within the meaning of the Crofters Act; that the debt was not therefore contingent, and that sequestration must be awarded.

Observed per Lord McLaren,—"Unless the proprietor and the tenant are agreed that the tenant is a crofter in the sense of the Crofters Act, and is entitled to its benefits, it is only through the ordinary Courts of the country that the dispute can be finally determined." *Stuart & Stuart v. Macleod*, Dec. 8, 1891, p. 223.

13. *Held by Lord Wellwood (Ordinary)*, upon a construction of the Crofters Holdings Acts, 1886 and 1887, that a decree for payment of arrears of rent may be pronounced against a crofter notwithstanding the dependence of an application to the Commissioners to have a fair rent fixed. *Stuart & Stuart v. Macleod*, Dec. 8, 1891, p. 223.

Bankruptcy—Illegal preference—Act 1696, c. 5.

14. By agreement purporting to be a "minute of lease" entered into in 1879 trustees "let" to A certain pawnbroking premises, together with the stock of pledges therein of the value of £1100, A being bound to pay rent for the premises, and 5 per cent on the value of the stock. It was provided that A should keep books shewing his intromissions with the business, and that in the event of the stock falling below the value at which it had been handed over to him, the trustees should have a right to enter into possession of the premises and stock, and that A should be bound to cede possession thereof on receiving fourteen days' notice. On 24th April 1888, A executed a deed ceding possession of the premises and of the stock of pledges to the trustees, and they at once entered into possession of premises and stock. Four days later A was sequestered. In an action by the trustee in his sequestration against the trustees, *held* that under the agreement the trustees had only a personal obligation by the bankrupt to deliver to them in a certain event the pledges then in his possession; and therefore, even assuming the event which gave them a right of re-entry to have occurred, that the deed by which the stock of pledges was transferred to the trustees was ineffectual as having been granted within sixty days of bankruptcy in satisfaction of a prior debt, within the meaning of the Act 1696, c. 5. *Paterson's Trustee v. Paterson's Trustees*, Nov. 13, 1891, p. 91.

Bankruptcy—Compensation—Sum payable by landlord on valuation—Arrears of rent.

15. A landlord on his tenant dying insolvent entered in terms of the lease into possession of the farm, and became liable for the value of the grain crop at a valuation. The tenant's estate was afterwards sequestered. In a

LEASE—Continued.

question between the trustee and the landlord, *held* that the latter was entitled to set off his claim for arrears of rent against the trustee's claim for the value of the grain. *Davidson's Trustee v. Urquhart*, May 26, 1892, p. 808.

Sequestration for rent.

16. Wrongous use of diligence. *Gray v. Weir*, Oct. 28, 1891, p. 25, and *Gray v. Smart*, March 18, 1892, p. 692.

LIFERENT. See *Succession*, 14 to 17.

LEGITIM. See *Succession*, 18.

LOAN. *Partnership—Power of partner to borrow money—Proof—Writ.*

A partner of a mercantile firm borrowed, as for his firm, a sum of £100 from his wife. She requested an acknowledgment from the firm, and, in compliance with that request, he handed her an acknowledgment which bore that the money had been received from her by the hands of her husband "on temporary loan." The acknowledgment was written by a clerk of the firm and was signed by their cashier *pp.* of the firm. It was proved that the cashier had so signed on the verbal instructions of the husband; that the money was paid to the cashier and put to the credit of the husband in the books of the firm. In an action by the wife against the firm for repayment of the loan, *held (diss. Lord Young)* (1) that the husband, as partner of a mercantile firm, had power to borrow money and to bind the firm for the debt; (2) that the writ having been signed by the cashier on the instruction of such a partner was writ of the firm; and (3) might be used *in modum probationis*, although it was neither holograph nor tested, and that therefore the loan to the firm had been established. *Bryan v. Butters Brothers & Co.*, Feb. 23, 1892, p. 490.

See *Bankruptcy*, 2, 9—*Right in security*.

MANDATARY. See *Process*, 5.

MARRIAGE-CONTRACT. *Conveyance of moveables to trustees retenta possessione—Possession—Reputed ownership.*

1. By antenuptial marriage-contract H. (the husband) conveyed to trustees his dwelling-house and "all and sundry the whole household furniture, . . . pictures, and other effects" therein. The trustees were infest in the house, which was occupied by H. and his wife, who also enjoyed the use of the furniture, pictures, &c. After some years H. became insolvent and compounded with his creditors. S., his brother-in-law, became security for part of the composition. In security of this obligation H. conveyed to S., by written agreement (with power of sale), and delivered, his pictures, including six which were in his house at the date of the marriage-contract. S. had no notice or knowledge of the terms of the marriage-contract. In an action by the trustee under the marriage-contract to have the pictures or their value restored to the trust, *held* that as S. had obtained the pictures under an onerous contract without knowledge of the conveyance in the marriage-contract, he was not bound to restore them. *Hewat's Trustee v. Smith*, Jan. 27, 1892, p. 403.

Contractual or testamentary—Provision to issue of children of marriage.

2. A conveyance by the husband in an antenuptial marriage-contract in favour of the children of the marriage, and the issue of such children, is purely testamentary and revocable as regards the issue of the children, unless the terms of the contract as a whole shew that it was *pars contractus* between the spouses that the husband should not have power to alter the provision to the issue of the children gratuitously.

Terms of an antenuptial marriage-contract which were *held* not to impose such an obligation on the husband. *Hall's Trustees v. Macdonald*, March 8, 1892, p. 567.

Legitim—Satisfaction—Provision in marriage-contract.

3. A father in his son's antenuptial marriage-contract bound himself to leave

MARRIAGE-CONTRACT—Continued.

to his son's marriage-contract trustees one full third part in value of the residue of his estate. The provision was not declared to be in satisfaction of the son's legitim. By his will, the father directed his executor to carry out the marriage-contract obligation. *Held* that the provision in the marriage-contract being a debt due by the father at his death, not expressed to be in satisfaction of legitim, the son was not thereby barred from claiming legitim. *Rait v. Arbuthnott*, March 18, 1892, p. 687.

Trust—Alimentary liferent of surviving husband—Power to discharge.

4. In an antenuptial marriage-contract a wife conveyed a sum of £4000 to trustees for the purposes,—(2) That, in the event of the marriage being dissolved by the predecease of the wife, "leaving a child or children of the marriage," the trustees should pay the annual produce of the fund to her husband "during his life, for his liferent and alimentary use only," excluding creditors and assignees, and that after his death the capital should be paid over to the child or children of the marriage, to the sons on attaining majority and to the daughters on attaining majority or being married. In the event of the failure of children when the term of payment arrived the fee was to be subject to the disposal of the wife by will, with power to the trustees to convey or pay over the capital or fee of the estate at any time after the wife's death and the failure of issue, "on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will." (3) In the event of the marriage being dissolved by the predecease of the husband, the wife was to enjoy an alimentary liferent of the £4000, and after her death the interest was to be applied for behoof of the children during their minority, and on their majority (or marriage in the case of daughters) the capital was to be paid over to them. It was further declared that if such child or children should all die before their mother, or although they should survive her, "should they all die before attaining majority and without leaving issue of their own bodies," the capital was to be disposed of according to the wife's will, or, in the event of her leaving no will, to be given to her heirs and executors. It was further provided that the provisions to the children should not be payable or become vested interests until after the death of the longest liver of the spouses and until the children attained majority. The marriage was dissolved by the predecease of the wife, who was survived by one son, and who left a will in which she made over all she possessed to her husband. In an action against the trustees by the husband and the son (who had no children) for payment upon their joint discharge of the £4000, *held* (rev. judgment of the First Division) that the trustees were bound to retain the capital of the trust (1) for the protection of the alimentary liferent of the husband, and (2) for the eventual interest of the possible issue of the son. *Hughes v. Edwardes*, July 25, 1892, H. L., p. 33.

Conditio si sine liberis.

5. Opinions that the *conditio si sine liberis* is applicable to provisions to children in marriage-contracts. *Hughes v. Edwardes*, July 25, 1892, H. L., p. 33.

See *Provisions to Children*.

MASTER AND SERVANT. See *Reparation*, 13 to 23.

MINES AND MINERALS. Right to pump water from mine into river—Pollution—Right to have special purity of water preserved.

1. A mineowner is not, apart from contract or prescriptive right, entitled to discharge into a stream water pumped out of the mine, although the water may not make the stream unfitted for any of the primary purposes, but only for special purposes for which the water of the stream is by nature peculiarly adapted. *Bankier Distillery Co. v. Young & Co.*, July 20, 1892, p. 1083.

Agricultural lease—Reservation of minerals—Severance damage.

2. The lease of a farm, which reserved to the proprietor full power to work

MINES AND MINERALS—Continued.

the minerals and to resume the land he might think necessary for that purpose, provided that the tenant should receive for any land so resumed an abatement from the rent in the proportion that the extent of ground resumed bore to the extent of the whole subjects let. *Held (dub. Lord McLaren)* that the tenant was not entitled to a sum in name of severance damage in addition to the abatement stipulated for. *Robertson v. Ross & Co.*, July 8, 1892, p. 967.

Reparation—The Coal Mines Regulation Act, 1887—General Rules, No. 15.

3. *Opinion (per Lord Justice-Clerk)* that the mouths of the cross roads which led off the main level of a mine, and which were within fifty yards of each other, were to be considered as "manholes or places of refuge" in the sense of the above rule. *Opinions reserved* by Lord Young, Lord Rutherford Clark, and Lord Trayner. *Hughes v. Clyde Coal Co.*, Dec. 18, 1891, p. 343.

See *Property*, 1—*Succession*, 16.

MINOR AND PUPIL. Pupil children resident with father abroad—Payment of trust funds belonging to children.

1. A father domiciled in England, by the law of which he was not the guardian of his children's estate unless appointed to be so by the Court, presented a petition for himself and his two pupil children, craving the Court to ordain Scots testamentary trustees, who were in possession of a fund belonging to the children, to pay to the petitioner for their behoof the whole or a part of the annual income of the fund. The petition was presented with the consent and concurrence of the trustees. The Court *refused* to grant the order craved, but intimated that they would be prepared to reconsider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian. *Seddon*, Nov. 13, 1891, p. 101.

Minor—Adoption—Homologation.

2. The proprietor of an estate in Shetland, which had been formerly liferented by his father, was applied to shortly after reaching majority by A, one of a number of his father's tenants, who, in accordance with a custom in Shetland, had deposited money at interest with their landlord, for payment of his deposit. The proprietor wrote in reply that he would "attend to your request as soon as possible," but that his affairs had been left in a "muddle," and it would take some time to get them into order. "It would be better perhaps to have chosen some other time to have drawn your money, as, of course, you are aware these have on the whole been bad years for getting moneys." Shortly thereafter the proprietor was sequestered. In the course of an application to get the sequestration recalled, his agent sent a circular to A, along with other depositors who were claimants in the sequestration, requesting him to assist him in this object, and enclosing a mandate in these terms:—"I, the undersigned, one of the depositors with the estate of Melby, being satisfied that Mr Scott's affairs can by good management and care be retrieved, hereby consent to the recall of his sequestration, and am willing that he should have time to pay his deposits." A did not accede to this request. In an action by A against the proprietor, who did not represent his father and who was not liable for his debts, for payment of the deposit, *held* that these letters did not import that the defender had after coming of age accepted liability for the deposit. *Henry v. Scott*, March 3, 1892, p. 545.

Minor pubes—Custody—Child's choice of residence.

3. An orphan girl, born in Scotland, thirteen years of age, was boarded out by a parochial board to which she had become chargeable. Her paternal grandmother, who resided in Ireland, presented a petition to have the parochial board ordained to furnish her with the girl's address, and for the custody of the girl. A curator ad litem appointed by the Court to the girl stated that the girl wished to remain where she was, that the arrangements made by the board for the boarding, education, and wellbeing

MINOR AND PUPIL—*Continued.*

of the girl were satisfactory, and that, in his opinion, nothing short of force would induce the girl to go to her grandmother, and concurred in craving the Court to refuse the petition. The Court *refused* the prayer for custody, on the ground that nothing had been shewn to justify the Court in interfering with the girl's choice of residence, and, being equally divided in opinion as to granting an order for the girl's address, on the motion of parties continued the cause *quoad ultra*. *Flannigan v. Inspector of Bothwell*, June 21, 1892, p. 909.

See *Parent and Child*.

MORA. See *Lease*, 10.

NOBILE OFFICIUM. See *Burgh*, 1—*Charity—Judicial Factor—Process*, 12.

NOTICE. See *Bankruptcy*, 5—*Election Law*, 7, 8—*Lease*, 8.

NOVATION. See *Contract*, 1.

OATH, REFERENCE TO. See *Proof*, 9, 10.

PACTUM ILLICITUM. See *Contract*, 3, 4.

PARENT AND CHILD. *Aliment—Title to sue—Illegitimate child—Married Woman.*

1. Held that a married woman whose husband had gone abroad and had not been heard of for several years, had a title to sue for aliment of an illegitimate child. *M'Quillan v. Smith*, Jan. 15, 1892, p. 375.

Aliment—Illegitimate child.

2. A claim for aliment by an illegitimate child against his parents is a claim for debt and transmits against their representatives. *Oncken's Judicial Factor v. Reimers*, Feb. 27, 1892, p. 519.

Aliment—Illegitimate child—Foreign.

3. An Englishwoman raised an action in Scotland against a domiciled Indian concluding for damages for alleged seduction and for aliment for a child alleged to be the fruit of the seduction. The seduction was alleged to have taken place in England. By the law of England a woman has no action for damages on the ground of seduction, and the only means by which she can recover aliment is by an application to a Justice of the Peace, if she be a single woman, under the Bastardy Act. In this case the woman made no such application, and married before the child was born, more than two years before raising her action in Scotland. Held that she could not maintain an action on either head in Scotland. *Rosses v. H. H. Sir Bhagvat Sinhjee*, Oct. 29, 1891, p. 31.

Aliment—Arrears—Warrant to imprison—Civil Imprisonment Act, 1882, secs. 3 and 4.

4. It is competent for a woman holding a decree for aliment of her bastard child to enforce payment of arrears against the debtor by an application for a warrant of imprisonment under the above Act. *Cain v. M'Colm*, May 31, 1892, p. 813.

Aliment—Right of parochial board to decree against father for future aliment of illegitimate children.

5. In an action by a parochial board against the father of two illegitimate children, who had been deserted by their mother, for payment of a sum already expended by the board on the children's aliment, and for payment of aliment at a specified rate until the children should respectively attain the age of fourteen, or should cease to be a charge on the board, the Court, while granting decree against the father for the amount already expended, *refused* to grant decree for future aliment. *Den v. Lumsden*, Nov. 10, 1891, p. 77.

Custody—Legitimate children—Minor pubes—Child's choice of residence.

6. An orphan girl, born in Scotland, thirteen years of age, was boarded out by a parochial board to which she had become chargeable. Her paternal grandmother, who resided in Ireland, presented a petition to have the

PARENT AND CHILD—*Continued.*

parochial board ordained to furnish her with the girl's address, and for the custody of the girl. A curator ad litem appointed by the Court to the girl stated that the girl wished to remain where she was, that the arrangements made by the board for the boarding, education, and wellbeing of the girl were satisfactory, and that, in his opinion, nothing short of force would induce the girl to go to her grandmother, and concurred in craving the Court to refuse the petition. The Court *refused* the prayer for custody, on the ground that nothing had been shewn to justify the Court in interfering with the girl's choice of residence. The Court being equally divided in opinion as to granting an order for the girl's address, on the motion of parties continued the cause *quoad ultra*. *Flannigan v. Inspector of Bothwell*, June 21, 1892, p. 909.

Custody—Charitable institution—Responsibility of directors.

7. In a petition by a father against S., the original founder of a home for destitute children, and certain directors appointed by her, to have them ordained to restore his three children who had been taken by S. to Nova Scotia, the Court, on 7th June 1889, ordained the defenders to deliver the children to their father on or before the first sederunt-day in October, and further appointed them to report to the Court on 18th July what steps had been taken in pursuance of the order. The directors (who alone appeared in the petition) thereupon instituted proceedings in the Supreme Court of Nova Scotia against S., from which she was ultimately discharged, it being held that she had taken all the steps which could be expected of her to find the children, without success. A detective officer, who was afterwards employed by the directors, having reported that his search for the children had been fruitless, and that he saw no practical way of following it up, the respondents, on 20th October 1891, moved that, in respect that they had done everything in their power to recover the children, the interlocutor of 7th June 1889 ought to be recalled. The Court *held* that the respondents had done everything which could in the circumstances be expected of them to recover the children, but *sisted* procedure in the petition *hoc statu* in order that either party might move further in it in the event of fresh information being obtained in regard to the children. *Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge*, Oct. 20, 1891, p. 8.

Custody—Illegitimate child.

8. The mother of a bastard child about a month old placed it in the care of a married couple, who undertook the care of it, it being agreed that she should make certain payments for its support. They took care of it for more than six years, during which she paid in part the stipulated sums for its support. Thereafter she raised an action in the Sheriff Court to have it restored to her, and obtained decree until a permanent arrangement should be made by a competent Court. It appeared from a report of the Sheriff-substitute, in the course of an appeal to the Court of Session, that the mother was a factory worker, who had had two other illegitimate children, that the child appeared afraid of her, that the couple with whom it had been placed had cared for it well, and that in its interests it was better in their custody than in the mother's. The Court recalled the decree, and dismissed the petition. *Mackenzie v. Keillor*, July 6, 1892, p. 963.

Custody—Sheriff—Jurisdiction—Custody of Children Act, 1891, sec. 1.

9. *Question*, whether the above Act applied to the case of an application made to the Sheriff and afterwards brought by appeal before the Court of Session. *Mackenzie v. Keillor*, July 6, 1892, p. 963.

Father as administrator-at-law—Pupil children resident with father abroad—Payment of trust funds belonging to children.

10. A father domiciled in England, by the law of which he was not the guardian of his children's estate unless appointed to be so by the Court, presented a petition for himself and his two pupil children, craving the Court to ordain Scots testamentary trustees, who were in possession of a fund belonging to

PARENT AND CHILD—*Continued.*

the children, to pay to the petitioner for their behoof the whole or a part of the annual income of the fund. The petition was presented with the consent and concurrence of the trustees. The Court *refused* to grant the order craved, but intimated that they would be prepared to reconsider the application on being informed by the petitioner that steps were being taken to have the children provided with a legal guardian. Seddon, Nov. 13, 1891, p. 101.

Filiation—Illegitimate child—Proof of paternity.

11. Evidence adduced by the pursuer in an action of filiation which the Court *held* (*diss.* Lord Young) insufficient to establish that the defender was the father of the pursuer's child.

Observations on the nature of the evidence which will be sufficient to establish the paternity of a bastard in an action of filiation. M'Kinven v. M'Millan, Jan. 13, 1892, p. 369.

Expenses—Dominus litis—Action by daughter with consent of father—Conjunct and several liability.

12. A girl of nineteen, with consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister of the congregation to which they belonged. The Sheriff assoltized the defender, finding that the statements alleged to have been made by him were true, and had been made by him solely in the discharge of his duty as minister; and further, found the girl and "her father, her curator and administrator-at-law, liable, conjunctly and severally, in expenses." The Sheriff proceeded upon the ground that the father had not only as her curator and administrator-in-law, but personally, taken a prominent and leading part in the litigation. *Held* that the Sheriff was entitled, in his discretion, to award the expenses against the father. Fraser v. Cameron, March 8, 1892, p. 564.

Forisfiliation.

13. Imbecile child—Derivative settlement. Lees v. Kemp, Oct. 17, 1891, p. 6, and Mackay v. Munro, Jan. 21, 1892, p. 396.

PAROCHIAL BOARD. See *Poor*.PARTNERSHIP. *Proof of partnership.—Trust—Ultra vires.*

1. Testamentary trustees were empowered to carry on any business in which the truster might be engaged at the time of his death, or to continue his interest in any business in which he might then be partner. At the time of his death the truster had a retail spirit business in Glasgow, which was managed by A, his brother, who, however, asserted that by arrangement with the truster he had right to half the profits and to half the goodwill. The trustees, of whom A was one, after taking legal advice as to A's claim, resolved to carry on this business under A's management, and the trustees allowed A to receive, as a partner, half the profits. After the business had been sold certain of the beneficiaries brought an action to have the profits so paid restored to the trust, alleging that the payments were *ultra vires*, on the ground that A had not been partner with the deceased, but merely manager, with a salary of half the profits. A proof was allowed. There was no written contract of copartnership, but A deposed that the truster had agreed to give him half the profits of the business, besides a share in the goodwill, in consideration of the trouble which he had had in putting the business on a satisfactory footing, the truster not having been able to look after it personally. A law-agent whom the truster occasionally consulted deposed that the truster "distinctly led me to understand his brother was a partner to the extent of one-half the business." *Held* that the partnership had in fact been established, and therefore that the trustees, having continued the business, were bound to allow A half the profits. Lawrie v. Lawrie's Trustees, March 17, 1892, p. 675.

Responsibility for partner's negligence—Agent and client.

2. *Held* by Lord Kyllachy (Ordinary) that a person becoming a partner in a

PARTNERSHIP—Continued.

law-agent's business at a certain date will be liable for his partner's neglect of duty to a client in carrying through a transaction after that date, although the employment began prior to the date of the partnership. *Opinions reserved in the Inner-House. Tully v. Ingram, Nov. 10, 1891, p. 65.*

Power of partner to borrow money—Proof—Writ.

3. A partner of a mercantile firm borrowed, as for his firm, a sum of £100 from his wife. She requested an acknowledgment from the firm, and, in compliance with that request, he handed her an acknowledgment which bore that the money had been received from her by the hands of her husband "on temporary loan." The acknowledgment was written by a clerk of the firm and was signed by their cashier *pp.* of the firm. It was proved that the cashier had so signed on the verbal instructions of the husband; that the money was paid to the cashier and put to the credit of the husband in the books of the firm. In an action by the wife against the firm for repayment of the loan, *held (diss. Lord Young)* (1) that the husband, as partner of a mercantile firm, had power to borrow money and to bind the firm for the debt; (2) that the writ having been signed by the cashier on the instruction of such a partner was writ of the firm; and (3) might be used *in modum probationis*, although it was neither holograph nor tested, and that therefore the loan to the firm had been established. *Bryan v. Butters Brothers & Co., Feb. 23, 1892, p. 490.*

Husband and Wife—Business carried on by spouses jointly—Married Women's Property Act, 1877, sec. 3.

4. In an action by the executor of a wife against the husband for the wife's share in a fish-hawking business, as being "earnings" in the sense of the above Act, evidence upon which it was held that the wife was to be regarded as merely her husband's agent, and that therefore the Act did not apply. *McGinty v. McAlpine, June 28, 1892, p. 935.*

PATENT. Prior publication.

1. *The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publication founded upon a description in the specification of an earlier patent. Held (aff. judgment of the First Division) that the test to be applied to the description so published was not whether it was sufficient to enable a mechanic to make the machine, but whether the invention was disclosed to the public in a manner so clear as to enable educated men conversant with the subject to give instructions for the making of the machines, and that applying that test there had been prior publication. The Anglo-American Brush Electric Light Corporation v. King, Brown, & Co., April 5, 1892, H. L., p. 20.*

Proof of prior publication.

2. *In an action for interdict against the infringement of a patent, dated 24th July 1885, the respondent pleaded that the patent was invalid by reason of prior publication of the invention. It was proved that in a foreign review, dated 30th June 1885, there was a description of an article admittedly indistinguishable from the subject of the patent. Evidence which held sufficient to instruct that the review had been published in this country prior to the date of the patent. Pickard & Curry v. Prescott, March 11, 1892, H. L., p. 56.*

PERSONAL OR REAL. See *Servitude—Superior and Vassal, 1.*

PERSONAL OR TRANSMISSIBLE. *Aliment—Bastard.*

A claim for aliment by an illegitimate child against his parents is a claim for debt, and transmits against their representatives. *Oncken's Judicial Factor v. Reimers, Feb. 27, 1892, p. 519.*

POLICE. Police Commissioners—Jurisdiction—Footpath by side of turnpike road—Turnpike Roads Act, 1831, sec. 96—Roads and Bridges Act, 1878, secs. 47 and 123.

1. A turnpike road, forming the main street in a burgh, had on either side of the carriageway strips of ground of varying breadth popularly known as

POLICE—*Continued.*

- loanings. Down to 1878 the Turnpike Road Trustees maintained the carriageways of uniform breadth in the centre of the street but did nothing for the loanings, which, however had been for over forty years maintained as footpaths by the town-council and latterly by the Police Commissioners. *Held* that the Turnpike Road Trustees could, prior to the Roads and Bridges Act, 1878, have prosecuted, under section 96 of the Turnpike Roads Act, 1831, any person driving carts or carriages on the loanings, and that the Police Commissioners being now vested with the control of the highways within the burgh under section 47 of the Act of 1878 were entitled to institute a similar prosecution under section 123 of that Act. *Duffie v. McCormack*, May 24, 1892, Just. Cases, p. 89.
- Streets—Paving private street—Lands and heritages “abutting” on street—Edinburgh Municipal and Police Act, 1879, sec. 130—Edinburgh Municipal and Police (Amendment) Act, 1891, sec. 33.*
2. The proprietor of an upper flat of a tenement and of a plot of garden ground fronting A Street on the west, and bounded by B Street on the north, objected to a notice under the Edinburgh Municipal and Police Acts, 1879 and 1891, calling on him to pave and causeway B Street, as owner “of lands and heritages fronting or abutting on the same.” The only access to the flat was from A Street, but the conveyance also included a *pro indiviso* right to the *solum* on which the tenement was built. Objection repelled. *Campbell v. Magistrates of Edinburgh*, Nov. 24, 1891, p. 159.

Streets—Notices to pave or causeway a street—Edinburgh Municipal and Police Act, 1879—Edinburgh Municipal and Police (Amendment) Act, 1891.

 3. Notices to pave or causeway a street under the provisions of the Edinburgh Municipal and Police Acts *held* to be insufficient in respect that they did not sufficiently specify the nature of the work required to be done. *Campbell v. Magistrates of Edinburgh*, Nov. 24, 1891, p. 159.

Assessment—Burgh—Sewer-rate—Commissioners’ power to borrow—General Police and Improvement Act, 1862, secs. 196 and 384.

 - 4. The commissioners of a burgh borrowed money on the security of the special sewer-rate to pay for the construction of sewers, and assessed the proprietors at a rate sufficient both to pay the interest and repay the capital in twenty years. *Held* that the assessment was lawful, because, assuming that section 384 of the above Act did not apply to borrowing for the construction of sewers, sec. 196 authorised the commissioners to borrow for the construction of sewers, and did not forbid such a system of borrowing as would pay off the capital by a sinking fund. *Police Commissioners of Govan v. Mickel*, March 17, 1892, p. 670.

Assessment—Burgh—Sewer-rate—General Police and Improvement Act, 1862, secs. 96, 100.

 - 5. The Commissioners of Police of a burgh constructed a new sewer, and imposed a rate of 1s. 5d. per £. To the proprietors whose properties were already sufficiently drained, and who did not therefore use the new sewer, they allowed a deduction of 1s. 4½d. per £, leaving a farthing payable by them, while from those whose properties were drained by the new sewer they exacted the full rate. *Held* that the assessment was legal, and that the deduction was warranted. *Police Commissioners of Govan v. Mickel*, March 17, 1892, p. 670.

Police offences—Using hackney carriages without licence at railway station—Job carriage—Glasgow Police Act, 1866, secs. 184, 218, and 219.

 - 6. The manager of a tramway company in Glasgow was charged and convicted of a contravention of section 184, in respect he used and let for hire two unlicensed hackney carriages. It was proved that the company, who had by lease an exclusive right of entry to the Caledonian Railway Station, had on the occasion libelled the two carriages standing and plying for hire without licences at the station; that they were hired by two passengers to carry them to their respective destinations, and that in neither case had the carriages been let out to hire by the day, month, or longer period, and no

POLICE—Continued.

previous intimation had been sent to the company by the hirers requiring the company to have them awaiting their arrival at the station. The accused maintained that the carriages were used as job carriages, and that under sec. 219 they did not require to have a licence. *Held* that the carriages in question were not job carriages, as defined in section 218, and that therefore sec. 219 did not apply. *Duncan v. Neilson*, Feb. 1, 1892, Just. Cases, p. 43.

See *Burgh—Public Health*.

POOR. Derivative settlement—Forisfiliation—Imbecile.

1. A young man, twenty-two years of age, who had all his life been so weak in mind as to be unable for any work, except of the most simple kind, and that under supervision, and who had never earned anything for his own support, was, on the application of his father, a farm-servant, removed by the inspector of poor to the district asylum. At the date of his removal he was suffering from an acute attack of mania. He continued to live in the asylum, and the relieving parish raised an action to fix liability for his support on the parish of his own birth. *Held* that at the date of his removal he had not been forisfiliated, and that he was still a member of his father's family, and therefore chargeable to his father's residential settlement. *Lees v. Kemp*, Oct. 17, 1891, p. 6.
2. *Held* (following the foregoing case) that a girl, twenty-three years of age, who was living in her father's house, and was unable from mental weakness to maintain herself, although able to do some light work under supervision, was not forisfiliated, and followed her father's settlement. *Mackay v. Munro*, Jan. 21, 1892, p. 396.

Settlement—Proof—Family tradition.

3. In an action by a relieving parish against a parish alleged to be that of the pauper's birth, the sole proof that the pauper had been born in the defending parish consisted of the testimony of the pauper, who was sixty-nine years of age, and of his sister, who deposed that their mother, now deceased, had frequently told them that the pauper was born at Scotston, in the defending parish, and that they always understood that he was born there. *Held* that it was not proved that the pauper was born in the defending parish. *Wallace v. Ross*, Dec. 8, 1891, p. 233.

Settlement—Alteration of parish boundaries by Boundary Commissioners—Local Government Act, 1889, secs. 49 and 50.

4. The transfer by the Boundary Commissioners of part of a parish to another parish has no effect on parochial settlements acquired prior to its date either by birth or residence in the part of the parish which has been so transferred.

Observations on the effect of an order of the Boundary Commissioners under the 49th section of the Local Government Act, 1889. *Inspector of Galashiels v. Inspector of Melrose*, May 12, 1892, p. 758.

Claim of relieving parish against parish of settlement.

When a pauper has been relieved in the asylum or poorhouse of another parish than his own the relieving parish is entitled to charge against the parish of settlement in addition to a sum for bed, board, fuel, &c. (1) a proportion of management expenses to cover the proportional expense of the staff employed in attending to the wants of the paupers in such asylum or poorhouse; and (2) a proportion of the interest actually paid for the current year by the relieving parish on the debt outstanding on capital account for building the poorhouse or asylum respectively; but nothing in respect of such part of the cost of erecting the buildings as had been paid off by the relieving parish.

Opinion (per Lord Stormonth Darling) that a parish maintaining a pauper lunatic belonging to another parish in a poorhouse asylum is entitled to include in its charge for maintenance a proportion of the annual cost of a farm connected with it as a curative agent. *Beattie v. Muir*, Jan. 29, 1892, p. 417.

POOR—*Continued.*

Right of parochial board to decree against father for future aliment of illegitimate children.

6. In an action by a parochial board against the father of two illegitimate children, who had been deserted by their mother, for payment of a sum already expended by the board on the children's aliment, and for payment of aliment at a specified rate until the children should respectively attain the age of fourteen, or should cease to be a charge on the board, the Court, while granting decree against the father for the amount already expended, refused to grant decree for future aliment. *Den v. Lumsden*, Nov. 10, 1891, p. 77.

POSSESSION. *Reputed ownership—Marriage-contract—Conveyance of moveables to trustees retenta possessione.*

By antenuptial marriage-contract H. (the husband) conveyed to trustees his dwelling-house and "all and sundry the whole household furniture, . . . pictures, and other effects" therein. The trustees were infeft in the house, which was occupied by H. and his wife, who also enjoyed the use of the furniture, pictures, &c. After some years H. became insolvent and compounded with his creditors. S., his brother-in-law, became security for part of the composition. In security of this obligation H. conveyed to S., by written agreement (with power of sale), and delivered, his pictures, including six which were in his house at the date of the marriage-contract. S. had no notice or knowledge of the terms of the marriage-contract. In an action by the trustee under the marriage-contract to have the pictures or their value restored to the trust, *held* that as S. had obtained the pictures under an onerous contract without knowledge of the conveyance in the marriage-contract, he was not bound to restore them. *Hewat's Trustees v. Smith*, Jan. 27, 1892, p. 403.

PREScription. *Triennial Prescription—Act 1579, c. 83—Merchant's account with cross entries.*

1. A cattle-dealer sued a farmer for a balance brought out on an account which contained entries of the prices of cows and potatoes sold by the dealer to the farmer at specified dates over a period of ten years, and entries of items of cash paid, and of the value of dung delivered, and cows sold by the farmer to the dealer. *Held* (distinguishing the case from that of *M'Kinlay v. Wilson*, 13 R. 210), that the account was not an account-current, and that the triennial prescription applied to it. *Batchelor's Trustees v. Honeyman*, June 18, 1892, p. 903.

Septennial limitation of cautionary obligations—Act 1695, c. 5.

2. A bond for borrowed money dated in November 1881 contained an obligation by the borrower to repay the principal sum at Whitsunday 1882, and an obligation by the borrower, and by certain persons as cautioners, to pay at said term the interest then due and interest half-yearly thereafter during the non-payment of the principal sum. Interest was duly paid on the bond until Martinmas 1890. In an action against one of the cautioners for payment of his share of the interest from Martinmas 1890 the defender pleaded that the cautionary obligation had been extinguished by the Act 1695, c. 5. *Held* by a majority of seven Judges (the Lord President, Lord Young, Lord Rutherford Clark, and Lord M'Laren) (*rev. judgment of Lord Stormonth Darling*) that as the interest sued for was not due till after the lapse of seven years from the date of the bond, the cautionary obligation to pay that interest was not affected by the Act. *Diss.* the Lord Justice-Clerk, Lord Adam, and Lord Trayner, who were of opinion that as payment of the principal sum and interest might have been enforced at any time within seven years from the date of the bond, after which no interest would have been due, the cautionary obligation was extinguished by the lapse of that time. *Molleson v. Hutchison*, March 9, 1892, p. 581.

PRESUMPTION. See *Donation*, 1—*Proof*, 3, 4.

PROCESS. *Ordinary procedure—Summons—Competency—Accumulation of defenders—Different grounds of action—Company.*

1. A shareholder in two limited tea companies brought an action against the directors of the companies, the companies themselves, and two private firms of B. & Co. and F. & Co. to have it declared that a sale by B. & Co. to the companies respectively of certain tea-gardens in India "was and is null and void," and that the defenders, the directors, were not entitled to enter into the sale; and further, that the two firms should be ordained jointly and severally to repay to the companies, in the proportion in which the companies were respectively interested, the sum of £79,000; or otherwise that the directors of the companies all jointly and severally should be ordained to pay to the companies the sum of £79,000. The pursuer averred that the two firms were represented in the directorate of the two companies; that B. & Co. were largely indebted to F. & Co.; that the partners of the firms, with a view to reduce this debt, made agreements on behalf of the two companies with B. & Co. whereby the tea-gardens, which belonged to B. & Co., and which were practically worthless, were sold to the companies in certain proportions to each at the exorbitant price of £79,000; that the money so received by B. & Co. was applied in reduction of their debt to F. & Co., and that this was a fraudulent scheme carried out by the directors (three of whom the pursuer admitted knew nothing about the scheme) to the loss and damage of the companies. *Held* that the action was incompetent in respect (1) that the first alternative conclusion was founded upon two distinct and separate wrongs, one against one corporation and another against another corporation; (2) that the second alternative conclusion must be regarded as a conclusion for damages in which a lump sum was sought to be obtained for separate losses sustained by two separate corporations; and (3) that the pursuer sought to recover the price without offering restitution of the subjects bought. *Smyth v. Muir*, Nov. 13, 1891, p. 81.

Ordinary procedure—Record—Amendment—Conditions—Court of Session Act, 1868, sec. 29.

2. Where a party to a cause has been allowed to amend the record on conditions imposed by the Lord Ordinary under section 29 of the Court of Session Act, 1868, he cannot, after making his amendments, object to the competency of the conditions.

Opinions that the Lord Ordinary has a discretionary power under the Act to attach conditions to such amendments as he may authorise with a view to the ultimate determination of the true points in controversy, and that the conditions are not limited to the mere payment of a sum of expenses. *Duthie Brothers & Co. v. Duthie*, June 20, 1892, p. 905.

Ordinary procedure—Record—Relevancy—Specification.

3. In an action by a betting commission-agent against his principal for recovery of the amount disbursed by the pursuer on account of the defender for bets lost the pursuer averred that certain of the bets in question had been laid with "a bookmaker." *Held* that the pursuer's averments were not irrelevant for want of the specification of the names of the bookmakers with whom the bets had been laid. *Knight & Co. v. Stott*, July 6, 1892, p. 959.
4. Averments of alleged want of notice of sale in an action of damages for wrongous diligence under a small-debt decree of sequestration for rent which were held not to be irrelevant for want of specification. *Gray v. Smart*, March 18, 1892, p. 692.

Ordinary procedure—Mandatory—Foreign.

5. Circumstances in which the Court refused *hoc statu* to ordain a party litigant who had gone to America to sist a mandatory. *Aitkenhead v. Bunten & Co.*, May 19, 1892, p. 803.

Ordinary procedure—Caution for expenses—Undischarged bankrupt.

6. An undischarged bankrupt lodged a claim in the sequestration of another bankrupt. The trustee having rejected the claim, the claimant appealed to

PROCESS—*Continued.*

the Sheriff. *Held* that the claimant could not be allowed to proceed without finding caution for expenses. *Dunsmore's Trustee v. Stewart*, Oct. 17, 1891, p. 4.

Ordinary procedure—Tender—Extrajudicial tender—Expenses.

7. An action was raised for payment of £169 as the amount remaining due to the pursuers on a contract to perform certain work. After service of the summons, but before it was called, the defender extrajudicially offered £155, but no expenses. This being declined, and the summons called, he offered in his defences £50, but made no offer of expenses. After proof, the pursuer was found entitled to £44. The Court, holding that the defender's conduct had been reasonable, and the action unnecessary, found the defender entitled to expenses. *Mavor & Coulson v. Grierson*, June 16, 1892, p. 868.

Expenses—Agent-Disburser—Compensation.

8. Where one of the parties in an action has obtained decree for certain expenses in the action, the agent of the other party is not entitled to decree in his own name for expenses to which his client has subsequently been found entitled. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Ordinary procedure—Reclaiming note—Failure to send copies of reclaiming note—6 Geo. IV. c. 120, sec. 18.

9. A reclaiming note was printed, boxed, enrolled on the Single Bills of the Second Division, and sent to the roll. The six copies of the reclaiming note were not sent to the respondents' agents till four days after the case had been sent to the roll. The respondents' agents had no intimation of the reclaiming note, and no knowledge of its having been presented, till the same period had elapsed. *Held* that the provisions of the above statute were directory merely and not imperative, and that it was in the power of the Court, if no prejudice were suffered by the respondent, to relieve the reclaimer of the consequences of his neglect. Motion by the respondent to dismiss reclaiming note *refused*. *Allan's Trustee v. Allan & Sons*, Oct. 23, 1891, p. 15.

Ordinary procedure—Reclaiming note—Reclaiming note against interlocutor refusing reference to oath—Court of Session Act, 1868, sec. 52.

10. A reclaiming note against an interlocutor refusing to allow a reference to oath has not the effect of submitting to review the prior interlocutors of the Lord Ordinary in terms of the Court of Session Act, 1868, sec. 52. *Clark v. Sawers*, July 20, 1892, p. 1090.

Ordinary procedure—Decree—Decree ad factum præstandum—Enforcement of obligation to build.

11. A feuar was taken bound to erect certain buildings on his feu within two years from the date of the feu-disposition. In an action by the superior for implement of the obligation, the Lord Ordinary ordained the feuar "forthwith" to erect the buildings in question. On a reclaiming note the Court recalled the Lord Ordinary's interlocutor, and holding that a decree *ad factum præstandum* should not leave the defender in doubt as to the measure of his obligation, decerned against him to erect the buildings in question "within one year" from the date of the interlocutor, parties having agreed that that time should be fixed.

Observations on the nature and effect of a decree ad factum præstandum.

Middleton v. Leslie, May 19, 1892, p. 801.

Ordinary procedure—Decree—Correction of error in date in a decree—Nobile officium.

12. The liquidator of a limited company having presented a note to the Court for authority to sell the superiority of subjects feued by the company under a feu-contract, dated 24th and 29th September 1878, obtained a decree in terms thereof. On its being discovered after the sale that the true dates of the feu-contract were 24th and 27th September 1878, the Court allowed correction of the error in the note, and granted warrant to make a similar

PROCESS—Continued.

correction on the extract decree and record copy thereof. Liquidators of Benhar Coal Co., Limited, Nov. 17, 1891, p. 108.

Ordinary procedure—Expenses.

13. (*Per Lord Young*) "I think that the most expedient course is that we should consider and decide the question of expenses when we are forming and expressing our opinion on the merits." *Allan's Trustees v. Allan & Son*, Oct. 23, 1891, p. 15.

Proof—Diligence—Recovery of documents—Defenders' books.

14. A firm, carrying on business in Birmingham, raised an action of damages for slander against the publishers of a Glasgow newspaper. The pursuers applied for a diligence to recover excerpts from the defenders' books, to shew the number of copies of the newspaper containing the alleged slander sent to Birmingham. In supporting their application, they stated that they intended to prove that a large number of copies were sent to Birmingham. There was no averment to this effect on record. *Held (diss. Lord Rutherford Clark)* that the diligence must be refused. *British Publishing Co., Limited, v. Hedderwick & Sons*, July 14, 1892, p. 1008.

Proof—Production of document after close of proof.

15. It is a matter for the discretion of the Court whether they will allow a document to be produced and put in evidence by a party after he has closed his proof.

Circumstances in which the Court permitted a document which was technically essential to the pursuer's title to be so produced. Liquidator of the Universal Stock Exchange Co., Limited, *v. Howat*, Nov. 20, 1891, p. 128.

Proof—Jury trial—Failure to proceed—A. S., 16th Feb. 1841, sec. 46.

16. *Held* that the above section does not apply in a case where a trial has taken place, a verdict been returned for the pursuer, and that verdict set aside, and the pursuer for twelve months thereafter has failed to take any further step in the action. *Macfarlane v. Beattie & Sons*, July 1, 1892, p. 953.

Proof—Jury trial—Issue—Action at common law and under the Employers Liability Act, 1880—Reparation—Master and Servant—Company.

17. In an action of damages at common law and under the Employers Liability Act, 1880, brought by a coal miner against his employers, a limited company, for damages in consequence of his having been injured by a bogie which had broken loose on an inclined plane in the mine, the pursuer averred that the bogie had broken loose through a defective system of working it which had become the practice in the mine, and that this practice was known to and authorised by the defenders, their manager, underground manager, and oversman, and he proposed an issue in general terms, with a schedule, claiming as damages the amount sued for at common law. The defenders moved that the sum stated in the schedule should be restricted to the amount sued for under the Employers Liability Act, 1880, on the ground that the action was irrelevant at common law, in respect that the pursuer had not averred that the defenders, acting through persons entitled to represent them, had authorised the practice complained of. The Court, without deciding the relevancy of the action at common law, *refused* the motion, and allowed the issue as proposed by the pursuer. *Henderson v. John Watson, Limited*, July 2, 1892, p. 954.

Proof—Jury trial—Issue—Slander—Want of probable cause—Privilege.

18. *Held* that, where a pursuer seeks to recover damages for a statement, imputing misconduct to him, which has been made by the defender, in discharge of his duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause.

Opinion (per Lord Trayner) that the same rule applies where the statement is made in exercise of a right. *Hill v. Thomson*, Jan. 16, 1892, p. 377.

PROCESS—*Continued.*

Proof—Jury trial—Issue—Reparation—Slander—Concurrence in and adoption of the slander of another.

19. In an action of damages for slander against A and B, the pursuer alleged that on the occasion of his election to the eldership in a parish church, the defenders had deliberately and maliciously resolved to use means to prevent his ordination; that they had prepared, or caused to be prepared, and published a petition to the minister to be signed by members of the congregation, representing that the pursuer's appointment as an elder would be injurious to the interests of the church; that the defenders, acting in concert and in pursuance of their malicious design, proceeded to canvas certain members of the church for signatures to the petition; that the defenders called upon S to obtain his signature to the petition, and that A, in his presence, made certain false and calumnious and injurious statements regarding the pursuer; that B was then present and heard what A said, and concurred with him in said slanderous statement uttered in pursuance of their said malicious design. The pursuer proposed the issues:—(1) Whether A made the false and calumnious statement in presence of S and B? and (2) whether B falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by A? *Held* that the second issue could not be allowed and that there should be one issue, viz., Whether the defenders, or either of them, and which of them, in presence and hearing of S, falsely and calumniously stated, &c.?

Held by Lord Stormonth Darling (Ordinary), and acquiesced in, that the pursuer was not bound to put in issue malice and want of probable cause, as the defenders were not privileged in canvassing for signatures to the petition.

Held by Lord Stormonth Darling, and acquiesced in, that in issues relating to statements by the defenders to the kirk-session want of probable cause must be put in the issue as well as malice. *Jack v. Fleming*, Oct. 15, 1891, p. 1.

Proof—Jury trial—Reparation—Amount of damages—Excess of damages.

20. The Court will be slow to set aside the verdict of a jury in an action for damages for personal injury on the ground of excess of damages, if it cannot be shewn that the jury took into account elements which they were not entitled to take into account.

Observations as to the elements which a jury might legitimately take into account in estimating the amount of damages for personal injury in an action in which it was judicially admitted that the pursuer had suffered no "specific loss in his business in consequence of the injury sustained by him." *McLaurin v. North British Railway Co.*, Jan. 5, 1892, p. 346.

Proof—Jury trial—Issue—Lease—Parole.

21. In an action of damages for wrongful sequestration at the instance of a tenant against his landlord the pursuer averred that the sequestration for non-payment of rent was in breach of an agreement to give an abatement from the rent stipulated in the written lease. The alleged agreement was not said to be instructed by any writing. *Held* that it was incompetent to prove it by parole, and that an issue must be disallowed. *Turnbull v. Oliver*, Nov. 21, 1891, p. 154.

Proof—Jury trial—Issue—Slander—Privilege.

22. Averments in an action of damages for alleged slander, with reference to which the Court *refused* to insert malice and want of probable cause in the issue, on the ground that the pursuer's statements did not necessarily disclose a case of privilege, and that if a case of privilege arose at the trial it was in the power of the presiding Judge to direct the jury accordingly. *Reid v. Coyle*, May 13, 1892, p. 775.

Particular action—Declarator—Declarator ab ante—Succession—Condition—Real burden.

23. The proprietrix of a heritable estate died leaving a *mortis causa* disposition of the estate to A and the heirs of his body, whom failing, to B and the

PROCESS—*Continued.*

heirs of her body, whom failing, &c., "under this declaration, burden, and condition, that in the event of any part of the said lands and estate . . . that may remain unsold at my death being thereafter sold or disposed of or excaimbed by any proprietor or possessor of the same, or adjudged, or attempted to be adjudged, or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such of the children of F as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000."

A, the institute, after succeeding under the destination, died, without heirs of his body, leaving a disposition of the estate to B for her liferent alimentary use only, and the heirs of her body in fee, whom failing, to C, a stranger to the original destination, and the heirs of his body, also strangers.

When B, who was a married woman, and had no heirs of her body, was sixty-three years of age, one of the children of F brought an action against C for declarator that in consequence of A's disposition the provision in the original settlement in favour of the children of F had come into operation. *Held, inter alia*, that the action was not premature. *Falconar Stewart v. Wilkie*, March 15, 1892, p. 630.

Particular actions—Multiplepinding.

24. When trustees under a testamentary deed bring an action of multiplepinding to have a question which has been raised as to its validity determined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration. *Hall's Trustees v. Macdonald*, March 8, 1892, p. 567.

Particular actions—Petition—Procedure in vacation—Company—Act 49 Vict. c. 23, sec. 5.

25. *Held* that the Lord Ordinary on the Bills has, under the above section, jurisdiction to entertain in vacation a petition for confirmation of reduction of capital, and that although no remit has been made to a permanent Lord Ordinary. *Niddrie and Benhar Coal Co., Limited*, May 31, 1892, p. 820.

Particular actions—Suspension—Caution.

26. Circumstances in which (*rev. judgment of Lord Low, Ordinary*) the Court *refused* to allow suspension of a charge upon a bill without caution. *Renwick v. Stamford, Spalding, and Boston Banking Co., Limited*, Nov. 24, 1891, p. 163.

Appeal—Sheriff.

27. Question, whether the Custody of Children Act, 1891, sec. 1, applied to an application made to the Sheriff and afterwards appealed to the Court of Session. *Mackenzie v. Keillor*, July 6, 1892, p. 963.

Appeal—Sheriff—Objection to competency of appeal not stated in limine.

28. In a Sheriff Court appeal for jury trial, the Court in the Single Bills, without objection, ordered issues, and subsequently put the case to the Summar Roll. When the case came out for hearing in the Summar Roll the respondent objected to the competency of the appeal on the ground that the time for appealing had elapsed. *Held* that it was competent for the Court to entertain the objection although it had not been stated in the Single Bills. *Hillhouse v. Walker*, Nov. 3, 1891, p. 47.

Appeal—Implement.

29. The procurator-fiscal of a burgh presented a complaint to the magistrates craving them to ordain a resident therein to destroy a dog belonging to him, which was alleged to be vicious, or to secure it safely, and failing his doing so for warrant to destroy it or to secure it. After proof the magistrates ordained the respondent to find caution that he would confine the dog, and failing his doing so within twenty-four hours granted warrant to destroy it. The respondent having found caution appealed to the Court of Session.

PROCESS—Continued.

Held (1) that the appeal was competent, and (2) that the interlocutor had not by the finding of caution been implemented so as to exclude appeal. *Rowan v. Gaffney*, Nov. 7, 1891, p. 62.

Appeal—Amendment of record—Expenses.

30. In an appeal from the Sheriff Court for jury trial in an action for damages for personal injuries, the Court were prepared to find the averments irrelevant, and to dismiss the action, and the pursuer was allowed to amend his record only upon payment of the expenses in the cause from the date of closing the record. *Gallagher v. Pattison*, Nov. 10, 1891, p. 79.

Appeal—Multiplepointing—Whole subject-matter of the competition—Court of Session Act, 1868, sec. 53.

31. In a multiplepointing in the Sheriff Court one of the claimants was found entitled to be ranked on the fund *in medio*, but no operative decree was pronounced. Effect was also given to an extrajudicial arrangement in regard to expenses. An appeal to the Court of Session *held* incompetent, in respect that "no final judgment" in terms of the 53d section of the Court of Session Act, 1868, had been pronounced, notwithstanding that the respondent desired to waive any objection to competency. *Governors of Strichen Endowments v. Diverall*, Nov. 13, 1891, p. 79.

Appeal—Competency—Expenses.

32. In an appeal in a Sheriff Court action the Court assoilzied the defender and found the pursuer liable "in the expenses in this Court." The Sheriff having subsequently given decree in favour of the defender for expenses in the Sheriff Court, the pursuer appealed. *Held* (1) that the interlocutor of the Court had exhausted the cause, and that the interlocutors subsequently pronounced in the Sheriff Court were incompetent; and (2) that it was competent to appeal against them. *Macgillivray v. Mackintosh*, Nov. 14, 1891, p. 103.

Appeal—Proof or jury trial—Judicature Act, 1825, sec. 40.

33. In an action of damages for assault which had been appealed for jury trial under the 40th section of the Judicature Act, the defender moved the Court to send the case back to the Sheriff Court, on the ground that it was of such a trifling character as not to be suitable for jury trial. The Court, on the ground that if the cause had originated in the Court of Session it would have been sent to a jury, *refused* the defender's motion, and approved of issues. *Crabb v. Fraser*, March 8, 1892, p. 580.

Appeal—Sheriff—A. S. 10th March 1870, sec. 3.

34. *Held* that the provision as to finality in the above Act of Sederunt is applicable only to an interlocutor which can competently be brought up on appeal, and therefore that it did not apply where a party had appealed incompetently and "abandoned his appeal," so as to exclude his having the interlocutor reviewed in a competent appeal subsequently taken. *Weir v. Tudhope*, June 14, 1892, p. 858.

Appeal—Sheriff—Extract—Court of Session Act, 1868, secs. 68 and 69—Sheriff Court Act, 1876.

35. In an action in a Sheriff Court the Sheriff pronounced certain interlocutors which could not be appealed against as they did not exhaust the cause. The pursuer extracted them. Thereafter the Sheriff pronounced an interlocutor finding it unnecessary to pronounce further on the merits, and awarding expenses to the pursuer. The defender then appealed to the Court of Session. The pursuer maintained that the appeal could not bring up any interlocutor which had been extracted. The Court *held* that whether the interlocutors were validly extracted or not, under sec. 69 of the Court of Session Act the appeal was "effectual to submit to review the whole interlocutors in the cause to the effect of enabling the Court to do complete justice." *Weir v. Tudhope*, June 14, 1892, p. 858.

Appeal—Competency—Husband and Wife—Terce—Brieve—Act 1503, cap. 77—Act 1681, cap. 10.

36. The heir-at-law is not entitled to obtain a sist of the proceedings under a

PROCESS—*Continued.*

briefe of service and cognition to terce on the ground that he is about to bring a declarator of the invalidity of the marriage, or on the ground that he is about to raise an action for declarator that the widow is barred from claiming terce by reason of having accepted a conventional provision out of heritage abroad belonging to the deceased.

Opinion (per Lord M'Laren) that under a briefe of terce it is competent for the inquest to consider whether the widow is barred from claiming terce by reason of having accepted a conventional provision.

Opinions that a briefe of service and cognition to terce may be removed to the Court of Session by appeal at any time before trial before the Sheriff.

Observations as to the competency of an appeal after trial and verdict.

Craik v. Penny, Dec. 18, 1891, p. 339.

Appeal—Competency—Bankruptcy—Election of Trustee—Bankruptcy Act, 1856, sec. 71.

37. At the election of a trustee in a sequestration, it was objected to an affidavit and claim that a bill by which it was vouched was prescribed, and that an acknowledgment of indebtedness indorsed on the bill, being holograph, did not prove its own date. The Sheriff disallowed the vote on the ground that the acknowledgment did not bear to be holograph. In an appeal on the ground that the Sheriff had exceeded his jurisdiction in giving effect to an objection which had not been stated, *held* that the Sheriff had not exceeded his jurisdiction, and that the appeal was incompetent under the 71st section of the Bankruptcy Act, 1856. *Smith v. Wilson*, Feb. 4, 1892, p. 428.

Questions as to *res judicata*. See *Res Judicata*. As to reference to oath. See *Proof*, 9, 10. As to appeals to House of Lords. See *Appeal*. As to appeals under Valuation Acts. See *Valuation Acts*, 4, 5.

PROOF. *Family tradition—Poor—Settlement.*

1. In an action by a relieving parish against a parish alleged to be that of the pauper's birth, the sole proof that the pauper had been born in the defending parish consisted of the testimony of the pauper, who was sixty-nine years of age, and of his sister, who deponed that their mother, now deceased, had frequently told them that the pauper was born at Scotston, in the defending parish, and that they always understood that he was born there. *Held (diss. Lord Young)* that it was not proved that the pauper was born in the defending parish. *Wallace v. Ross*, Dec. 8, 1891, p. 233.

Lease—Parole.

2. In an action of damages for wrongful sequestration at the instance of a tenant against his landlord the pursuer averred that the sequestration for non-payment of rent was in breach of an agreement to give an abatement from the rent stipulated in the written lease. The alleged agreement was not said to be instructed by any writing. *Held* that it was incompetent to prove it by parole, and that an issue must be disallowed. *Turnbull v. Oliver*, Nov. 21, 1891, p. 154.

Extrinsic evidence.

3. Succession—Incidence of burden—Testament. *Brand v. Scott's Trustees*, May 13, 1892, p. 768.

Onus—Reparation—Machinery—Latent defect.

4. *Observations* upon the *onus* of proof where an accident happens owing to a latent defect in machinery. *Milne v. Townsend*, June 3, 1892, p. 830.

Bastard—Filiation—Proof of paternity.

5. *Observations* on the nature of the evidence which will be sufficient to establish the paternity of a bastard in an action of filiation. *M'Kinven v. M'Millan*, Jan. 13, 1892, p. 369.

Amount of damages.

6. *Observations* as to the elements which a jury might legitimately take into account in estimating the amount of damages for personal injury in an action in which it was judicially admitted that the pursuer had

PROOF—*Continued.*

suffered no "specific loss to his business in consequence of the injury sustained by him." *M'Laurin v. North British Railway Co.*, Jan. 5, 1892, p. 346.

Process—Diligence—Recovery of documents—Defenders' books.

7. A firm, carrying on business in Birmingham, raised an action of damages for slander against the publishers of a Glasgow newspaper. The pursuers applied for a diligence to recover excerpts from the defenders' books, to shew the number of copies of the newspaper containing the alleged slander sent to Birmingham. In supporting their application, they stated that they intended to prove that a large number of copies were sent to Birmingham. There was no averment to this effect on record. *Held (diss. Lord Rutherford Clark)* that the diligence must be refused. *British Publishing Co., Limited, v. Hedderwick & Sons*, July, 14, 1892, p. 1008.

Valuation-roll—Lease.

8. *Opinion* that a return by a landlord to an assessor under the Lands Valuation Acts of the rent of a farm is not conclusive evidence, as between landlord and tenant, of an agreement to reduce the rent fixed in a written lease. *Rattray v. Leslie's Trustee*, June 11, 1892, p. 853.

Reference to oath—Construction of deposition—Admissibility of letters.

9. In an action by a law-agent for payment of a prescribed account for professional services, the pursuer referred the cause to the defender's oath. In his oath the defender admitted that the pursuer had rendered him the services referred to in the account, but deponed that he had only promised to pay what he was able, and that he understood the pursuer was carrying on the litigation as a speculation. *Held* that the words of the oath imported an obligation by the defender to remunerate the pursuer, limited only by his means, and that the oath was affirmative of the reference.

Observations upon the question how, in an examination under a reference to oath, documents may be made available. *Broatch v. Dodds*, June 11, 1892, p. 855.

Reference to oath—Reference to oath of agent—Reference on question of law.

10. Clark charged Sawers upon a decree which he held against Sawers, and the principal sum in which had been paid, for payment of a sum in name of interest alleged to have accrued on the decree. Sawers brought a suspension pleading *res judicata* in respect of an interlocutor pronounced in an action by Clark against him for payment of the interest. Clark denied that the question was *res judicata*, and averred that he had taken payment of the principal sum as an interim settlement and under reservation of his right to interest. The Lord Ordinary sustained the plea of *res judicata*, and suspended the charge. This interlocutor having become final, Clark lodged a minute of reference in which he referred it "to the oath of the complainer, whom failing, to his solicitor, . . . who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at, whether the payment made by the complainer to the respondent was an interim payment, and the settlement then arrived at an interim settlement." *Held* that the reference was incompetent, in respect that it was a reference to the oath of the complainer's agent, and (*per* the Lord President) on the further ground that the interlocutor of the Lord Ordinary sustaining the plea of *res judicata* was a judgment on a question of law and not on a question of fact. *Sawers v. Clark*, July 20, 1892, p. 1090.

Culpable homicide—Letters of panel.

11. In the course of the trial of a woman for the culpable homicide of her infant child her counsel proposed to put in evidence certain letters written by her to her mother prior to and during her pregnancy which shewed that she had suffered from irregularity of menstruation prior to and subsequent to her becoming pregnant. The object of the evidence was to shew that she was ignorant of the probable period of her confinement, and that

PROOF—Continued.

her labour had come upon her unexpectedly. *Held* (per Lord Young) that the letters were inadmissible as evidence for the panel. Her Majesty's Advocate v. Scott, March 29, 1892, Just. Cases, p. 63.

See *Company*, 8—*Donation—Husband and Wife*, 1—*Loan—Partnership*, 1, 3—*Patent*, 2—*Process*, 14 to 22.

PROPERTY. Disposition—Superior and Vassal—Construction of disposition.

1. In 1796 the Duke of Argyll, who held the *plenum dominium* of the lands of Castle Campbell of the Crown, disposed in feu the lands of Hillfoot, part of Castle Campbell, to Drysdale, but reserved the coals and coalheughs. Tait acquired the Castle Campbell estate remaining in the Duke. Tait became bankrupt in 1828, and in 1837 Tait's trustee, on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, who had in 1796 acquired Drysdale's feu, had offered a certain sum for these subjects, and had been preferred to the purchase, conveyed to Moir, "all and whole the town and lands of Hillfoot . . . all as at present possessed" by Moir and his tenants. No coal had at this time been worked in Hillfoot. The feu-rights and infeftments granted by the disponent's predecessors to feuars were excepted from the warrandice clause. The disposition contained an assignation to an unexecuted precept of sasine in a crown charter of resignation and confirmation, which Tait had obtained, "in so far as applicable to the lands of Hillfoot thereby disposed, to the end that" Moir "may be more readily infeft and seased in the premises, and also in and to the whole feu-duties and other services and casualties payable from the said lands and others above disposed." "Surrogating hereby" Moir "in my full right and place of the premises for ever." On the precept assigned Moir was infeft. In 1890 Orr, who had acquired from Tait's trustee in 1860 the lands of Castle Campbell, with a description which included the lands of Hillfoot, and the "coals and coalheughs," raised an action against Moir's testamentary trustees to have it declared that the pursuer was proprietor of the coals in Hillfoot (which still remain unworked), in virtue of the conveyance of 1860. The defenders pleaded the conveyance of 1837. *Held* by a majority of the whole Court that the defenders should be assoilzied, in respect that the conveyance of 1837 on a just construction carried the coals along with the superiority to Moir, *diss.* Lord Justice-Clerk, Lord Young, Lord Rutherford Clark, Lord Wellwood, Lord Kyllachy, and Lord Low, who *held* that that conveyance carried nothing but the superiority. *Orr v. Moir's Trustees*, March 18, 1892, p. 700.

Sale—Breach of contract—Rescission—Damages—Actio quanti minoris.

2. Where a piece of ground was sold with absolute warrandice, and, while things remained entire, it was discovered that the ground was subject to restrictions against building. *Question* whether the purchaser was entitled to claim damages and retain possession.

Observations (per Lord M'Laren) on the remedies open to a purchaser of moveable or heritable property in cases of breach of the contract of sale. *Louttit's Trustees v. Highland Railway Co.*, May 18, 1892, p. 791.

Sale—Conveyance—Whether implied right of access.

3. Where in a conveyance of property a roadway is mentioned as a boundary it is not *prima facie* included in the grant, nor does the mention of it imply that it is always to be kept open as a roadway, and although a sale of heritable subjects always implies a right of access to these subjects, the right is satisfied if the disponent retains such access as existed at the date of the grant. *Louttit's Trustees v. Highland Railway Co.*, May 18, 1892, p. 791.

See *River—Servitude—Sheriff*, 1—*Process*, 11.

PROVISIONS TO CHILDREN. Bond of provision—Bankruptcy—Surrogatum.

The proprietor of an estate, which he had disentailed, became bankrupt. At

PROVISIONS TO CHILDREN—*Continued.*

the date of his sequestration the estate was burdened with a bond for £6000 which he had granted to trustees "in trust, for payment to the children of" his "marriage surviving me who would not have succeeded" under the entail, "or in case of such of them as shall predecease me, their lawful issue or representatives claiming right in virtue of special settlement by marriage-contract of the sums to be received by them." The bond contained a declaration that if at the granter's death there should only be two of such children, issue or representatives, surviving, the obligation should be restricted to £5000, and if there should only be one, £4000, and that if there should be none the provision should lapse. The date of payment was to be the first term twelve months after the granter's death. In the sequestration the trustees for the children, of whom there were two, were ranked for £2510, as the value of their contingent claim on the estate, and received payment of that sum. In a special case the two children claimed the sum from the trustees as the value of their contingent right, or at least the interest of the fund. *Held* that the sum, with the interest thereon, fell to be held by the trustees till the first term a year after the granter's death. *Maxwell Heron's Trustees v. Maxwell Heron*, June 23, 1892, p. 922.

PUBLIC HEALTH. *Statute—Construction—Public Health Act, 1867, secs. 45 and 46—Glasgow Police Acts, 1862 and 1866.*

1. The provisions of the Glasgow Police Acts, 1862 and 1866, dealing with underground dwellings, enact certain requirements from which, however, they exempt such dwellings as are registered in pursuance of the Acts. The Public Health Act, 1867, contains similar but enlarged provisions relating to underground dwellings, but without the exemptions. In a prosecution under the Public Health Act for contravention of these provisions in the case of an underground dwelling in Glasgow, *held* that it was not a good defence that the dwelling was registered under the Glasgow Police Acts. *Lang v. Munro*, March 9, 1892, Just. Cases, p. 53.

Police—Aberdeen Police and Water-Works Act, 1862, secs. 140-145.

2. A person was convicted of a contravention of section 140 of the Aberdeen Police Act, 1862, upon a complaint which set forth that he permitted to remain on a piece of land occupied by him in Aberdeen a large quantity of paraffin, "which was injurious to health and offensive to the occupiers of premises adjoining." It was proved that the paraffin was offensive and injurious to the health of his neighbours. *Held* that the words "any matter or thing whatever injurious to health or offensive to" the occupiers of adjoining premises were to be read as meaning any matter or thing *ejusdem generis* with those specified, and did not apply to goods stored for commercial purposes, although they might be injurious to health and offensive to the neighbours, and conviction *quashed*. *Walker v. Lamb*, Feb. 16, 1892, Just. Cases, p. 50.

Public Health Act, 1867, sec. 26—Possession of fish unfit for human food.

3. *Held* that to make a relevant charge of an offence under the above section it was necessary to allege that the carcase, &c. was in fact exposed for sale, or was in fact intended to be used as human food, and that it was not sufficient to allege that there was probable cause for believing it to be intended for human food. *Phillips v. Auld*, Jan. 9, 1892, Just. Cases, p. 29.

County Council—Bye-law for suppression of nuisance—Local Government Act 1889, sec. 57.

4. Terms of a bye-law which was *held* to be beyond the powers given to County Councils by section 57 of the Local Government Act, 1889, to suppress by means of a bye-law nuisances not already punishable in a summary manner by virtue of any Act in force throughout a county. *Eastburn v. Wood*, July 14, 1892, Just. Cases, p. 100.

See *Justiciary Cases*, 4, 24—*Police*.

PUBLIC-HOUSE. *Breach of Certificate—Licensed grocer—Public-Houses Act Amendment Act, 1862, Form 3, Schedule A—“Give to be drunk or consumed on the premises.”*

1. A customer called on a grocer in his licensed premises to settle an account, and to introduce a friend as a new customer. He asked that his friend should be supplied with a half glass of whisky. The grocer supplied the whisky as requested, and it was drunk by the person so introduced on the premises. The whisky was not paid for. *Held* that the grocer had committed a breach of his certificate. *Macpherson v. Campbell*, May 27, 1892, *Just. Cases*, p. 99.

Prosecution for selling spirits without a certificate against an innkeeper holding temporary licence from Commissioners of Inland Revenue—Oppression—Public-Houses Act Amendment Act, 1862, sec. 5.

2. An innkeeper, whose licence expired on 15th May, but whose occupancy of the inn, in virtue of the Removal Terms (Burghs) Act, 1886 (49 and 50 Vict. c. 50), sec. 4, did not expire till the 28th, presented an application to the Commissioners of Inland Revenue, with concurrence of two local Justices of the Peace, craving authority to sell exciseable liquors from the 15th till the 28th. The application was granted upon his paying a quarter's licence duty. On receiving notice from the chief constable that he was not entitled to sell without a certificate, he ceased to do so after the 17th. On the 20th he was charged and subsequently convicted by a magistrate who was one of the Justices of the Peace who had concurred in the application to the Commissioners for the offence of selling liquor on the 17th without a certificate. The Court *sustained* an appeal by him, holding that the prosecution was, in the circumstances, oppressive. *Miller v. White*, July 18, 1892, *Just. Cases*, p. 104.

Contravention of Acts—Traffic in liquor in any “place or premises” without certificate—“Place”—Public-Houses Act, 1862, sec. 17, and secs. 6, 8, 16.

3. The Public-Houses Act, 1862, enacts by sec. 17 that every person trafficking in exciseable liquors “in any place or premises without having obtained a certificate in that behalf” shall be guilty of an offence. A complaint under this section stated that the accused did on a certain date “at a tent in a grass field on the farm of M. traffic in exciseable liquors without a certificate.” The accused, having been convicted, maintained in a suspension that the complaint was not relevant, because a field was not “a place” capable of being certificated, and therefore sec. 17 of the Act did not apply. *Held (diss. Lord Trayner)* that the complaint was relevant, because a particular field was a place for which, under the statute (sec. 6), a special certificate might be granted for a particular occasion, and therefore that sec. 17 applied to the case. *Hutcheon v. Cadenhead*, Jan. 9, 1892, *Just. Cases*, p. 32.

Contravention of Acts—Illegal trafficking in exciseable liquors—Relevancy—Public-Houses Amendment Act, 1862, sec. 20.

4. *Held* that to make a relevant charge under section 20 of the above Act it was not sufficient to set forth that a magistrate, upon being satisfied by the personal examination on oath of a credible witness that there was reasonable ground for believing that exciseable liquors were trafficked in within unlicensed premises occupied by the accused, had granted a warrant to search the premises, and that upon its execution exciseable liquor had been found therein exceeding one gallon, but that it was necessary to set forth in addition that the liquors found were trafficked in or were kept for the purpose of traffic. *Batchen v. Morrison*, Jan. 9, 1892, *Just. Cases*, p. 25.

Contravention of Acts—Review—Suspension—Public-Houses Act Amendment Act, 1862.

5. A person who had been convicted of an offence against the Public-Houses Acts by trafficking in spirits without a certificate brought a suspension of the conviction, alleging that the holder of a licence for the premises in question had executed a trust for creditors, that the licence was in force,

PUBLIC-HOUSE—Continued.

that the trustee had put him (the complainer) in charge of the business till a purchaser for it should be obtained, and that he was simply acting as the trustee's servant. He pleaded that the facts involved no contravention, and that the proceedings were oppressive. The Court *refused* the suspension, on the ground that by the Public-Houses Act Amendment Act, 1862, the judgment of the magistrate was final on the facts, and that if the magistrate thought the facts warranted a conviction, there was no oppression.

Observed that if the complainer wished to raise the legal question whether the facts proved warranted the charge of contravention he should have asked the magistrate to state a case.

Opinion that if the facts set forth by the complainer had been found as the facts in a stated case the conviction could not have been upheld, since they constituted no contravention of the Public-Houses Acts. *Rattray v. White*, Dec. 18, 1891, Just. Cases, p. 23.

PUBLIC OFFICIAL. See *Justiciary Cases*, 18.

RAILWAY. *Compulsory powers—Compensation—Tenant's interest—Notice—Lands Clauses Consolidation Act, 1845, secs. 17 and 115.*

1. A railway company gave notice to an agricultural tenant that they intended to take part of his farm under the Lands Clauses Consolidation Act, 1845, and that they required him to state his claim for compensation, and that they were willing to treat with him in regard to it, and at the same time demanded that if he claimed compensation under an unexpired lease he should produce the lease or other evidence along with his claim within twenty-one days, and that failing his doing so, he would be considered as a tenant from year to year in terms of section 115. *Held* that the railway company was not entitled under section 115 to demand production of the lease until a claim for compensation had been made by the tenant. *Forfar and Brechin Railway Co. v. Bell*, May 17, 1892, p. 786.

Compulsory powers—Property—Servitude—Callander and Oban Railway Act, 1878, sec. 28.

2. When land is taken by a railway company under their compulsory powers it is taken absolutely and free of all servitudes, unless it be otherwise provided in the special Act.

A railway company by their private Act obtained compulsory powers to acquire land, and were taken bound to satisfy every claim competent to the town-council of a burgh for the "loss of all rights of servitude of which they shall be deprived by the construction of the company's works." Some years after the execution of the works the burgh contended that this clause by implication saved its servitude of way over a strip of ground in front of the railway station, which had been taken by the company and converted by them into a garden, in respect that no works had been constructed to deprive the burgh of its right. *Held* that the servitude had been extinguished. *Town-Council of Oban v. Callander and Oban Railway Co.*, June 21, 1892, p. 912.

Compulsory powers—Reparation—Railways Clauses Consolidation Act, 1845, sec. 6—Glasgow Central Railway Act, 1888, sec. 41.

3. A railway company authorised by a special Act to construct certain railways in Glasgow was, by one of its clauses bearing to be for the protection of the Corporation of Glasgow, bound to make such alterations on sewers affected by the construction of the railway as the corporation might deem necessary. *Held* that section 6 of the Railway Clauses Act did not apply to damage to lands caused by the construction of sewers under section 41 of the special Act, as such damage was not caused by the construction of the railway. *Caledonian Railway Co. v. M'Bride*, Dec. 8, 1891, p. 255.

Reparation—Culpa—Carriage—Bags of sugar in transit contaminated by leakage from boxes containing poison—Liability of railway company to persons poisoned thereby.

4. Bags of sugar in course of carriage by railway were contaminated by leak-

RAILWAY—Continued.

age from a box containing an arsenical solution marked weed-killer. In an action for *solatium* and damages by relatives of persons poisoned by the sugar against the railway company and the merchant who sold the sugar, the Court (*rev. judgment of Lord Stormonth Darling*) *assolizied* the railway company, holding (1) that the primary responsibility for the accident lay upon the consignors of the weed-killer who had sent the box to the railway company without warning them of the extremely poisonous nature of its contents; (2) that it was proved that the railway had no reason to suspect the poisonous character of the contents of the box; (3) that the mere fact that the company's servants had placed the leaking box near the sugar inferred no such delict as would make the company liable to the pursuers; and (4) that the failure of the railway company's servants to tell the consignee that the bags were wet with a liquid which they believed to be sheep dip inferred no such delict.

Held further (aff. judgment of Lord Stormonth Darling), that the consignees of the sugar fell to be *assolizied*, no fault having been established against them. *Cramb v. Caledonian Railway Co.*, July 19, 1892, p. 1054.

Reparation—Fire caused by spark from engine—New type of engine in which old means of arresting sparks omitted.

5. The owners of a flax store near the line of the Caledonian Railway Company brought an action against the company for damages on account of the destruction of the store, which had been set on fire by a spark from one of the company's engines. The pursuers alleged that the engine was improperly constructed in respect that it had no "spark arrester." The evidence shewed that spark arresters were in common use at one time, but in the case of engines of a modern type, such as the engine which caused the fire was, they had been discontinued, both because they impaired the efficiency of the engine and because other means were adopted of preventing the emission of sparks, which, as the defenders' witnesses—a number of locomotive engineers—alleged, were as efficacious as spark arresters; and it was proved that the use of spark arresters had been given up by most of the large English railway companies. The pursuers, on the other hand, adduced witnesses, who deponed that in their opinion spark arresters ought to be used in modern engines. *Held* that it had not been proved that the defenders were negligent in using an engine which had no spark arrester, and therefore that they fell to be *assolizied*. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 608.

Reparation—Contributory negligence.

6. A flax store was built near a railway, with no window or other means of lighting except a door facing the railway. The flax was set on fire by a spark from a passing train, when the door was open. *Held* that there was no contributory negligence on the part of the owner of the store. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 608.

Arbitration.

7. Reference of all differences as to the provisions of certain sections of a private Act of Parliament. *Magistrates of Glasgow v. Caledonian Railway Co.*, June 17, 1892, p. 874.

See *Reparation*, 4.

REAL BURDEN. See *Succession*, 12—*Superior and Vassal*, 1.

RECOMPENSE. *Agent and Principal—Agency for a business during a fixed period.*

- Patmore & Company* agreed with *Cannon & Company* to act as *Cannon & Company's* agents in Scotland for the sale of goods manufactured by *Cannon & Company*, consisting of leather goods, dips, and glues, at a certain rate of commission and other allowances for a period of five years, unless broken by mutual consent and with a reconsideration of terms for leather at the end of the first year. Before the end of the first year *Cannon & Com-*

RECOMPENSE—*Continued.*

pany intimated that they had given up their leather business. Patmore & Company in consequence sued Cannon & Company for breach of contract, and maintained also, alternatively, that Cannon & Company were bound to recompense them for certain outlay, with reference to which they averred that "when said agreement was entered into the pursuers, at the defenders' request, arranged to change their office in Glasgow and to remove to a larger one with greater storage and show-room accommodation in order to suit the requirements of the defenders' business," and that this additional accommodation, and consequent increase of rent, had become unnecessary through the defenders' breach of contract. The Court *dismissed* the action, holding (1) that there had been no breach of contract, it not being a condition of the contract that Cannon & Company should continue their leather business for a year; and (2) that the averments in support of the alternative claim for recompense were irrelevant. Patmore & Co. v. B. Cannon & Co., Limited, July 14, 1892, p. 1004.

REFERENCE TO OATH. See *Proof*, 9, 10.

REI INTERVENTUS. *Improbative writ—Cautioner.*

A bank agreed to make advances to A on his obtaining B's guarantee. A formal letter of guarantee, ending with the words "In witness whereof," was then prepared by the bank and handed to A for execution by B. A obtained B's signature and afterwards got two persons to sign as witnesses who had not seen B subscribe nor heard him acknowledge his subscription. A returned the document to the bank with the names and designations of the witnesses, the testing-clause was filled up by the bank, and the bank made an advance to A upon the faith of the guarantee. In an action by the bank upon the letter of guarantee against B the defender pleaded that he was not bound, as the deed was not tested. The above facts were admitted or proved. *Held* that the defender having signed the deed and delivered it to A, who was *in hac re* the bank's agent, had delivered it to the bank as a guarantee for advances to be made to A, and that the bank having made advances upon the faith of it, the defender's imperfect obligation had been validated by *rei interventus*. National Bank of Scotland, Limited, v. Campbell, June 17, 1892, p. 885.

REPARATION. *Obligation ex delicto—Foreign—Parent and Child—Aliment.*

1. A person suing for damages *ex delicto* in respect of an act committed abroad has no action unless that act is by the law of the place where it is committed a wrong inferring a legal remedy. *Rosses v. H. H. Sir Bhagvat Sinhjee*, Oct. 29, 1891, p. 31.

Breach of contract—Jus tertii.

2. A workman in the employment of a firm of engineers, who were engaged in fitting up engines in a ship which was lying in a dry dock, fell from the gangway, which was the only means of access to the ship, and was injured. He raised an action of damages against the ship-carpenters, who had docked the vessel and put up the gangway, averring that they had been employed to dock the vessel by the shipbuilders; that they had undertaken this work, and had performed it; and that the gangway which it was their duty to provide, and which they did provide, was defective. He also averred that the shipbuilders had no connection with the engineers in whose employment he was. *Held* that he had stated no relevant grounds for damages, the failure to supply a sufficient gangway, if it truly were insufficient, being not a delict, but a breach of the contract between the ship-carpenters and the shipbuilders, with which neither the pursuer nor his employers had any concern. *Campbell v. A. & D. Morrison*, Dec. 10, 1891, p. 283.

Discharge—Payment by one of several persons sued.

3. A workman in the employment of a firm of engineers, who were fitting up engines in a ship which was lying in a dry dock, fell from a gangway connecting the ship with the shore and was injured. He raised an action of damages in the Sheriff Court against (1) his own employers (2) the

REPARATION—*Continued.*

builders of the ship, and (3) the ship-carpenters who had docked the ship and put up the gangway. This action was dismissed for want of jurisdiction. The workman accepted two small sums from his own employers and from the builders, acknowledging receipt of the payment by the former as "in full of expenses incurred . . . in connection with his alleged claim for damages," and discharging the latter in consideration of this payment "of and from all claims of reparation, and for payment of legal and other expenses now or hereafter competent to me." He then raised an action of damages for £500 in the Court of Session against the ship-carpenters. *Held* (per Lord Low, Ordinary) that he was not barred from doing so by these payments or the terms of his discharges. *Opinions reserved in the Inner-House.* *Campbell v. A. & D. Morrison*, Dec. 10, 1891, p. 282.

Amount of damages—Excess of damages.

4. The Court will be slow to set aside the verdict of a jury in an action for damages for personal injury on the ground of excess of damages, if it cannot be shewn that the jury took into account elements which they were not entitled to take into account.

Observations as to the elements which a jury might legitimately take into account in estimating the amount of damages for personal injury in an action in which it was judicially admitted that the pursuer had suffered no "specific loss to his business in consequence of the injury sustained by him." *McLaurin v. North British Railway Co.*, Jan. 5, 1892, p. 346.

Action by mother for solatium and damages for son's death pending action raised by son for damages for injury.

5. A workman raised an action against his employer for damages for personal injury alleged to have been caused by the defenders' fault. The pursuer having died, his mother, as his executor, was sisted in his room. While this action was pending the mother raised a second action in her own right against the same defenders for solatium and damages for the death of her son, which she alleged to be due to the same injury. *Held* (aff. judgment of the Second Division) that the second action was incompetent. *Darling v. Gray & Sons*, May 31, 1892, H. L., p. 31.

Safety of the public—Machinery—Latent defect—Onus.

6. A carter engaged in the discharge of stones from a lorry in the premises of a marble-merchant, not his employer, was killed by the fall of a derrick crane. In an action of damages raised by the deceased's father against the marble-merchant, it was proved that the cause of the accident was the breaking through crystallisation of an iron strap, by which the stay of the crane was attached to the concrete foundation, and that the defect was latent. It was also proved that two years before the accident the upper strap of the crane had also snapped from a similar cause; that the owner of the crane had thereupon sent it to a competent engineer, who, after thorough examination, had used the lower strap in its reconstruction; that since that date the defender's foreman had periodically inspected it in the ordinary way, and that nothing had happened to suggest the necessity of any special inspection. The Court *assolized* the defender, holding that the pursuer had failed to prove fault.

Observations upon the *onus* of proof where an accident happens owing to a latent defect in machinery. *Milne v. Townsend*, June 3, 1892, p. 830.

Road—Unfenced road—Road trustees—Turnpike Roads Act, 1831.

7. It is a question of circumstances whether an unfenced road with a drop of eight or nine feet at one side is so dangerous as to impose on the road trustees the duty of fencing the road, either at common law or under the Turnpike Roads Act, 1831. *Fraser v. Magistrates of Rothesay*, May 31, 1892, p. 817.

Road—Precautions for safety.

8. A road authority in charge of a suburban road had in winter weather collected heaps of road-scrappings, 2 feet long, 18 inches wide, and 8 inches high, at the side of the footway, where it ran in front of cottages. On the op-

REPARATION—Continued.

posite side there was a footway but no houses. The heaps were allowed to remain several days before they were removed. A woman coming out of one of the cottages in a dark night, and proceeding to cross the road, tripped upon one of these heaps as she stepped from the footway on to the road, fell, and broke her arm. *Held* that, in the circumstances, the road authority were in fault, and therefore liable in damages. *Nelson v. County Council of Lower Ward of Lanark*, Dec. 11, 1891, p. 311.

Known danger—Landlord and Tenant—Lease.

9. The tenant of a house raised an action against the landlord to recover damages for injuries sustained by slipping upon an outside stair leading to the house on 9th March 1891. She averred,—“After Whitsunday 1890, when the pursuer entered into possession of the said house, she found that the steps, five in number, from the level of the street up to the outside door, were much worn and in a dangerous condition for her use as a tenant.” She further averred that she had complained to the defender’s factor of the defect, and that the defender had in the autumn of the same year announced his intention of putting in new steps. The Court *dismissed* the action as irrelevant, in respect that the pursuer’s averments shewed that knowing the danger she had for ten months continued to occupy the house and to use the steps. *Webster v. Brown*, May 12, 1892, p. 765.

Railway—Culpa—Carriage—Bags of sugar in transit contaminated by leakage from boxes containing poison—Liability of railway company to persons poisoned thereby.

10. Bags of sugar in course of carriage by railway were contaminated by leakage from a box containing an arsenical solution marked weed-killer. In an action for *solutium* and damages by relatives of persons poisoned by the sugar against the railway company and the merchant who sold the sugar, the Court (*rev. judgment of Lord Stormonth Darling*) *assolized* the railway company, holding (1) that the primary responsibility for the accident lay upon the consignors of the weed-killer who had sent the box to the railway company without warning them of the extremely poisonous nature of its contents; (2) that it was proved that the railway had no reason to suspect the poisonous character of the contents of the box; (3) that the mere fact that the company’s servants had placed the leaking box near the sugar inferred no such delict as would make the company liable to the pursuers; and (4) that the failure of the railway company’s servants to tell the consignee that the bags were wet with a liquid which they believed to be sheep dip inferred no such delict.

Held further (*aff. judgment of Lord Stormonth Darling*), that the consignees of the sugar fell to be *assolized*, no fault having been established against them. *Cramb v. Caledonian Railway Co.*, July 19, 1892, p. 1054.

Railway—Contributory negligence.

11. A flax store was built near a railway, with no window or other means of lighting except a door facing the railway. The flax was set on fire by a spark from a passing train, when the door was open. *Held* that there was no contributory negligence on the part of the owner of the store. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 609.

Railway.

12. Fire caused by spark from engine—New type of engine in which old means of arresting sparks omitted. *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, March 15, 1892, p. 609.

Master and Servant—Insufficient provision for servant’s safety—Ship in course of construction—Unfenced and unlighted tank.

13. In an action of damages brought by the widow of a ship carpenter against his employers for damages on account of his death when employed by them in the building of a ship, the pursuer averred that on the occasion in question the ship had been launched and was being made ready for sea; that the deceased, having finished his work at about half-past five in the

REPARATION—*Continued.*

evening (when it was dark) was leaving the ship by the only exit available to him, when he fell into an open tank about twenty feet in depth and was killed; that this tank was close to the foot of a ladder up which he had to go, was unfenced, and not protected in any way, nor lighted; that the defender was not aware that the tank was open and unprotected; that it was the defenders' duty to have fenced, covered, or lighted it; that the deceased relied and was entitled to rely on their doing so; that at other times they both covered or fenced the tank and lighted it. The defenders pleaded that the action was irrelevant. *Held (diss. Lord M'Laren)* that the action was relevant. *Jamieson v. Russell & Co.*, June 18, 1892, p. 898.

Master and Servant—Unfenced machinery—Factory and Workshop Act, 1878.

14. The representatives of a workman who had been killed by an accident in a distillery raised an action of damages against the distillers, his employers, in respect of his death. They averred that he had been many years in the defenders' employment, and that it had been part of his duty to assist in the mash-house and, *inter alia*, to clear out a spout by which mash was brought into the mash-tun; that part of the steam-driven machinery for stirring the mash travelled round the edge of the mash-tun; that an iron rod to fence the machinery ran part of the way round the mash-tun; that on the day of the accident the deceased was standing upon a wooden box and reaching over the tun to clear out the spout, when the box slipped, and as the iron rod did not protect this part of the tun, he was caught between the moving machinery, which he could not see owing to the steam, and the end of the rod and killed. They averred that the defenders were in fault, and in breach of the Factory and Workshop Act, 1878, in not securely fencing the machinery, which was part of the mill-gearing, and this fault was the cause of the death of the deceased. *Held* that the defenders were not bound to fence the place in question, and that no relevant averment of fault had been made, and action dismissed. *Robb v. Bulloch, Lade, & Co.*, July 9, 1892, p. 971.

Unfenced machine—Volenti non fit injuria.

15. Where a workman engages in any employment, he takes upon himself all the ordinary risks incidental to his employment. Where, however, there are additional risks created by his employer's fault, and an accident happens to the workman, it is a question of fact to be determined on the evidence whether the workman either expressly or by implication has voluntarily agreed to relieve his employer of the consequences of those risks, and if he has not the employer will be liable.—In an action of damages by the widow of a workman who was killed while pointing out a defect in a calendar machine at which he was working to his employers' engineer, it was proved that the machine was dangerous and should have been fenced, that the accident was due to the employers failing to fence the machine, and that the deceased had on several occasions prior to the accident complained to the engineer and foreman of the works of the want of a fence. *Held* (1) that the defenders were in fault in failing to fence the machine; (2) that the fact of the deceased continuing to work knowing the danger did not imply an agreement to relieve his employers of responsibility for the consequences of their fault; and (3) that the defenders were liable in damages. *Wallace v. Culter Paper Mills Co., Limited*, June 23, 1892, p. 915.

Master and Servant—Risk known to servant—Unfenced machinery—Knowledge of foreman.

16. A lad of sixteen was employed to drive a copper-cutting machine by turning a handle which worked the fly-wheel and so set the gearing of the machine in motion. The ordinary way of driving the wheel was that this lad and another stood one on each side of the handle and turned it. While he was engaged in this work the lad's hand was crushed in the cogged or pinion wheels attached to the fly-wheel, and he raised an action against his employers at common law, and, alternatively, under the Employers

REPARATION—*Continued.*

Liability Act for damages. He averred that the machine was situated close to the wall, the point of the handle being only eighteen inches from it; that at the time of the accident there was a "considerable quantity of sheets of copper laid against the wall . . . on the side of the handle on which" he should have stood; that in consequence he "could not use the handle, but had to help to turn the fly-wheel by catching the rim. He worked in this manner in sight and with the knowledge of the foreman all day, and was not forbidden to do so. He had been previously working it in the same way, which was the only possible method open to pursuer, and that with foreman's knowledge." His hand slipped off the fly-wheel, as he alleged, was caught between the pinion or cogged wheels and the spur wheel, and was crushed. He further averred that there was a duty on the defenders to have the machinery fenced, and that if it had been fenced the accident would not have happened. *Held* (1) that he had not stated a relevant case of fault against his employers in his averments as to the presence of the sheets of copper; (2) that the averment of the foreman's knowledge of his actings was not relevant to support a case under the Employers Liability Act; and (3) that, as the machine was driven by hand, and as there was no danger in the use of it, there was no obligation to fence it. *Milligan v. Muir & Co.*, Oct. 27, 1891, p. 18.

Master and Servant—Employers Liability Act, 1880, sec. 1.

17. A builder's labourer was killed by the fall of a scaffolding on which he was working in the demolition of an old building. In an action by his widow against his employer, to recover damages under the Employers Liability Act, it was proved that the scaffolding had been erected by P., a foreman labourer, with the assistance of the deceased and of another labourer; that these three persons were all experienced in such work; that the materials were good, and the manner of constructing the scaffolding such as was usual for such work; that the cause of the accident was that while a stone was being removed from the old building, it broke and a piece of it struck a projecting part of the scaffolding, and brought down the scaffolding; that while it would have been possible to take such precautions as would have prevented the scaffolding being brought down, such precautions were not usually taken even by careful workmen doing such work. *Held* that the defender was not liable in damages under the Employers Liability Act, 1880. *Thomson v. Dick*, May 19, 1892, p. 804.

Master and Servant—Issue—Action at common law and under the Employers Liability Act, 1880—Company.

18. In an action of damages at common law and under the Employers Liability Act, 1880, brought by a coal miner against his employers, a limited company, for damages in consequence of his having been injured by a bogie which had broken loose on an inclined plane in the mine, the pursuer averred that the bogie had broken loose through a defective system of working it which had become the practice in the mine, and that this practice was known to and authorised by the defenders, their manager, underground manager, and oversman, and he proposed an issue in general terms, with a schedule, claiming as damages the amount sued for at common law. The defenders moved that the sum stated in the schedule should be restricted to the amount sued for under the Employers Liability Act, 1880, on the ground that the action was irrelevant at common law, in respect that the pursuer had not averred that the defenders, acting through persons entitled to represent them, had authorised the practice complained of. The Court, without deciding the relevancy of the action at common law, *refused* the motion, and allowed the issue as proposed by the pursuer. *Henderson v. John Watson, Limited*, July 2, 1892, p. 954.

Master and Servant—Coal Mines Regulation Act, 1887—General Rules, No. 15.

19. *Opinion* (per Lord Justice-Clerk) that the mouths of the cross roads which led off the main level of a mine, and which were within fifty yards of each

REPARATION—Continued.

other, were to be considered as "manholes or places of refuge" in the sense of the above rule. Opinions *reserved* by Lord Young, Lord Rutherford Clark, and Lord Trayner. *Hughes v. Clyde Coal Co.*, Dec. 18, 1891, p. 343.

Master and Servant—Injury not connected with the fault alleged as ground of accident.

20. A workman in the employment of a firm of engineers was working a crane in their moulding-shop. In this shop was a moulding-pit about twelve feet deep. While working at the crane the workman had his thumb caught in the pinion-wheel of the crane and injured. To recover damages for this injury he raised an action against his employers, in which he averred that between the moulding-pit and the crane "at the nearest point there is only some nineteen inches or so of space"; that "in turning round the crane it became necessary for pursuer to pass along the edge of the moulding-pit, which was uncovered, and as the room left to pass was so small that the crane handle overhung the pit, he stumbled on the edge of the pit, and, in an endeavour to regain his balance, his left hand was caught in the wheels of the crane and the thumb torn off." He also averred that the pit should have been covered and was not. *Held* that the pursuer had disclosed no relevant case, the accident being, according to his own statement, due to his stumble, and that stumble not being alleged to be due to the narrowness of the space between the crane and the pit, or to the fact of the pit being uncovered. *Greer v. Turnbull & Co.*, Oct. 27, 1891, p. 21.

Master and Servant—Responsibility to his own servant of auctioneer selling in the premises of another.

21. *Held* (*per* Lord Justice-Clerk, Lord Young, and Lord Trayner) that an auctioneer selling goods in the premises of another is not responsible for the sufficiency of these premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency. *Nelson v. Scott, Croall, & Sons*, Jan. 30, 1892, p. 425.

Master and Servant—Sale by auction—Liability of customers to auctioneer's servant.

22. At a sale by auction of the bankrupt stock of a coachbuilder within his premises, an accident occurred to a person engaged in lowering by a hoist a lot of goods which had been sold. In an action of damages raised by him against A, the auctioneer, and against B, the purchaser of the lot, the pursuer averred that at the time of the accident he was in A's employment, that the accident would not have happened had the hoist been provided with a proper brake; that the goods had been loaded on the hoist under the superintendence of B, who grossly overweighted it, or permitted it to be overweighted; that B had been an apprentice with the coachbuilder, and knew, or ought to have known, that the hoist was overweighted. The pursuer pleaded that the auctioneer was responsible to him for the hoist being defective in not having a proper brake, and that B was liable for the hoist being overweighted. *Held* (1) that the pursuer had not stated a relevant case against A, the Lord Justice-Clerk, Lord Young, and Lord Trayner, holding that an auctioneer is not responsible to his servants for the sufficiency of appliances in the premises of an employer, Lord Rutherford Clark holding that the pursuer's statement that the hoist was overweighted exonerated the auctioneer, as it was not alleged that he was responsible for this; and (2) (*dub.* Lord Rutherford Clark) that there was no relevant ground of action stated against B. *Nelson v. Scott, Croall, & Sons*, Jan. 30, 1892, p. 425.

Master and Servant—Employers Liability Act, 1880, sec. 1—Contract of employment.

23. A firm of shipbuilders were in the practice of entering into contracts for the execution of certain pieces of work within their yard with squads of fitters. Each of these men employed labourers to assist in his part of the work, who were exclusively under his control and direction, and who

REPARATION—*Continued.*

were paid 7d. an hour by the squad. When the piece of work was finished the squad divided the profit among themselves. The shipbuilders' foreman inspected the work as it proceeded to see that the result was satisfactory, but did not interfere with the work. In an action of damages raised against the shipbuilders by a labourer who had been injured through the fault of the fitter who employed him, the pursuer founded on the Employers Liability Act, 1880. *Held* that the Act did not apply to the case, as the pursuer had not been employed by the defenders. *Sweeney v. Duncan & Co., Limited*, June 17, 1892, p. 870.

Slander—Dishonourable conduct.

24. In a letter by a landlord to his tenant complaining of the failure of the latter to make immediate payment of a debt alleged to be due by him under a reference to an arbiter, the writer stated,—“I am surprised at your conduct, which you must see is very dishonourable.” *Held* that the letter was not actionable. *Turnbull v. Oliver*, Nov. 21, 1891, p. 154.

Slander—Newspaper—Innuendo.

25. Terms of an anonymous letter in a newspaper with reference to the state of a public school which were *held* to entitle the master of the school to an issue whether it represented that the pursuer was unfit for his post, and that it was the duty of the board to dismiss him. *M'Kerchar v. Cameron*, Jan. 19, 1892, p. 383.

Slander—Privilege.

26. *Held* that the publisher of a newspaper, who has refused to disclose the name of the writer of an anonymous letter to the editor, cannot plead privilege in answer to an action of damages for slanderous statements in the letter. *M'Kerchar v. Cameron*, Jan. 19, 1892, p. 383.

Slander—Issue—Want of probable cause—Privilege.

27. *Held* that, where a pursuer seeks to recover damages for a statement, imputing misconduct to him, which has been made by the defender, in discharge of his duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause.

Opinion (per Lord Trayner) that the same rule applies where the statement is made in exercise of a right. *Hill v. Thomson*, Jan. 16, 1892, p. 377.

Slander—Privilege—Malice.

28. In an action of damages for slander the pursuer averred that he was a joiner in the employment of C. M. & Co., shipwrights; that on a certain day he and three other workmen were sent by the firm to execute a piece of work on board a vessel lying in the docks at Glasgow belonging to the defenders; that some days after the said workmen had left the vessel the defenders sent an account to C. M. & Co.,—“To six bottles of whisky, at 3s. 6d. per bottle, abstracted by your men while putting up, &c. on board” the vessel, and subsequently wrote this letter to C. M. & Co.,—“In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were intact, but after they left we found, on examination, that a case had been tampered with and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it.” The pursuer averred that the account and letter “falsely, maliciously, calumniously, and without probable cause,” represented the pursuer as being dishonest, and as having stolen six bottles of whisky. There was no other averment of malice. *Held (dub. Lord Rutherford Clark)* that the pursuer's averments shewed that the defenders were privileged in making the statements complained of, and that as the pursuer had failed to set forth facts from which malice could be inferred, the action was not relevant. *M'Fadyen v. Spencer & Co.*, Jan. 7, 1892, p. 350.

Slander—Privilege—Malice—Statements regarding candidate for municipal election.

29. In an action of damages for slander the pursuer averred that in the course

REPARATION—*Continued.*

of a municipal election, in which he had been a candidate, the defender, who was an elector, had, in order to influence electors to vote against him, falsely and calumniously stated that the pursuer had been bankrupt, and that he had made a very bad failure, meaning thereby that it was a dishonest and disreputable failure, and that his creditors had received only 1s. 6d. per £, and that the pursuer was, in consequence, an unsuitable person to represent the electors. *Held* (1) that the words alleged to have been used by the defender might reasonably bear the innuendo put upon them, but (2) that assuming that they did so, the pursuer's statement shewed that the defender was privileged in using them, and that as malice was not averred, the action fell to be dismissed. *Bruce v. Leisk*, Feb. 20, 1892, p. 482.

Issue—Slander—Privilege.

30. A midwife raised an action of damages for alleged slander against a doctor, averring that she had been called to attend a woman (Mrs Moore) in labour, that she had given her a certain drug which was the proper treatment, that the defender having been called in to see the woman, "he, without so much as inquiring at the pursuer what the drug was, or what dose had been given, and conceiving that it would be a favourable opportunity for indulging his hostile and malicious feelings towards her, falsely, wickedly, calumniously, and maliciously stated to Mrs Moore's husband, the said Stephen Moore, that the pursuer had poisoned his wife." Further, she averred that this statement was made "in a malicious spirit, with a view of injuring the pursuer in the practice of her art as a midwife." She proposed an issue whether the defender "falsely and calumniously" stated that the pursuer had poisoned the patient. The defender maintained that malice and want of probable cause ought to be put in issue. The Court *refused* to insert malice and want of probable cause in the issue, on the ground that the pursuer's statements did not necessarily disclose a case of privilege, and that if a case of privilege arose at the trial it was in the power of the presiding Judge to direct the jury accordingly. *Reid v. Coyle*, May 13, 1892, p. 775.

Slander—Concurrence in and adoption of the slander of another.

31. In an action of damages for slander against A and B, the pursuer alleged that on the occasion of his election to the eldership in a parish church, the defenders had deliberately and maliciously resolved to use means to prevent his ordination; that they had prepared, or caused to be prepared, and published a petition to the minister to be signed by members of the congregation, representing that the pursuer's appointment as an elder would be injurious to the interests of the church; that the defenders, acting in concert and in pursuance of their malicious design, proceeded to canvass certain members of the church for signatures to the petition; that the defenders called upon S to obtain his signature to the petition, and that A, in his presence, made certain false and calumnious and injurious statements regarding the pursuer; that B was then present and heard what A said, and concurred with him in said slanderous statement uttered in pursuance of their said malicious design. The pursuer proposed the issues:—(1) Whether A made the false and calumnious statement in presence of S and B? and (2) whether B falsely and calumniously concurred in and adopted the said statement falsely and calumniously made by A?

Held that the second issue could not be allowed, and that there should be one issue, viz., Whether the defenders, or either of them, and which of them, in presence and hearing of S, falsely and calumniously stated, &c.?

Held by Lord Stormonth Darling (Ordinary), and acquiesced in, that the pursuer was not bound to put in issue malice and want of probable cause, as the defenders were not privileged in canvassing for signatures to the petition.

Held by Lord Stormonth Darling, and acquiesced in, that in issues relating to statements by the defenders to the kirk-session want of pro-

REPARATION—*Continued.*

bable cause must be put in the issue as well as malice. *Jack v. Fleming*, Oct. 15, 1891, p. 1.

Wrongous diligence—Small-debt decree—Finality—Diligence—Small-Debt Act, 1837, secs. 30 and 31—Citation Amendment Act, 1871, sec. 3—Citation Amendment Act, 1882, sec. 3.

32. A tenant, whose furniture had been sold under a small-debt decree of sequestration for rent, which contained a warrant for sale after forty-eight hours' notice, brought an action of damages against his landlord and the sheriff-officer by whom the proceedings had been carried out, alleging that neither the summons nor the inventory and appraisement, nor the charge on the decree, had been duly served on him, in respect that the executions bore that copies of the summons, the inventory and appraisement, and the decree and charge, had been sent to the pursuer in a registered letter addressed to him at the house which contained his furniture after he had removed to a house in another town, and that the defenders knew of his removal, and knew, or could easily have ascertained, his new address, and he further stated that he was entirely ignorant of the whole proceedings until some time after the sale had taken place. The defenders stated that the registered letters had been sent to the last address known to them, and therefore that there had been due service in terms of the Citation Amendment Act, 1882. *Held* (1) that the action, in so far as founded on the alleged irregularities in the service of the summons and of the inventory and appraisement, was incompetent, all review of a small-debt decree, including procedure leading up to such decree, being excluded by the 30th section of the Small-Debt Act, 1837; but (2) that the action in so far as founded on the alleged want of notice prior to the sale was competent, the Small-Debt Act not protecting diligence following on a small-debt decree, and (*rev. judgment of Lord Low*) that the pursuer's averments were not irrelevant for want of specification. *Gray v. Smart*, March 18, 1892, p. 692.

Wrongous use of diligence—Sequestration in security of rent—Warrant to carry back furniture removed by tenant.

33. The tenant of a house, without having paid the rent of £5 for the current half year, and before the termination of his tenancy, removed part of his furniture to a farm five miles distant, of which he had taken a lease. The removal was carried out in an open manner, and the landlord, who lived in the same tenement, had been previously informed that the tenant intended to remove before the term, though not of the precise day on which he would do so. As soon as the landlord heard that the tenant had removed he wrote to him threatening proceedings, unless the rent were paid by a certain date, but this letter failed to reach the tenant until after that date owing to the negligence of the person to whom the landlord had given it to post. On the day mentioned the landlord, believing that his letter had reached the tenant in due course, raised a summons of sequestration against him, averring that he had removed his effects "without finding security for the rent, and without intimation to the pursuer." The landlord also lodged a minute craving warrant, in respect the tenant "had removed the subjects of hypothec," to carry the same back to his house. The Sheriff thereupon granted warrant as craved, and on the next day a sheriff-officer proceeded to the tenant's new abode, and was in the act of bringing the furniture back to the landlord's house when the proceedings were stopped by the tenant paying the rent and expenses. In an action at the instance of the tenant, the Court *held* that the warrant had been executed without cause, and therefore that its execution was illegal, and that the landlord was liable in damages. *Gray v. Weir*, Oct. 28, 1891, p. 25.

See Agent and Client—Contract, 6, 9—Lease, 3, 6—Partnership—Ship, 11.

REPUTED OWNERSHIP. *See Possession.*

RES JUDICATA.

A steel company brought an action against the contractors for the Forth Bridge for declarator that the defenders were bound by contract to take from them the whole steel required for the bridge. The defenders answered that on a true construction of the contract they were not bound to take from the pursuers more than 30,000 tons; that the pursuers had always acted on this view of the contract, and had for this reason acquiesced in the defenders purchasing steel rivets from another firm; and that they were therefore barred from putting any other construction upon the contract. In this action, on 2d March 1888, the following interlocutor was pronounced:—"Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge." This interlocutor was affirmed on appeal by the House of Lords.

In a subsequent action of damages for breach of contract at the pursuers' instance against the defenders, *held* that the judgment in the former action did not preclude the defenders from maintaining in defence that the pursuers had acquiesced in the defenders purchasing rivets from another firm, and had accordingly, so far as regarded rivets, waived their rights under the contract. *Steel Co. of Scotland v. Tancred, Arrol, & Co.*, July 20, 1892, p. 1062.

REVENUE. *Income-Tax—Abatement—Income-Tax Act, 1842, Schedules D and E, Rule I.—Income-Tax Act, 1853, sec. 51—Customs and Inland Revenue Act, 1876, sec. 8.*

1. A bank-agent, who had an income of £374 and occupied rent free a house forming part of the bank premises, which was of the annual value of £50, was disallowed the abatement by the Assessor of Income-Tax, on the ground that the value of the house fell to be reckoned as part of his income, and that his income was thus not under £400. The bank-agent objected, on the ground that it was part of his duty as bank-agent to occupy the house for the protection of the bank, and that he could not sublet the house or vacate it even temporarily without consent of the directors and without another bank official being appointed to occupy it in his absence, and that he was liable to be removed at any time. The house was suitable for the bank-agent, and if it had not been provided he would have required another of the same annual value. *Held* (rev. judgment of the Second Division and three consulted Judges) (1) that in ascertaining total income from all sources with a view to exemptions enacted by sec. 8 of the Inland Revenue Act, 1876, no income arising in this country can be taken into account which is not chargeable under one or other of the income-tax schedules. (2) That the advantage of free residence which the appellant derived from the discharge of his duty of residing in the bank premises for the purposes of the bank was not a subject of assessment in any of the schedules of the Income-Tax Act, and therefore was not to be taken into account in calculating his total income under sec. 8 of the Income-Tax Act, 1876. *Tennant v. Smith* (Inland Revenue), March 14, 1892, H. L., p. 1.

Income-tax—Exemption—Scientific institution—Income-Tax Act, 1842, Sched. A, Rule 6.

2. The Income-Tax Act, 1842, schedule A, rule 6, exempts from income-tax "any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is demanded for any instruction there afforded by lectures or otherwise." *Held* that the hall, library, and museum of the Royal College of Surgeons of Edinburgh were not exempt under the above provision, in respect that the college was not a literary or scientific institution, but an institution whose main objects were professional. *Inland Revenue v. Royal College of Surgeons of Edinburgh*, March 19, 1892, p. 751.

Income-Tax—Profits—Deduction—Bonus—Income-Tax Act, 1842, Schedule D, First Case, Rules III. and IV. and sec. 159.

3. A company borrowed a large sum of money, and undertook, along with

REVENUE—*Continued.*

repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent thereon. *Held* that, in estimating the balance of profits and gains chargeable under Schedule D, the company were not entitled to deduct the amount of the bonus from the profits of the year in which it was paid. *Arizona Copper Co. v. Surveyor of Taxes*, Nov. 20, 1891, p. 150.

Inhabited house duties—Hotel stables and coach-house—House Tax Act, 1808, Schedule B, Rule 2—Inhabited House Duty Act, 1851, Schedule—Customs and Inland Revenue Act, 1878, sec. 13, subsec. 1.

4. *Held* that stables and a coach-house, which were occupied in connection with the business of a hotel by the hotel-keeper, but which were separated from it by a passage over which the public had a right of way and three adjoining feuars a servitude of passage, were not exempt from inhabited house duty, but fell to be assessed along with the hotel. *Smith v. Petrie*, Jan. 27, 1892, p. 405.

Legacy-duty—Moveable estate directed to be invested in purchase of land—Entail—Act 36 Geo. III. c. 52, secs. 12 and 19.

5. Testamentary trustees were directed, during the period of six years next after the testator's death, to realise the residue of the trust-estate, consisting of moveables to the extent of about £350,000, and therewith to purchase land to be entailed on A and a series of heirs. The trustees expended £21,000 on the purchase of land. At the end of the six years A presented a petition for disentail, and having by private arrangement obtained the consents of the next three heirs on payment of compensation for their respective interests, as ascertained by an extrajudicial valuation, obtained a decree ordaining the trustees to convey to him in fee-simple the lands and the moneys held by them for investment in land. The Crown thereupon claimed from the trustees legacy-duty upon the capital of the whole residue of the moveable estate, under the 19th section of the Act 36 Geo. III. c. 52, on the ground that A had right to the whole thereof, and had, in the sense of that section, "become entitled to an estate of inheritance in possession in the real estate to be purchased therewith." The trustees maintained (1) that the duty fell to be charged only on the succession which had opened to A under the will, and that as he was merely the first of a series of beneficiaries in succession, the duty should be charged on his interest as an annuity, the proceedings by which he had acquired a right in fee-simple being transactions *inter vivos* which did not affect his succession; and (2) alternatively, that he was entitled to deduct from the amount of residue to which he had right the compensation paid by him to the three next substitute heirs for their consents to the disentail. The Court *sustained* the claim of the Crown without deduction, holding (1) that the words in the proviso in section 19 of the Act 36 Geo. III. c. 52, "shall become entitled to an inheritance in possession in the real estate to be purchased therewith," mean shall become entitled to an absolute interest in the money bequeathed to be laid out in the purchase of land; and (2) that the fact that A had not "become entitled" to such an absolute interest by the will, but by the voluntary arrangement in the disentail proceedings, did not prevent the proviso applying to his case; and (3) that the sums paid to the next heirs of entail for their consent did not fall to be deducted from the amount liable to duty. *Lord Advocate v. Dunlop's Trustees*, Feb. 6, 1892, p. 461.

Stamp-duty—Marine insurance—Customs and Inland Revenue Act, 1867, sec. 1, Schedule B, and sec. 4—Interpretation Act, 1889, sec. 1 (b).

6. *Held* that a time policy of insurance embracing a number of vessels with separate sums insured on each was properly stamped at the duty corresponding to the aggregate sum insured. *Great Britain Steamship Premium Association v. Whyte*, Nov. 17, 1891, p. 109.

See *Public-House*, 2—*Valuation-roll*, 1.

REVOCATION. See *Succession*, 19 to 22.

RIGHT IN SECURITY. *Bond and disposition in security—Assignment of portion of bond—Pari passu ranking—Power of sale—Titles to Land Consolidation Act, 1868, secs. 119, 122, and 123—Conveyancing Act, 1874, sec. 48.*

1. Where the holder of a bond and disposition in security assigns a portion of the bond to another with a declaration that the debts are to rank *pari passu*, either creditor may bring the subjects of the security to sale for payment of his own portion of the debt without consent of the other, but the security of the other will remain unaffected thereby. *Nicholson's Trustees v. M'Laughlin*, Nov. 4, 1891, p. 49.

Security over moveables—Conveyance of moveables by husband to marriage-contract trustees retenta possessione—Subsequent delivery by husband of moveables in security of creditors.

2. By antenuptial marriage-contract H. (the husband) conveyed to trustees his dwelling-house and "all and sundry the whole household furniture, . . . pictures, and other effects" therein. The trustees were infeft in the house, which was occupied by H. and his wife, who also enjoyed the use of the furniture, pictures, &c. After some years H. became insolvent and compounded with his creditors. S., his brother-in-law, became security for part of the composition. In security of this obligation H. conveyed to S., by written agreement (with power of sale), and delivered, his pictures, including six which were in his house at the date of the marriage-contract. S. had no notice or knowledge of the terms of the marriage-contract. In an action by the trustees under the marriage-contract to have the pictures or their value restored to the trust, *held* that as S. had obtained the pictures under an onerous contract without knowledge of the conveyance in the marriage-contract, he was not bound to restore them. *Hewat's Trustee v. Smith*, Jan. 27, 1892, p. 403.

See Agent and Client—Harbour, 1—Husband and Wife, 5—Judicial Factor, 2—Succession, 9.

RIVER, LOCH, AND SEA. *River—Tidal and navigable—Foreshore—Obstruction in alveo—Fishings.*

1. The proprietor of the lands of S had a Crown grant of the salmon-fishings *ex adverso* of his lands in a tidal navigable river, the banks of which at ebb tide consisted of low mud flats, covered at every tide. The tenant of the fishings erected, with the sanction of the proprietor, a platform, based on shingle and piles, to facilitate his fishing. The foundations of the platform were in part, at least, in the *alveus* of the river. In an action brought by the proprietor of lands and fishings on the other side of the river for removal of the platform, it was proved that a substantial part of the erection was *in alveo*, and that it was injurious to the pursuer's fishings. *Held* that the pursuer was entitled to have the whole erection removed. *Ross v. Powrie & Pitcaithley*, Dec. 11, 1891, p. 314.

River—Pollution—Right to have special purity of water preserved—Mines and minerals—Right to pump water from mine into river.

2. A mineowner is not, apart from contract or prescriptive right, entitled to discharge into a stream water pumped out of the mine, although the water may not make the stream unfitted for any of the primary purposes, but only for special purposes for which the water of the stream is by nature peculiarly adopted. *Bankier Distillery Co. v. Young & Co.*, July 20, 1892, p. 1083.

Sea—Crown—Trust for public—Sea below low-water mark—Sea water intra fauces terræ—Three mile limit—Territorial waters.

3. The Crown has a right in the water and the *solum* of sea lochs *intra fauces terræ* below low-water mark such as will entitle it to prevent any person from using them for purposes other than the recognised public uses, and that without any allegation of injury, actual or prospective, to these public uses.

The rule applied to prevent the Clyde Navigation Trustees from depositing dredgings from the Clyde in Loch Long.

Opinions that the right of the Crown to the *solum* of sea lochs *intra fauces terræ* is a proprietary right, and not a mere trust for public uses.

RIVER, LOCH, AND SEA—*Continued.*

Opinions (per Lord Young and Lord Kyllachy) that the Crown has also a proprietary right in the *solum* of the sea from low-water mark as far as the three mile limit, upon the open coast. Lord Advocate v. Clyde Navigation Trustees, Nov. 25, 1891, p. 174.

ROAD. See *Police*, 1, 2, 3—*Reparation*, 7, 8.

ROUP. See *Sale*, 2.

SALE. *Constitution of contract—Sale of heritage—Unilateral agreement.*

1. In an action by A B for declarator that the defender had sold a house to the pursuer, the pursuer founded on the following document subscribed by the defender before witnesses, and delivered by her to the pursuer,—“I have agreed to sell my house . . . for one hundred and fifty pounds to A B.” The Court *assolized* the defender, holding that the document did not import a unilateral obligation by the defender to sell the house to the pursuer at a certain price, which would have been effectual without writing on the part of the pursuer, but imported merely one side of a bilateral contract of sale of heritage, which could have no effect until completed in writing by the other party. Malcolm v. Campbell, Dec. 9, 1891, p. 278.

Sale by auction—Responsibility of auctioneer selling in the premises of another to his own servant.

2. Held (per Lord Justice-Clerk, Lord Young, and Lord Trayner) that an auctioneer selling goods in the premises of another is not responsible for the sufficiency of these premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency. Nelson v. Scott, Croall, & Sons, Jan. 30, 1892, p. 425.

Delivery—Unforeseen accidents preventing delivery.

3. Where a person has contracted to deliver goods, which are not part of his own stock in trade, and are known not to be, and has taken due care in placing his order for these goods with a manufacturer, he will not be responsible for any delay in the delivery that may be caused by unforeseen circumstances, such as strikes, or sickness among workmen. Taylors v. Maclellans, Oct. 21, 1891, p. 10.

Breach of contract—Damages—Loss of Profits.

4. A manufacturing company in this country entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignment of huts sent in pursuance of this contract was sold by the merchants at a profit, but subsequent consignments were rejected by them as being disconform to contract. In an action by the merchants against the manufacturers for damages, it was proved that the pursuers were justified in their rejection of the huts. The Court, in assessing the damages due by the defenders for their breach of contract, held that the pursuers were entitled to payment of a reasonable allowance for loss of profits, the ordinary rule whereby damage is assessed at the difference between the contract price and the market price when the breach of contract is ascertained being, in the circumstances, inapplicable. Duff & Co. v. Iron and Steel Fencing and Buildings Co., Dec. 1, 1891, p. 199.

Property—Breach of contract—Rescission—Damages—Actio quanti minoris.

5. Where a piece of ground was sold with absolute warrandice, and, while things remained entire, it was discovered that the ground was subject to restrictions against building,—*Question* whether the purchaser was entitled to claim damages and retain possession.

Observations (per Lord M'Laren) on the remedies open to a purchaser of moveable or heritable property in cases of breach of the contract of sale. Louttit's Trustees v. Highland Railway Co., May 18, 1892, p. 791.

Property—Conveyance—Whether implied right of access.

6. Where in a conveyance of property a roadway is mentioned as a boundary it is not *prima facie* included in the grant, nor does the mention of it

SALE—Continued.

imply that it is always to be kept open as a roadway, and although a sale of heritable subjects always implies a right of access to these subjects, the right is satisfied if the disponent retains such access as existed at the date of the grant. *Louitt's Trustees v. Highland Railway Co.*, May 18, 1892, p. 791.

See *Agent and Client—Partnership*, 2—*Husband and Wife*, 5.

SCHOOL. Contract between "old" parochial teacher and school board as to emoluments—Government grant—Education Act, 1872.

1. After the passing of the Education Act, 1872, the School Board of Inveraray entered into an arrangement with the "old" parochial teacher, who continued in office under them, by which the emoluments of the latter were to include "all the Government grants without any deductions, except the salary or salaries of a pupil teacher or pupil teachers." From 1873 to 1886 inclusive the School Board paid to the teacher the whole Government grants received by them, deducting only pupil teachers' salaries. In 1887 and following years they refused to pay to him (1) a grant in the shape of an increased grant for attendance made to certain Highland counties, including Argyll, by a minute of the Scottish Education Department dated 30th April 1885, and (2) a grant for needlework, introduced in 1887 by the Education Code. In an action by the teacher to recover the amount of these grants, *held (diss. Lord Young)* (1) that it was not *ultra vires* of the School Board of 1873 to make such an agreement with the pursuer; and (2) that the grants in question fell within the agreement. *Smith v. School Board of Inveraray*, Dec. 8, 1891, p. 247.

School Board—Election—Scotch Education Department—Title to sue—Education Acts, 1872 and 1878.

2. *Held (diss. Lord Young)* that it was *ultra vires* of the Scotch Education Department to issue a General Order to the effect that in school board elections "if the number of candidates nominated and not withdrawn . . . shall be less than the number to be elected but sufficient to constitute a quorum of the school board . . . they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members." *Duncan v. Crichton*, March 10, 1892, p. 594.
3. The number of the school board of a burgh was fixed under the statutes at nine. On the occasion of the election in 1891 six persons only were nominated. The returning officer declared them duly elected, and they then met and elected three others. The declaration of election was made, and the meeting was held in compliance with a General Order of the Scotch Education Department of 1st October 1890 which dealt with cases such as had occurred, and bore to be issued under the schedule annexed to the Education Act of 1878. Certain ratepayers in the burgh brought a reduction of the return and of the minute of meeting, calling as defenders the returning officer and the nine persons concerned. *Held (diss. Lord Young)* (1) that the pursuers as ratepayers had a title to sue, (2) that they were entitled to decree in respect that no election had taken place under the statute, and (3) that the schedule of the Act of 1878 did not warrant the General Order of the Department, which was therefore *ultra vires* and illegal. *Duncan v. Crichton*, March 10, 1892, p. 594.

Failure to educate child—Sentence—Education Act, 1872, sec. 70—Education Act, 1883, sec. 9.

4. *Held* that under a complaint alleging a contravention under sec. 70 of the Education Act, 1872, it was incompetent for the Sheriff-substitute to find that the accused had failed to secure the regular attendance of his child at some public or inspected school after due warning, in terms of sec. 9 of the Education Act, 1883. *McDonald v. Duff*, Nov. 2, 1891, Just. Cases, p. 1.

Failure to educate child—Mother prosecuted in absence of father—Education Act, 1872, sec. 70.

5. A mother was charged on a complaint brought under the Education

SCHOOL—*Continued.*

(Scotland) Act, 1872, with failing to provide efficient elementary education for her child. Her husband, who usually resided in family with her, was, at the date of the complaint, absent from home, having been for six months employed at work at a known address in another county. *Held* that, notwithstanding the absence of the husband, the wife was not liable. *Macdonald v. Lamont*, Feb. 1, 1892, Just. Cases, p. 41.

See *Charity*, 1.

SEA. See *River*, 3.

SEQUESTRATION. See *Bankruptcy*—*Lease*, 12—*Reparation*, 32, 33.

SERVICE. See *Sheriff*, 1—*Trust*, 4.

SERVITUDE. *Thirlage*—*Agreement by suckeners to pay annual fixed sum*—*Discontinuance of mill.*

By deed of submission dated in 1814 between certain persons "proprietors connected with the sucken and thirlage of the meal mill of Nairn" on the one part, and the proprietors of the mill on the other, on the narrative that it was expedient that the servitude of thirlage should be "compensated or commuted by a fixed annual payment" in lieu and satisfaction of the right of thirlage, and of all services, prestations, and restrictions incident thereto; and in order to prevent disputes in the exaction and payment of the multures and sequels at the mill; and that the intake and mill run of the mill had been attended with inconvenience and loss to the proprietors of the mill and to the proprietors and tenants astricted, and that the millowners were "willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken," on payment of an annual sum by each of the parties submitters as compensation in lieu of multures, sequels, and mill services—the parties therefore submitted to the arbiter all differences and disputes presently subsisting between them with regard to the said annual compensation, declaring that this compensation should in no ways prejudice the proprietors of the mill of their claim to outsucken multures. By decree-arbital the arbiter fixed the sums payable by the respective heritors and suckeners, as in full of all demands that the proprietors of the mill could have against the said heritors and suckeners for multures, sequels, and services, and ordained the proprietors of the mill to accept the same yearly and termly in all time coming. In 1878 the mill was sold, the disposition conveying, *inter alia*, the "hail multures, sucken, sequels, and knaveships of the said mill, and hail parts, privileges, and pertinents thereof." The purchasers having demolished the building, one of the persons found liable in an annual payment under the decree-arbital declined to make any further payment. The purchasers of the mill then brought an action to enforce payment, but admitted that they had no intention of rebuilding the mill. *Held* (*rev. judgment of Lord Kincairney, dub. Lord Rutherford Clark*), that on a sound construction of the submission and decree-arbital, it was a condition of exacting the payments found due by the arbiter that the mill should be in a working condition, and therefore, as it was admitted that there was no intention of rebuilding the mill, that the defender fell to be *assoilzied*.

Question, whether the original obligation to pay multures had been converted by contract into a personal obligation. *Forbes' Trustees v. Davidson*, July 14, 1892, p. 1022.

See *Railway*, 2.

SHERIFF. *Jurisdiction*—*Property*—*Possession*—*Service.*

1. A Sheriff has jurisdiction over the proprietors of lands lying within his sheriffdom in any competent action relating to the possession of these lands, or of things locally situated within them, although such proprietors reside beyond, and are not served with the action within, the sheriffdom,

SHERIFF—*Continued.*

A Local Authority brought an action in a Sheriff Court to have the proprietors of certain lands within the sheriffdom, through which a pipe belonging to the Local Authority was laid, interdicted from drawing from the pipe in question a supply of water for a particular portion of their lands. The defenders were resident beyond, and were not served with the action within, the sheriffdom. *Held* that the Sheriff had jurisdiction to deal with the action, in respect that its subject-matter related to heritable property within his sheriffdom, and that the defenders were proprietors of lands within it. *Culross Special Water Supply District Committee v. Smith-Sligo's Trustees*, Nov. 6, 1891, p. 58.

Jurisdiction—Custody of Children Act, 1891, sec. 1.

2. Question, whether the above Act applied to the case of an application made to the Sheriff and afterwards brought by appeal before the Court of Session. *Mackenzie v. Keillor*, July 6, 1892, p. 963.

Jurisdiction—Summary Procedure—Merchant Shipping Act, 1854.

3. A seaman was charged in the Sheriff Court of Renfrewshire with a contravention of the 255th section of the Merchant Shipping Act, 1854, in so far as he had at Brisbane and Melbourne respectively wilfully and fraudulently made a false statement of his own name to the masters of two ships, the one belonging to the port of Melbourne, and the other to the port of Glasgow. *Opinions* that under the provisions of the Merchant Shipping Act, 1854, the Sheriff had jurisdiction to entertain the charge. *Simpson v. Board of Trade*, March 29, 1892, Just. Cases, p. 66.

Jurisdiction—Review—Small-Debt Act, 1837, sec. 31.

4. A defender in the Small-Debt Court having objected to the Sheriff-substitute's jurisdiction upon the ground that she had no residence in the county, he, after a proof, repelled her objection, and decerned against her. *Held* (1) that the defender was entitled to appeal to the High Court under the 31st section of the Small-Debt Act, 1837, on the ground of "defect of jurisdiction" of the Sheriff-substitute, and (2) that the case should be remitted to the Sheriff to inquire into the facts, and to report. *Russell & Co. v. Murray*, March 9, 1892, Just. Cases, p. 61.
5. Action of damages for alleged wrongous diligence on a small-debt decree. *Gray v. Smart*, March 18, 1892, p. 692.

Discretion of Sheriff—Bankruptcy—Cessio—Debtors Act, 1880, sec. 9.

6. A journeyman joiner made an application for cessio. His assets were £3, 5s., his wages 34s. per week, and his liabilities £56, 7s. 3d. His principal debtor, who had received a dividend of 3s. per £1 on his claim for £27, 10s. 3d. under a trust-deed granted by the petitioner some years before (in respect of which payment the other creditors at that time granted discharges), and who had subsequently received 2s. per £1, objected to his obtaining decree. There were four other creditors, and the applicant stated in his examination that he proposed, when able, to pay them in full, but not to make any arrangement with the objecting creditor, and that it was diligence used by him that had led to the presentation of the application. The Sheriff on this ground, and because there were practically no assets, refused the application. The Court *reversed* this judgment, and remitted to grant decree of cessio. *Sproul v. M'Cusker*, March 1, 1892, p. 539.

Application for warrant to imprison—Aliment—Civil Imprisonment Act, 1882, sec. 4, subsecs. 2, 3, and 4.

7. An application, under the Civil Imprisonment (Scotland) Act, 1882, by a creditor in a decree for the aliment of a bastard child, is to be disposed of summarily by the Sheriff with reference to the circumstances of the debtor at the date of the application. It is not competent for the Sheriff, after having satisfied himself that the debtor is unable to pay the aliment, to continue the application for a definite period on the chance of the debtor's circumstances improving. *Cain v. M'Colm*, May 31, 1892, p. 813.

See *Bankruptcy*, 7, *Lease*, 9, and for Appeal to Court of Session see *Process*, 27, 29 to 37.

SHIP. *Charter-party—Demurrage.*

1. A charter-party stipulated that the steamship "Cassia" should proceed to "Portugalete, or any other usual ore loading place in the River Nervion, not above Luchana, as ordered by merchants' agents on arrival," and there load a cargo of iron ore, "after being berthed in turn." The vessel was ordered to go to Portugalete. The rules for regulating the turns of vessels loading there provided that their turn should be taken from the official list of arrivals. On 17th June the "Cassia" arrived at Portugalete, and was duly entered in the turn list. The shipmaster was ordered by the merchants to load the ship at a particular loading place to which a certain class of ore was brought by railway from a certain ore deposit named "Penuco." In consequence of other ships which had previously arrived being loaded from the same deposit, the "Cassia" had to wait her turn, and was not berthed for loading till 27th June. Another vessel which had arrived after the "Cassia" and had received a later number on the turn list had been berthed on 21st June at a different loading place to receive another class of ore from a different deposit, and finished loading on the 24th. In an action for demurrage by the owners of the "Cassia" against the charterers, *held (diss. Lord Young)* that according to the terms of the charter-party the "Cassia" should have been berthed on 21st June, and that the charterers were liable to the owners for demurrage. *Stephens, Mawson, & Goss v. Macleod & Co., Oct. 29, 1891, p. 38.*
2. By charter-party it was agreed that a vessel should, after loading, proceed to Leith docks "and deliver" the cargo of coal "alongside any safe wharves, crafts, or depots." The cargo was to be taken from alongside the vessel "at the merchant's risk and expense according to the usual custom at loading and discharging ports." Forty-eight running hours were allowed for discharge, after which demurrage was stipulated for, "except in case of strikes, . . . detention by railway or cranes, . . . or any other cause beyond the control of the charterers which may impede the ordinary lading and discharging of the vessel." On the arrival of the vessel at Leith, in consequence of a strike of railway servants the charterers could not be supplied with waggons to remove the coal by railway as they had arranged with their customers to do, and did not discharge the vessel within the running hours. There was no rule of the port that coal must be discharged into waggons, or forbidding its discharge on the quay. In an action by the owners for demurrage in respect of the charterers' failure to discharge within the running hours, *held* that the charterers had failed to shew that the discharging of the vessel had been impeded by any of the excepted causes. *Granite City Steamship Co., Limited, v. Ireland & Son, Nov. 20, 1891, p. 124.*
3. A charter-party provided that the vessel should proceed to a port named and deliver a cargo in the usual and customary manner on being paid freight at a certain rate "per ton delivered into trucks," and contained the following clause of exceptions:—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, machinery and boilers, commotion by pitmen, strikes, detention by railways, of whatever nature and kind soever during the said voyage, always mutually excepted." In an action upon the charter-party at the instance of the shipowners for payment of demurrage it was averred that there had been delay in the discharge of the cargo owing to the refusal of a railway company to supply trucks to receive it, on account of the charterers having, in breach of the company's regulations, kept too many trucks unloaded in their works. *Held* that the delay was covered by the exception "detention by railways," and action dismissed as irrelevant. *Letricheux & David v. Dunlop & Co., Dec. 1, 1891, p. 209.*
4. A charter-party of a steamship chartered to carry grain from the Black Sea provided that there should be "eleven running days, Sundays excepted, for loading and unloading, and ten days on demurrage over and above the

SHIP—Continued.

said lay-days at 6d. per ton per running day. The 1885 bills of lading to be used under this charter, and its terms to be considered part thereof." The printed bill of lading 1885, as filled up by the master at the port of loading, contained this clause:—"Five and a-half 5½/8 laying-days remain for discharging cargo." The words and figures in italics were filled in by the master. In an action for demurrage against an onerous indorsee of the bill of lading, the shipowner contended that under the charter-party part of a day fell to be counted as a day, and that the shipmaster went beyond his power in stating the lay-days remaining for discharge at more than five days. *Held* that the master was empowered by the charter-party to fill up the blanks in the bill of lading, and that the bill of lading as filled up was binding on the owners.

Question as to the time from which lay-days begin to run. *Allan v. Johnstone*, Jan. 13, 1892, p. 364.

Charter-party—Delivery of cargo.

5. A ship was chartered to carry a cargo of timber and "deals for beam fillings and broken stowage" to a safe port as ordered, "the cargo to be unloaded as customary at port of discharge at such wharf or dock as the charterers or their agents may direct." "The custom of the wood trade of each port to be observed in all cases when not specially expressed." The ship was ordered by the consignees to discharge at Queen's Dock, Glasgow, but the harbourmaster refused to give a berth there, and assigned another berth for the discharge of the cargo into the water. The consignees acquiesced in this arrangement, and the deals as well as the timber were discharged into the water. In an action for payment of freight against the consignees the defenders pleaded compensation in respect of damage alleged to have been sustained by the deals being put into the water, and in being allowed to remain in the water for several days. The Sheriff-substitute held that by the custom of Glasgow Harbour the shipowners were bound to deliver the logs upon the quay, and that they were liable for the damage caused by their being allowed to remain in the water. In an appeal *held* (1) that the defenders' acquiescence in the mode of discharge had freed the ship from responsibility therefor; and (2) that the ship had performed her contract by delivering the deals into the water, and had no further responsibility in regard to them. *Thorsen v. M'Dowall & Neilson*, March 18, 1892, p. 743.

Charter-party—Freight—Demurrage.

6. A charter-party provided that part of the freight should be payable on arrival, "and the remainder after unloading and on right delivery of the cargo." It also provided that the owners should have a lien "for all freight, dead freight, and demurrage." The ship in the course of delivering a cargo of timber into the Clyde at Glasgow suspended delivery for two days till the consignee should find security for the freight. In an action for two days' demurrage, *held* that the shipowners were not entitled to demurrage, as they might have completed unshipment of the cargo and yet retained their lien. *Thorsen v. M'Dowall & Neilson*, March 18, 1892, p. 743.

Charter-party—Delay in taking delivery—Rescission.

7. A steamship owner at Hastings, with the view of carrying on more effectually passenger traffic during the summer months between that and other ports in the south of England, entered into a charter-party with the owner of the steamship "Victoria," then being fitted out on the Clyde. By the charter-party (dated 3d July 1891) he agreed "to hire the said steamship till the 30th September 1891, she being placed at the disposal of the charterers in the port of Greenock or Port-Glasgow, in such berth as charterers may direct, such orders to be given to owner's agents before arrival of the steamer." No date was fixed for delivery of the vessel. The charter-party bore that the charterer should pay the hire at a certain rate per month, "commencing the day of delivery in good order and ready for sea in the Clyde, notice whereof

SHIP—Continued.

to be given to charterers." "Payment of said hire to be made in cash monthly, in advance, to owners in Glasgow, first month's hire to be paid before the steamer leaves the Clyde. Charterer agrees to give a banker's guarantee for the due payment of hire-money, and in default of such payment or payments as herein specified, the owners or their agents shall have the faculty of withdrawing the said steamer from the service of the charterers. On 13th July the charterer received a telegram that the vessel would be handed over at Glasgow on the 15th, "when banker's guarantee and month's hire must be forthcoming." The charterer, on the 15th, sent a telegram,—"Leave for Glasgow to-night; am prepared to take 'Victoria.'" The charterer did not set out till the following night, but sent no explanation of his delay. He reached Glasgow on the morning of the 17th, and went to the vessel at 11.30 A.M. There was no one on board to give delivery. He endeavoured to communicate with the defender's brokers, but failed to do so till 4.30, when he was informed that the vessel had been let to another person about 12.30 of the same day. In answer to an action of damages for breach of contract in failing to deliver the vessel, the owner pleaded (1) that time was of the essence of the contract, and that the pursuer's failure to take delivery on the 15th amounted to a breach of contract; and (2) that the pursuer's conduct prior to the 17th of July was such as to justify the defender in believing that he did not intend to fulfil the contract. *Held* (1) that there had been no breach of contract on the pursuer's part; (2) that there was nothing to justify the defender in resiling from the contract; and (3) that the pursuer was entitled to damages for loss of profit. *Collard v. Carswell*, July 12, 1892, p. 987.

Salvage—Remuneration for services.

8. In an action for payment of £100 as salvage services rendered near Aberdeen by a small boat about 9 o'clock on the evening of 21st June, to a passenger steamer which had run aground upon a rock in a dangerous neighbourhood in a dense fog, it was proved that the boat had been the first to come to the steamer's assistance, and was instrumental in passing a hawser from the steamer to a tug, which came to her assistance soon after, and which towed her into harbour. The Sheriff-substitute fixed the value of the services at £10, and on appeal by the pursuers the Court (*dis. Lord M'Laren*) refused to increase the award. *Walker v. North of Scotland Steam Navigation Co.*, Jan. 19, 1892, p. 386.

Entry in log.

9. Slander—Privilege—Merchant Shipping Act, 1854, sec. 104. *Hill v. Thomson*, Jan. 16, 1892, p. 377.

Shipping casualty appeal.

10. Sufficient and proper instructions for safe navigation of vessel—Procedure before Court of investigation. *Watson v. Board of Trade*, July 20, 1892, p. 1078.

Harbour—Powers of harbourmaster—Reparation.

11. A schooner sailing up the River Dee to Kirkcudbright harbour was steered by the master, with the assistance of two local fishermen acting as pilots. On the vessel reaching a point within the harbourmaster's jurisdiction, one of the pilots hailed the harbourmaster, who was standing at the head of the west pier, for instructions when to drop the anchor. The harbourmaster made signs for the vessel to come on. The master thereupon changed his course from the mid-channel to one leading directly to the head of the pier. The harbourmaster, after the course was changed, continued to make signs for the vessel to advance. The vessel continued in her course till she grounded on a bank near the pier. The harbourmaster in giving the orders was in the belief that the tide was full, while in fact it had ebbed three inches. In an action of damages brought by the owner of the vessel against the harbour trustees, the First Division held that the harbourmaster was in fault, but that there was contributory negligence on the part of those in charge of the vessel in changing its course. In an appeal held (*rev. the judgment*) (1)

SHIP—Continued.

that the accident was caused by the fault of the harbourmaster in directing the vessel to take a wrong course; and (2) that the shipmaster was not in fault in following that course, as he was bound to obey the harbourmaster's orders. *Renney v. Magistrates of Kirkcudbright*, March 31, 1892, H. L., p. 11.

See *Insurance*, 1—*Justiciary Cases*, 2, 8, 19, 22, 29—*Reparation*, 13.

SLANDER. See *Reparation*, 24 to 31—*Solatium*.

SMALL-DEBT ACTS. See *Reparation*, 32—*Sheriff*, 4, 5.

STAMP. See *Revenue*, 6.

STATUTE. Construction—*Public Health Act*, 1867, secs. 45 and 46—*Glasgow Police Acts*, 1862 and 1866.

1. The provisions of the Glasgow Police Acts, 1862 and 1866, dealing with underground dwellings, enact certain requirements from which, however, they exempt such dwellings as are registered in pursuance of the Acts.

The Public Health Act, 1867, contains similar but enlarged provisions relating to underground dwellings, but without the exemptions.

In a prosecution under the Public Health Act for contravention of these provisions in the case of an underground dwelling in Glasgow, *held* that it was not a good defence that the dwelling was registered under the Glasgow Police Acts. *Lang v. Munro*, March 9, 1892, p. 53.

Retrospective effect.

2. Conveyancing Act, 1874. *Houston v. Buchanan*, March 1, 1892, p. 524.

Ejusdem generis.

3. Aberdeen Police and Waterworks Act, 1862. *Walker v. Lamb*, Feb. 16, 1892, Just. Cases, p. 50.

Interpretation Act, 1889.

4. Plural and Singular—Marine Insurance—One policy for a number of vessels—Stamp. *Great Britain Steamship Premium Association v. Whyte*, Nov. 17, 1891, p. 109.

STATUTES.

1503, cap. 77. See *Husband and Wife*, 2.

1579, cap. 83. See *Prescription*, 1.

1681, cap. 10. See *Husband and Wife*, 2.

1695, cap. 5. See *Cautioner*, 2.

1696, cap. 5. See *Bankruptcy*, 2.

30 Geo. III. cap. 52. See *Revenue*, 5.

39 and 40 Geo. III. cap. 98 (*Thellusson Act*). See *Succession*, 11.

48 Geo. III. cap. 55 (*House-Tax Act*, 1808). See *Revenue*, 4.

3 Geo. IV. cap. 91. See *Burgh*, 3.

4 Geo. IV. cap. 60 (*Lotteries Act*, 1823). See *Justiciary Cases*, 26, 32.

6 Geo. IV. cap. 120 (*Judicature Act*, 1825). See *Process*, 9, 33.

1 and 2 Will. IV. cap. 43 (*Turnpike Roads Act*, 1831). See *Police*, 1—*Reparation*, 7.

2 and 3 Will. IV. cap. 65 (*Reform Act*, 1832). See *Election Law*, 1.

1 Vict. cap. 41 (*Small-Debt Act*, 1837). See *Reparation*, 32—*Sheriff*, 4.

5 and 6 Vict. cap. 35 (*Income-Tax Act*, 1842). See *Revenue*, 1, 2, 3.

8 and 9 Vict. cap. 19 (*Lands Clauses Consolidation Act*, 1845). See *Railway*, 1.

8 and 9 Vict. cap. 33 (*Railways Clauses Consolidation Act*, 1845). See *Railway*, 3.

11 and 12 Vict. cap. 36 (*Entail Amendment Act*, 1848). See *Entail*.

11 and 12 Vict. cap. 42. See *Justiciary Cases*, 20.

13 and 14 Vict. cap. 92 (*Prevention of Cruelty to Animals Act*, 1850). See *Justiciary Cases*, 14.

14 and 15 Vict. cap. 36 (*Inhabited House-Duty Act*, 1851). See *Revenue*, 4.

16 and 17 Vict. cap. 34 (*Income-Tax Act*, 1853). See *Revenue*, 1.

STATUTES—Continued.

- 16 and 17 Vict. cap. 93 (*Burgh Harbours Act*, 1853). See *Burgh*, 3.
- 17 and 18 Vict. cap. 91 (*Lands Valuation Act*, 1854). See *Valuation Acts*.
- 17 and 18 Vict. cap. 104 (*Merchant Shipping Act*, 1854). See *Justiciary Cases*, 2, 8, 19, 22, 30.
- 19 and 20 Vict. cap. 58 (*Burgh Voters Act*, 1856). See *Election Law*, 6, 7, 8.
- 19 and 20 Vict. cap. 79 (*Bankruptcy Act*, 1856). See *Bankruptcy*.
- 20 and 21 Vict. cap. 58 (*Lands Valuation Act*, 1857). See *Valuation Acts*, 1, 5.
- 25 and 26 Vict. cap. 35 (*Public-Houses Amendment Act*, 1862). See *Public-House*.
- 25 and 26 Vict. cap. 89 (*Companies Act*, 1862). See *Company*.
- 25 and 26 Vict. cap. 97 (*Salmon Fisheries Act*, 1862). See *Justiciary Cases*, 16.
- 25 and 26 Vict. cap. 101 (*General Police and Improvement Act*, 1862). See *Burgh*, 1—*Police*, 4, 5.
- 25 and 26 Vict. cap. ccciii. (*Aberdeen Police and Water-Works Act*, 1862). See *Public Health*, 2.
- 25 and 26 Vict. cap. cciv. (*Glasgow Police Act*, 1862). See *Public Health*, 1.
- 27 and 28 Vict. cap. 53 (*Summary Procedure Act*, 1864). See *Justiciary Cases*, 7, 10, 21, 22, 23, 26 to 30.
- 29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866). See *Justiciary Cases*, 10—*Police*, 6.
- 30 and 31 Vict. cap. 23 (*Customs and Inland Revenue Act*, 1867). See *Insurance*, 1.
- 30 and 31 Vict. cap. 101 (*Public Health Act*, 1867). See *Justiciary Cases*, 4, 24—*Public Health*, 1, 3.
- 30 and 31 Vict. cap. 131 (*Companies Act*, 1867). See *Company*.
- 31 and 32 Vict. cap. 48 (*Representation of the People Act*, 1868). See *Election Law*, 2, 7, 9.
- 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868). See *Process*.
- 31 and 32 Vict. cap. 101 (*Titles to Land Consolidation Act*, 1868). See *Right in Security*.
- 31 and 32 Vict. cap. 123 (*Salmon Fisheries Act*, 1868). See *Justiciary Cases*, 16, 17.
- 34 and 35 Vict. cap. 42 (*Citation Amendment Act*, 1871). See *Reparation*, 32.
- 35 and 36 Vict. cap. 62 (*Education Act*, 1872). See *Justiciary Cases*, 15, 31.
- 37 and 38 Vict. cap. 42 (*Building Societies Act*, 1874). See *Building Society*.
- 37 and 38 Vict. cap. 94 (*Conveyancing Act*, 1874). See *Right in Security*, 1—*Superior and Vassal*, 2—*Trust*, 4—*Writ*, 3.
- 38 and 39 Vict. cap. 61 (*Entail Amendment Act*, 1875). See *Entail*, 6.
- 38 and 39 Vict. cap. 62 (*Summary Prosecutions Appeals Act*, 1875). See *Justiciary Cases*, 4, 5, 6.
- 39 and 40 Vict. cap. 16 (*Customs and Inland Revenue Act*, 1876). See *Revenue*, 1.
- 39 and 40 Vict. cap. 70 (*Sheriff Court Act*, 1876). See *Process*, 35.
- 40 and 41 Vict. cap. 26 (*Companies Act*, 1877). See *Company*, 1.
- 40 and 41 Vict. cap. 29 (*Married Women's Property Act*, 1877). See *Husband and Wife*, 4.
- 41 and 42 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878). See *Revenue*, 4.
- 41 and 42 Vict. cap. 16 (*Factory and Workshop Act*, 1878). See *Reparation*, 14.
- 41 and 42 Vict. cap. 51 (*Roads and Bridges Act*, 1878). See *Police*, 1.
- 41 and 42 Vict. cap. 78 (*Education Act*, 1878). See *School*, 2, 3.
- 41 and 42 Vict. cap. clxvii. (*Callander and Oban Railway Act*, 1878). See *Railway*, 2.

STATUTES—Continued.

- 42 and 43 Vict. cap. 42 (*Lands Valuation Amendment Act*, 1879). See *Valuation Acts*, 4, 5.
- 42 and 43 Vict. cap. cxxxii. (*Edinburgh Municipal and Police Act*, 1879). See *Police*, 2, 3.
- 43 and 44 Vict. cap. 34 (*Debtors Act*, 1880). See *Bankruptcy*, 13.
- 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880). See *Reparation*, 16, 17, 18, 23.
- 44 and 45 Vict. cap. 21 (*Married Women's Property Act*, 1881). See *Bankruptcy*, 1.
- 45 and 46 Vict. cap. 42 (*Civil Imprisonment Act*, 1882.) See *Aliment*.
- 45 and 46 Vict. cap. 53 (*Entail Act*, 1882). See *Entail*, 1, 6.
- 45 and 46 Vict. cap. 77 (*Citation Amendment Act*, 1882). See *Reparation*, 32.
- 46 and 47 Vict. cap. 56 (*Education Act*, 1883). See *School*, 4.
- 46 and 47 Vict. cap. 62 (*Agricultural Holdings Act*, 1883). See *Lease*, 8, 11.
- 48 and 49 Vict. cap. 3 (*Representation of the People Act*, 1884). See *Election Law*, 3, 4.
- 48 and 49 Vict. cap. 16 (*Registration Amendment Act*, 1885). See *Valuation Acts*, 1.
- 49 and 50 Vict. cap. 23 (*Companies Act*, 1886). See *Company*, 2, 10.
- 49 and 50 Vict. cap. 29 (*Crofters Holdings Act*, 1886). See *Bankruptcy*, 3—*Lease*, 12, 13.
- 50 and 51 Vict. cap. 24 (*Crofters Holdings Act*, 1887). See *Bankruptcy*, 3—*Lease*, 12, 13.
- 50 and 51 Vict. cap. 35 (*Criminal Procedure Act*, 1887). See *Justiciary Cases*, 18.
- 50 and 51 Vict. cap. 58 (*Coal Mines Regulation Act*, 1887). See *Mines and Minerals*, 3.
- 51 and 52 Vict. cap. cxciv. (*Glasgow Central Railway Act*, 1888). See *Arbitration—Railway*, 3.
- 52 and 53 Vict. cap. 20 (*Agricultural Holdings Act*, 1889). See *Lease*, 9.
- 52 and 53 Vict. cap. 50 (*Local Government Act*, 1889). See *County Council—Poor*, 4.
- 52 and 53 Vict. cap. 63 (*Interpretation Act*, 1889). See *Insurance*, 1.
- 54 and 55 Vict. cap. 3 (*Custody of Children Act*, 1891). See *Parent and Child*, 9.
- 54 and 55 Vict. cap. cxxxvi. (*Edinburgh Municipal and Police Amendment Act*, 1891). See *Burgh*, 2—*Police*, 2, 3.

STREET. See *Police*, 2, 3.

SUCCESSION. Description of class—"Their children."

1. A trustor appointed his trustees on the lapse of a liferent to divide the residue of his estate equally among a number of nephews and nieces, the children of any who should predecease him coming into their parent's place. By a codicil he directed his trustees to retain out of the shares falling to one of his nephews, James Whittet, and one of his nieces, Mrs Jane Whittet, £200, and to divide this sum "among their children equally." James and Jane Whittet were spouses, and at the date of the trust-settlement had two children. After the trustor's death, but before the expiration of the liferent, Mrs Jane Whittet died, and Mr Whittet married a second time, and had, when the liferent expired, six children by this second marriage. Held that the children of the second marriage were not entitled to participate in the sum of £200. *Whittet's Trustees v. Whittet*, July 9, 1892, p. 975.

"Family."

2. A bequest to the "family" of A held not to include the grandchildren of A. *Low's Trustees v. Whitworth*, Feb. 4, 1892, p. 431.

Division per stirpes or per capita.

3. A testator gave the interest on the residue of his estate equally among his

SUCCESSION—*Continued.*

two sisters and a sister-in-law, "the families of the annuitants to get the interest of their mother until the death of the last annuitant," when the residue was to be divided into two parts, one part going to the Free Church, the other to "the families of my two sisters." All three annuitants had families, and the children of the sister-in-law and one of the sisters enjoyed their mother's interest during the survivance of the longest liver of the sisters. On the death of the last annuitant *held* that the half of the residue should be divided between the families of the two sisters *per stirpes*. *Low's Trustees v. Whitworth*, Feb. 4, 1892, p. 431.

4. A testator directed her trustees to pay the whole residue "equally between John Inglis and the children of Daniel M'Neil . . . equally between them." John Inglis was a nephew of the testator, and Daniel M'Neil's wife was a niece. Both survived the testator. *Held* that the division was bipartite between Inglis and the M'Neils, and equal again among the M'Neils, of whom there were eight. *Inglis v. M'Neils*, June 23, 1892, p. 924.

Conditio si sine liberis.

5. A testator directed one-half of the residue of his estate to be paid to "the families of my two sisters." Both sisters left children who survived the testator, but one of the children of the elder sister had predeceased the date at which the testament was made, leaving a family. *Held* that this family did not take any part of the residue. *Low's Trustees v. Whitworth*, Feb. 4, 1892, p. 431.
6. Where the terms of a testamentary deed shewed that the testator had contemplated the contingency of legatees dying and leaving issue by making certain legacies payable to the issue of legatees in the event of their predecease, *held* that the *conditio si sine liberis* was not to be implied in the case of a legacy where he had made no such provision.

Question whether the *conditio si sine liberis* can be implied in favour of the issue of a conditional institute. *Carter's Trustees v. Carter*, Jan. 29, 1892, p. 408.

Accretion—Children taking parents' share.

7. A trustor by trust-disposition directed that the residue of his estate should be divided among his brothers and sisters who might survive him, jointly with the legal issue of any of them who might predecease him. He further restricted the share of A., one of his sisters, to an alimentary liferent, giving her children the fee, and in the event of her dying without lawful issue he destined her share to her brothers and sisters who might be surviving at the date of her decease, jointly with the lawful issue of such of them as might have deceased. By codicil the trustor revoked "all share" that a brother R. would have been entitled to under the will, and left "that share" to R.'s family. On A.'s death, without issue, *held* that R.'s family were entitled to participate in the accreting share, just as their father would have been had he not been disinherited. *M'Culloch's Trustees*, May 14, 1892, p. 777.

Construction—Executor—Trustee.

8. Under a mutual settlement by husband and wife, the survivor was appointed "sole trustee and executor of the predeceaser." By subsequent codicil executed at sea, on 14th June 1890, to which the wife was not a party, the husband directed,—"I wish my estate to be managed by the same trustees as my brother John, dead or alive, including to my wife." The husband died on 21st June 1890. After the husband's death competing petitions were presented (1) by the curator bonis of the wife, who had become insane, and (2) by the persons named as trustees under the settlement of the testator's brother John, dated 18th April and recorded 21st May 1891, the former claiming to be appointed executor-dative as representing his ward, and the latter claiming confirmation as executors-nominate under the codicil. *Held* (1) that upon a construction of the testamentary writings the unlimited power conferred by the codicil on the persons therein designated to manage the estate along with the wife, who had previously been nominated

SUCCESSION—*Continued.*

trustee and executor, implied their nomination as executors as well as trustees, and that they had a title to be confirmed executors-nominate; (2) that the curator bonis had under the Act of Sederunt, February 13, 1730, no title to be appointed executor-dative, other persons having a title having offered to confirm; and therefore (3) that the trustees were entitled to confirmation.

Opinions that a testamentary conveyance to certain persons as trustees or with a direction to manage does not necessarily imply their appointment as executors. *Martin v. Ferguson's Trustees*, Feb. 16, 1892, p. 474.

Legacy—Special legacy—Right in security.

9. *Held, per Lord Kyllachy* (Ordinary), that the legatee of a specific moveable subject must take it *cum onere*, and redeem it for himself if it has been pledged or assigned in security by the testator subsequent to the date of the bequest. *Stewart v. Stewart*, Dec. 10, 1891, p. 310.

Incidence of burden—Proof—Testament—Extrinsic evidence.

10. J. S. in 1879 executed a settlement in which he conveyed to trustees his whole heritable and moveable estates with this direction,—“After payment of all my just and lawful debts . . . my said trustees shall pay and make over to” his sister-in-law Mrs B., wife of W. B., in liferent, and her children in fee, one-half of the residue of his estate, and to his brothers and sisters the other half of the residue. On 4th January 1881 J. S. executed a bond over his house and grounds of L. for £4000 in favour of the firm of W. B. & Company to whom he was owing £10,000, and the bond was recorded. By a codicil dated in 1889 the testator conveyed to Mrs B., the widow of W. B., in liferent, and to J. B., their daughter in fee, his house and grounds of L. as occupied by him, with the household furniture, silver plate, and other moveables therein, stating that he revoked the settlement “only in so far as it conveys generally the said dwelling-house,” &c., “hereby confirming the same in all other particulars.” After the death of J. S., Mrs B. and her daughter raised against the trustees an action for declarator that the bequest of the house and grounds was not burdened with the debt contained in the bond, and that the trustees were bound to pay it out of the deceased's other estate on the grounds (1) that the settlement and codicil implied a direction that the debt in the bond should be paid out of the general estate exclusive of the subjects conveyed by the codicil, and (2) *separatim*, that the settlement and codicil were to be construed under reference to the facts of the case, and that so construed they implied this direction. In support of the latter plea the pursuers averred that at the date of the bond J. S. was owing to the firm of W. B. & Company a debt of £10,000, and that being then apprehensive that his affairs might become embarrassed he voluntarily offered the security to these creditors, and asked them to send to his agent authority to record the bond; that this authority was given, and the bond recorded, but that he retained the bond in his own possession; that he never intended the bond to be acted upon, except in the event of his bankruptcy, and that subsequently, when his affairs became prosperous, he destroyed the bond; that his house and grounds were never worth more than £4000, and that at the date of the codicil and at the date of his death they were not worth more than £3000, and that that being less than the amount of the bond, their bequest would be of no value, which could not be presumed to have been the truster's intention. *Held* that the pursuers' averments were not relevant, and action dismissed. *Brand v. Scott's Trustees*, May 13, 1892, p. 768.

Accumulation—Thellusson Act—Effect of Thellusson Act in accelerating period of distribution.

11. In a trust-disposition and settlement the testator set forth the following trust purpose:—“*Quarto*, considering that there are now belonging to me valuable mineral properties . . . and that it is my wish that the rents” thereof “shall not at first be at the disposal of the heir in possession of my other Scotch estates, but shall for a certain time be reserved by my said

SUCCESSION—*Continued.*

trustees for the purposes after mentioned, therefore I hereby direct" the trustees to carry the proceeds of these properties "to an account which shall be called the 'Garscadden Trust Fund Account,' and to apply the balance standing at the credit of that account from time to time as follows." He then directed the trustees to pay certain debts and provisions, "and lastly, after satisfying all the preceding purposes they shall accumulate the rents and proceeds of my said mines and minerals until the same shall amount to the sum of £25,000, but they shall not accumulate the interest . . . but shall pay the interest, dividends, or annual profits of the said accumulated fund . . . yearly to the heir who shall be in possession of my landed estates for the time . . . and though there appears to me at present to be no reason to doubt that the proceeds of my said mines and minerals will be amply sufficient to meet all the burdens which I have thus laid upon them, and to admit of an accumulation to the extent of £25,000, after paying all the burdens which I have thus laid upon them, but in case, from any unforeseen contingency, the said mines and minerals shall either cease to be worked, or the proceeds thereof be much diminished, yet the said 'Garscadden Trust Fund Account' shall still be kept up during the lifetime of my two sons and also during the lifetime of the first heir descending from either of them who shall be in existence at the time of my death and who shall have succeeded to my lands and estates, and in case any other mines and minerals are subsequently discovered, the proceeds of these shall, in like manner, be entered in the said account, and accumulated till the total free balance at the credit thereof shall amount to the sum of £25,000, and this being accomplished, I authorise and direct my said trustees to close the said account and pay over the accumulated fund to the heir then in possession of my said lands and estate, to whom my said trustees shall then also convey the said mines and minerals themselves in the form of an entail, in like manner as is hereinafter directed in reference to my landed estates: And in like manner the said account shall be closed at the death of the last survivor of my said two sons and of the first heir descending from either of them who shall have been in existence at the time of my death, and shall have succeeded to my said lands and estates, although the accumulated sum should not then amount to the foresaid sum of £25,000, and the amount then at the credit of the said account, whatever it may be, shall in like manner be paid to the heir then in possession of my said lands." The testator died on 17th April 1870, and was survived by his two sons and by the eldest son of his second son. The trustees had paid off the whole debts and provisions directed to be paid from the fund, and had accumulated £12,138, when, on 17th April 1891, the Thellusson Act prevented further accumulation. The testator's eldest son having died unmarried, the second son, the heir in possession of the testator's estates, raised an action against the trustees for declarator that from 17th April 1891 the direction to accumulate had become void, and that the pursuer had right to the accumulated fund. *Held* (1) that the testator's sole purpose in postponing payment of the fund was accumulation; and (2) that further accumulation being impossible the pursuer was entitled to the fund. *Colquhoun v. Colquhoun's Trustees*, June 30, 1892, p. 946.

Repugnancy—Condition—Real burden—Declarator ab ante.

12. The proprietrix of a heritable estate died leaving a *mortis causa* disposition of the estate to A and the heirs of his body, whom failing, to B and the heirs of her body, whom failing, &c., "under this declaration, burden, and condition, that in the event of any part of the said lands and estate . . . that may remain unsold at my death being thereafter sold or disposed of or excambied by any proprietor or possessor of the same, or adjudged or attempted to be adjudged, or carried away in any manner of way for his or her debt, that then and in any of these events there shall be paid out of the price of the lands . . . if and when sold, or created a real lien and burden upon the same if they shall remain unsold, to and in favour of such

SUCCESSION—*Continued.*

of the children of F as may then be in existence, or to their heirs, equally to and among them, the sum of £10,000." A, the institute, after succeeding under the destination, died, without heirs of his body, leaving a disposition of the estate to B for her *liferent* alimentary use only, and the heirs of her body in fee, whom failing, to C, a stranger to the original destination, and the heirs of his body, also strangers. When B, who was a married woman, and had no heirs of her body, was sixty-three years of age, one of the children of F brought an action against C for declarator that in consequence of A's disposition the provision in the original settlement in favour of the children of F had come into operation. *Held* (1) that the action was not premature; (2) that the provision in favour of the children of F was effectual as a condition of the gift to A; (3) on a construction of the whole deed of the testatrix, that A had "disposed of" the estate and so had come under an obligation to create a real burden over it for £10,000 in favour of the children of F; and (4) that C and his heirs, as A's gratuitous disponees, were, on succeeding to the estate, under the same obligation. *Falconar Stewart v. Wilkie*, March 15, 1892, p. 630.

Repugnancy—Discretionary power in trustees to retain subject of a vested right—Bankruptcy of legatee.

13. A testator directed her trustees to make over the residue of her estate to her son on his attaining the age of twenty-five, "declaring that my trustees shall be entitled, so long as they think it expedient to do so, to retain the said residue and remainder in their own hands, and that even after my son shall have attained said age, and only pay him the annual produce or income thereof, it being understood that should they so retain it after he attains twenty-five years, and should he die without said residue and remainder and others having been paid to him, then the same shall be paid to his nearest heirs and representatives whomsoever, my intention being that the same should vest in him at said age of twenty-five." In a competition between the son's trustee in bankruptcy and the mother's testamentary trustees, after the son had attained the age of twenty-five, but before the residue had been made over to him, *held* that the residue having vested in the son the testamentary trustees were not entitled to retain it, but were bound to pay it over to the son's trustee. *Mackinnon's Trustees v. Official Receiver in Bankruptcy in England*, July 19, 1892, p. 1051.

Liferent—Protected liferent—Irritant clause—Bankruptcy—Trustee—Power of sale.

14. By disposition and settlement an estate was conveyed to certain persons in *liferent* and certain other persons in fee under a declaration prohibiting the *liferenters* from "selling, mortgaging, or otherwise disposing of" their interest, and further declaring, that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or part thereof," should be null and void, and that "all parties signing such deeds or instruments" should forfeit their rights in favour of the person next in succession. The *liferenter* in possession under this disposition granted a trust-disposition for behoof of his creditors, conveying the *liferent* to the trustees with a power of sale; subsequently his estates were sequestrated. *Held* (1) that the trust-disposition was neither a sale nor a mortgage, and consequently was not struck at by the clause of forfeiture; and (2) that as that clause did not strike at the diligence of creditors, the *liferent* was vested in the trustee by the sequestration; and that the trustee was entitled to sell the *liferent* interest without incurring the forfeiture. *Chaplin's Trustee v. Hoile*, Dec. 8, 1891, p. 237.

Alimentary liferent—Power to discharge.

15. In an antenuptial marriage-contract a wife conveyed a sum of £4000 to trustees for the purposes,—(2) That in the event of the marriage being dissolved by the predecease of the wife, "leaving a child or children of the marriage," the trustees should pay the annual produce of the fund to her husband "during his life, for his *liferent* and alimentary use only," excluding credi-

SUCCESSION—*Continued.*

riage-contract being a debt due by the father at his death, not expressed to be in satisfaction of legitim, the son was not thereby barred from claiming legitim. *Rait v. Arbuthnott*, March 18, 1892, p. 687.

Power to make advances—Interest.

19. A trustor left his estate to be divided among his family of four daughters, vesting being postponed till the period of payment, viz, the majority of the youngest daughter. He empowered his trustees "to make advances" to his daughters "on their marriage," which advances were to be accounted as part of their shares, and to be deducted from their shares of the residue on the final division taking place. Three of the daughters were married during the subsistence of the trust. The trustees on the occasion of each marriage paid the daughter a sum of £1000, and made her an annual allowance of £300. *Held* (1) that the annual allowances were *ultra vires* of the trustees; (2) that the allowances so paid to each married daughter, with interest thereon to the date of division, were to be imputed to account of her share of residue; (3) that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and (4) that no interest was chargeable on the sums of £1000. *Baird's Trustees v. Duncanson*, July 19, 1892, p. 1045.

Revocation—Codicil—Re-execution of settlement.

20. A lady left (1) a trust-disposition and settlement, partly signed by her and also executed notarially of date 8th March; (2) a codicil executed notarially on 14th March; and (3) a trust-disposition and settlement executed on 9th April in the ordinary way, all in the year 1890. (1) and (3) were both universal settlements, and were practically identical. There was no express revocation of prior settlements in (3). The codicil bequeathed a legacy to a person to whom a legacy was bequeathed in the first trust-disposition, and again in identical terms in the second trust-disposition, the codicil bearing that its provision was "in addition to the provisions in my trust-disposition and settlement in favour of the" legatee. In a special case brought to determine whether the codicil was or was not recalled by the second trust-disposition, it was stated that the first trust-disposition of the 8th of March was executed notarially, because from bodily weakness the testator had not been able to complete the execution of it in her own hand; that her man of business had explained to her that, if she recovered strength, "it might be better to have the deed re-executed and signed by herself"; that accordingly, she having recovered, it was so "re-extended and re-executed," this deed being the trust-disposition of 9th April; and that the notary who prepared and executed the codicil was not the same person who prepared the two trust-dispositions and took charge of their execution. *Held* that the codicil was not recalled, the trust-disposition of 9th April being merely a re-attestation of the will of 8th March. *Dalglish's Trustees v. Crum*, Nov. 25, 1891, p. 170.

Power to revoke—Mutual settlement.

21. By mutual settlement two spouses conveyed to trustees the whole property belonging to them or to either of them at their respective deaths, for certain purposes, reserving "our respective liferents of the premises, with power to us or the survivor of us to alter, innovate, or revoke these presents at pleasure." *Held* that under this clause the surviving spouse had no power to revoke bequests in the settlement of subjects which were the property of the predeceasing spouse, or bequests which were the joint gift of both spouses. *Kay's Trustees v. Stalker*, July 20, 1892, p. 1071.

Power to revoke—Trust—Delivery.

22. A trustor by trust-disposition, on the narrative that he was then in solvent circumstances, and that he regarded himself as morally and legally liable to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children, disposed certain heritable subjects, and also assigned certain policies of insurance upon his own life to trustees, and bound himself to the trustees

SUCCESSION—Continued.

to keep the policies in force. He then directed the trustees to hold and apply the trust-estate for payment of a variety of provisions to his wife and children, some of which were to come into immediate operation, and also for payment of £500 to a nephew, payment of the last mentioned provision being directed to be made as soon as the trustees had received payment of the proceeds of the policies of insurance. The residue of the trust-estate was directed to be divided, on the death of his wife, among his lawful children. It was further declared that none of the provisions should become vested interests until the period of payment. The deed contained no express power to revoke, and was delivered to the trustees, who were infest in the heritable subjects and intimated the assignation of the policies in their favour to the insurance companies. Subsequently the trustor executed a deed revoking the provision of £500 to the nephew. *Held*, after the death of the trustor, that the provision in favour of the nephew was irrevocable. *Robertson v. Robertson's Trustees*, June 7, 1892, p. 849.

Vesting—No gift apart from direction to pay—Legacy to daughter, whom failing, her issue.

23. A testator directed his trustees to pay the liferent of his estate to his widow, under burden of maintaining his unmarried daughters and such of his sons as should require assistance; after her death to pay an annual sum equally to his sons, and the balance of income equally among his unmarried daughters, while two remained unmarried; after the death of the widow, and the death or marriage of all the daughters but one, to dispose to his sons certain heritable subjects, but that under the burden of an annuity of £15 to the unmarried daughter so long as she should remain unmarried, and to pay "to each of my daughters, married and unmarried, without restriction, and not exclusive of the *jus mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one; and it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right equally among them to their mother's provisions." The sons were appointed residuary legatees. The testator was survived by his widow, one son, and three daughters. After the death of the widow one daughter died leaving issue, and a second daughter, H., died unmarried; the third daughter, who survived, was unmarried. In a question between the testamentary representatives of H. and her father's residuary legatee, *held (diss. Lord Young)*, that a legacy or provision of £1500 had not vested in her. *Reeve's Executor v. Reeve's Judicial Factor*, July 14, 1892, p. 1013.

See Marriage-contract—Provisions to Children—Revenue, 5—Trust.

SUPERIOR AND VASSAL. Feu-contract—Transmission of obligation to erect buildings upon personal representatives—Real burden.

1. A proprietor by feu-contract feued certain ground to three partners of a company, "and the survivors or survivor, and the heir of the last survivor," as trustees for behoof of the company, "with and under the burden of the whole conditions, reservations, burdens . . . which are declared to be real burdens affecting the lands conveyed," viz., that dwelling-houses of a certain value should be erected by the above-named vassals within two years upon the lands, and be upheld by them in good order, and insured and rebuilt if burnt down, "and failing such houses being erected . . . then and in that event these presents . . . shall, in the option of the superior, become null and void." After the lapse of the two years the last surviving partner of the company died in possession of the subjects without having implemented the obligation to build, and his widow, who had been appointed sole trustee under her husband's settlement, did not take up the feu. The superior raised an action against her as her husband's sole

SUPERIOR AND VASSAL—*Continued.*

trustee, concluding to have her ordained to implement the obligation, and failing implement to pay damages. The Court *assolized* her from the conclusions of the action, holding (1) that as the obligation was by the express terms of the feu-contract imposed solely upon the vassals holding the lands under the contract, it did not transmit against the last vassal's personal representative, and that (2) as the conclusion of the summons was for implement of a personal obligation attaching to the defender herself, and no such obligation was prestable, she was not liable in damages.

Opinions that under the terms of the feu-contract there was a personal obligation to build imposed upon the vassal in possession of the subjects, and that it might have been enforced by the superior by the ordinary remedies available to him at common law, notwithstanding the option expressly given him by the deed to irritate the feu in the event of the vassal's failure to build.

Opinions that the obligation to build would transmit and be enforceable against anyone taking up the feu. *Macrae v. Mackenzie's Trustee*, Nov. 20, 1891, p. 138.

Superior and Vassal—Casualty—Implied entry—Conveyancing Act, 1874, sec. 4, subsecs. 2 and 3—Statute—Retrospective effect.

2. A proprietor of heritable subjects was infeft in them by registration of his disposition in 1873. At this date the last entered vassal had been dead for several years, although the fact was not then ascertained. In 1891 the superior raised an action against the proprietor in statutory form for payment of a casualty, it being by this time ascertained that the last entered vassal had died before 1873. The Lord Ordinary (Stormonth Darling) *held* that the casualty due was the rent of the subjects for the year 1873, the year in which the infeftment was registered. On a reclaiming note, *held* that the measure of the casualty was the rent of the year 1874, the year in which the statute giving the vassal an implied entry was passed. *Houstoun v. Buchanan*, March 1, 1892, p. 524.

Property—Disposition—Superior and Vassal—Construction of disposition.

3. In 1796 the Duke of Argyll, who held the *plenum dominium* of the lands of Castle Campbell of the Crown, disposed in feu the lands of Hillfoot, part of Castle Campbell, to Drysdale, but reserved the coals and coalheughs. Tait acquired the Castle Campbell estate remaining in the Duke. Tait became bankrupt in 1828, and in 1837 Tait's trustee, on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, who had in 1796 acquired Drysdale's feu, had offered a certain sum for these subjects, and had been preferred to the purchase, conveyed to Moir "all and whole the town and lands of Hillfoot . . . all as at present possessed" by Moir and his tenants. No coal had at this time been worked in Hillfoot. The feu-rights and infeftments granted by the disposer's predecessors to feuars were excepted from the warrandice clause. The disposition contained an assignation to an unexecuted precept of sasine in a crown charter of resignation and confirmation, which Tait had obtained, "in so far as applicable to the lands of Hillfoot thereby disposed, to the end that" Moir "may be more readily infeft and seased in the premises, and also in and to the whole feu-duties and other services and casualties payable from the said lands and others above disposed." "Surrogating hereby" Moir "in my full right and place of the premises for ever." On the precept assigned Moir was infeft. In 1890 Orr, who had acquired from Tait's trustee in 1860 the lands of Castle Campbell, with a description which included the lands of Hillfoot, and the "coals and coalheughs," raised an action against Moir's testamentary trustees to have it declared that the pursuer was proprietor of the coals in Hillfoot (which still remained unworked), in virtue of the conveyance of 1860. The defenders pleaded the conveyance of 1837. *Held* by a majority of the whole Court that the defenders should be assolized, in respect that the

SUPERIOR AND VASSAL—*Continued.*

conveyance of 1837, on a just construction carried the coals along with the superiority to Moir. *Orr v. Moir's Trustees*, March 18, 1892, p. 700.

Process—Decree ad factum præstandum—Enforcement of obligation to build.

4. A feuar was taken bound to erect certain buildings on his feu within two years from the date of the feu-disposition. In an action by the superior for implement of the obligation, the Lord Ordinary ordained the feuar "forthwith" to erect the buildings in question. On a reclaiming note the Court recalled the Lord Ordinary's interlocutor, and holding that a decree *ad factum præstandum* should not leave the defender in doubt as to the measure of his obligation, decerned against him to erect the buildings in question "within one year" from the date of the interlocutor, parties having agreed that that time should be fixed. *Middleton v. Leslie*, May 19, 1892, p. 801.

Entry—Composition or Relief-duty—Confirmation.

5. A proprietor having a personal title to the lands of W.—inherited from an ancestor who was a singular successor of the last entered vassal, and who held an infeftment unconfirmed—in 1810 disposed the lands to trustees for payment of debts and of annuities to himself and his wife, for implementing the provisions of any settlement left by him, and finally for reconveyance to himself or to his heirs of the lands not sold. Power was given to the trustees to sell with the grantor's written consent. In 1815 the trustees having obtained decree of adjudication in implement against the truster's heir, and having been infeft thereon, were entered with the superior as trustees, for the purposes of the trust-deed, by a charter of sale, adjudication, and confirmation, which, inter alia, expressly confirmed the infeftment of the truster's ancestor. The trustees paid composition to the superior. In 1860 they granted a disposition to the truster's heir-at-law of the lands not sold, who was infeft thereon, and subsequently by the Conveyancing Act, 1874, obtained an entry with the superior. The last surviving trustee having died in 1863, the superior claimed composition. The vassal tendered relief-duty. Held (aff. judgment of the Second Division) that the vassal was bound to pay composition in respect (1) that if the charter of confirmation obtained by the trustees created a new investiture, it did not operate as an enfranchisement of the truster's heirs, and that the heir to whom the trustees conveyed was a singular successor to them; (2) that if the trust title did not create a new investiture, but was a mere burden upon the truster's right, the vassal was not the heir of any investiture recognised by the superior, since his ancestor's infeftment had not been confirmed prior to the charter of confirmation obtained by the trustees, and since the confirmation of it contained in that charter was to be regarded as confirming it only to the limited effect of validating the trustees' title. *Johnstone v. Duke of Buccleuch*, July 25, 1892, H. L., p. 39.

SUSPENSION. See *Process*, 26.

TERCE. See *Husband and Wife*, 2.

THELLUSSON ACT. See *Succession*, 11.

THIRLAGE. See *Servitude*.

TIME. See *Bankruptcy*, 5, 8—*Election Law*, 7.

TITLE TO SUE. See *Agent and Client*—*Burgh*, 2—*Husband and Wife*, 6—*Insurance*, 3, 5—*Judicial Factor*, 2—*School*, 3—*Trust*, 6.

TRADE NAME. *Hotel*—*Distinctive addition*—*Interdict*.

A railway company purchased for use as a hotel certain premises to which the original proprietor had sixteen years before given the name "Palace Hotel," and by which name it had ever since been known to the public. Mann, who had under lease successfully managed the hotel as tenant for thirteen of these years, removed to another hotel in close proximity, and advertised his new hotel as the "Palace Hotel," and "Mann's Palace Hotel." In a suspension and interdict by the railway company against Mann it

TRADE NAME—*Continued.*

was proved that his use of either name had led to many mistakes injurious to the complainers. The Court granted interdict against Mann's using either name, holding (1) that his use of the name "Palace Hotel" amounted to a representation injurious to the complainers' interests; and (2) that it had been proved that the addition of his own name was not sufficient to distinguish it from the complainers' hotel. *Great North of Scotland Railway Co. v. Mann*, July 15, 1892, p. 1035.

TRUST. *Judicial factor.*

1. Where the administration of a testamentary trust could not be carried on in consequence of the trustees being equally divided in opinion, the Court, on the petition of the liferenter, sequestrated the trust-estate and appointed a judicial factor. *Stewart v. Morrison*, July 14, 1892, p. 1009.
2. Circumstances in which certain testamentary trustees, who had unsuccessfully opposed the appointment of a judicial factor, were found liable in expenses. *Stewart v. Morrison*, July 14, 1892, p. 1009.
3. In a petition by the next of kin of a domiciled Scotsman for removal of his testamentary trustees and the appointment of a judicial factor, the only allegation against the testamentary trustees was that they intended to remove the trust-estate from Scotland to the prejudice of the petitioners, who stated that they were about to bring a reduction of the settlement on the ground of incapacity and undue influence. The trustees having stated that they had no intention of removing the estate from Scotland, the Court *refused* the petition. *Bowman v. Russell's Trustees*, Dec. 1, 1891, p. 205.

Succession—Service—Conveyancing Act, 1874, sec. 43.

4. Trustees under a marriage-contract acquired right to a heritable bond by assignation to themselves *nominatim* as trustees "and the survivor of them, and their or his foresaids and assignees whomsoever." There was no antecedent in the deed to which the expression "their or his foresaids" could refer. All the trustees having died, the survivor of the spouses, by virtue of a power in the marriage-contract, appointed new trustees. This deed of appointment contained no conveyance. The heir of the last survivor of the trustees named presented a petition for service as nearest and lawful heir in special to the last survivor in the lands contained in the heritable bond under the provision of section 43 of the Conveyancing Act of 1874. *Held* that this was a competent way of making up the title. *M'Lean*, July 16, 1892, p. 1043.

Power to make advances—Interest.

5. A trustor left his estate to be divided among his family of four daughters, vesting being postponed till the period of payment, viz., the majority of the youngest daughter. He empowered his trustees "to make advances" to his daughters "on their marriage," which advances were to be accounted as part of their shares, and to be deducted from their shares of the residue on the final division taking place. Three of the daughters were married during the subsistence of the trust. The trustees on the occasion of each marriage paid the daughter a sum of £1000, and made her an annual allowance of £300. *Held* (1) that the annual allowances were *ultra vires* of the trustees; (2) that the allowances so paid to each married daughter, with interest thereon to the date of division, were to be imputed to account of her share of residue; (3) that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and (4) that no interest was chargeable on the sums of £1000. *Baird's Trustees v. Duncanson*, July 19, 1892, p. 1045.

Title to sue—Inter vivos trust—Liability of trustees to account for their intrusions to creditors in a bond and disposition in security over the trust-estate.

6. By *inter vivos* deed of trust a trustor conveyed certain heritable property to trustees directing them to pay therefrom any sums which they might borrow on the security of the trust-estate, with the interest accruing thereon, to pay the surplus of the rents to his wife during her life, and on her death to convey the trust-estate to his daughter. *Held* that the trust not being a trust for creditors the creditors in a bond and disposition in security granted

TRUST—*Continued.*

by the trustees had no title to call them to account for their intromissions with the trust-estate. *Lucas' Trustees v. Beresford's Trustees*, June 29, 1892, p. 943.

Delivery—Power to revoke.

7. A trustor by trust-disposition on the narrative that he was then in solvent circumstances, and that he regarded himself as morally and legally liable to the persons therein named for the sums therein mentioned, and that he was desirous of making a suitable provision for his wife and children, disposed certain heritable subjects, and also assigned certain policies of insurance upon his own life to trustees, and bound himself to the trustees to keep the policies in force. He then directed the trustees to hold and apply the trust-estate for payment of a variety of provisions to his wife and children, some of which were to come into immediate operation, and also for payment of £500 to a nephew, payment of the last mentioned provision being directed to be made as soon as the trustees had received payment of the proceeds of the policies of insurance. The residue of the trust-estate was directed to be divided, on the death of his wife, among his lawful children. It was further declared that none of the provisions should become vested interests until the period of payment. The deed contained no express power to revoke, and was delivered to the trustees, who were infest in the heritable subjects and intimated the assignation of the policies in their favour to the insurance companies. Subsequently the trustor executed a deed revoking the provision of £500 to the nephew. *Held*, after the death of the trustor, that the provision in favour of the nephew was irrevocable. *Robertson v. Robertson's Trustees*, June 7, 1892, p. 849.

Ultra vires—Partnership—Power of trustees to compromise claim by one of their number.

8. Testamentary trustees were empowered to carry on any business in which the trustor might be engaged at the time of his death, or to continue his interest in any business in which he might then be partner. At the time of his death the trustor had a retail spirit business in Glasgow, which was managed by A, his brother, who, however, asserted that by arrangement with the trustor he had right to half the profits and to half the goodwill. The trustees, of whom A was one, after taking legal advice as to A's claim, resolved to carry on this business under A's management, and the trustees allowed A to receive, as a partner, half the profits. After the business had been sold certain of the beneficiaries brought an action to have the profits so paid restored to the trust, alleging that the payments were *ultra vires*, on the ground that A had not been partner with the deceased, but merely manager, with a salary of half the profits. A proof was allowed. There was no written contract of copartnership, but A deposed that the trustor had agreed to give him half of the profits of the business, besides a share in the goodwill, in consideration of the trouble which he had had in putting the business on a satisfactory footing, the trustor not having been able to look after it personally. A law-agent whom the trustor occasionally consulted deposed that the trustor "distinctly led me to understand his brother was a partner to the extent of one-half the business." *Held* that the partnership had in fact been established, and therefore that the trustees, having continued the business, were bound to allow A half the profits.

Question, whether the trustees would have been entitled to enter into a compromise of their co-trustee's claims. *Lawrie v. Lawrie's Trustees*, March 17, 1892, p. 675.

Executor.

9. *Opinions* that a testamentary conveyance to certain persons as trustees, or with a direction to manage, does not necessarily imply their appointment as executors. *Martin v. Ferguson's Trustees*, Feb. 16, 1892, p. 474.

Process—Multiplepounding.

10. When trustees under a testamentary deed bring an action of multiplepounding to have a question which has been raised as to its validity deter-

TRUST—Continued.

mined, it is their duty to lodge a claim, as trustees, for the whole fund for the purpose of administration. *Hall's Trustees v. Macdonald*, March 8, 1892, p. 567.

See *Bankruptcy*, 5, 6, 7, 8, 11, 12—*Charity—Marriage-Contract—Parent and Child*, 10—*Succession*, 13, 14, 15.

VALUATION ACTS. *Expenses connected with printing roll—Liability of Crown—Valuation Act, 1854, secs. 3, 18—Valuation Act, 1857, sec. 1—Registration Amendment Act, 1885, sec. 12.*

1. When the Assessor under the Lands Valuation Acts is the Surveyor of Inland Revenue for the district, and the County Council has resolved, under sec. 12 of the Registration Amendment Act, 1885, that the Valuation-roll shall be printed, the extra trouble caused to the Assessor and his clerks in preparing and revising the roll for the press falls to be paid for by the Inland Revenue. *County Council of Lanarkshire v. Lord Advocate*, March 15, 1892, p. 617.

“*Consideration other than rent*”—*Goodwill—Public-house—Obligation by proprietor not to commence rival business—Valuation of Lands Act, 1854, sec. 6.*

2. Where a sum of money is paid in name of goodwill to the proprietor and occupant of an inn by a purchaser or lessee of the premises, the Valuation Committee are not entitled without inquiry to take the whole of that sum as applicable to the premises themselves.

Observations upon the elements which may be assumed to enter into the goodwill of a publican's business formerly carried on by the proprietor of the premises, and sold by him to his tenant under a lease.

The proprietor of a public-house, who had carried on business there, let the premises to a tenant on a ten years' lease, the tenant paying a sum for goodwill, and the proprietor undertaking not to commence business as a spirit-dealer in the same town during the currency of the lease. *Held* that the obligation by the proprietor not to carry on a rival business was a valuable consideration in favour of the tenant, not effeiring to the premises, which should have been deducted from the value of the goodwill before any addition was made in respect thereof to the rent in the lease. *Hughes v. Assessor for Stirling*, June 7, 1892, p. 840.

Public parks—Basis of valuation.

3. Where a municipal corporation allows land held by it to be used for public recreation, it should be entered in the Valuation-roll at an annual value equal to the rent which might be obtained if the lands were let and the public excluded, but if the land is held subject to servitudes of way or other restrictions which are binding on the corporation, the land should be valued at the rent which may be obtained for its use subject to these restrictions. *Ferrier v. Assessor for Edinburgh*, July 20, 1892, p. 1074.

Process—Statement of case—Findings in fact—Valuation Amendment Act, 1879, sec. 7.

4. In a case stated for the opinion of the Valuation Appeal Court, the Valuation Committee set forth the contentions of the parties, that the appellants had led evidence (which was set forth at length, as taken down in shorthand), and the following determination,—“The Committee sustained the appeal to the effect of reducing the valuation” to a certain sum. *Held* that the case had been improperly stated, as it neither set forth the facts proved, nor stated whether the determination of the Committee proceeded on the principle contended for by the Assessor, or on that contended for by the appellants, and case dismissed. *Steel Co. of Scotland, Limited, v. Assessor of Lanarkshire*, June 7, 1892, p. 847.

Complaint by third party—Case—Competency—Valuation of Lands Act, 1854, secs. 8, 9, and 13—Valuation of Lands Act Amendment Act, 1857, sec. 2—Valuation of Lands Amendment Act, 1879, secs. 6, 7, 8, and 9.

5. The Lands Valuation Acts entitle persons dissatisfied with an assessor's valuation of subjects held by themselves “to appeal,” and persons dis-

VALUATION ACTS—*Continued.*

satisfied with an assessor's valuation of subjects held by others "to complain" to the commissioners or magistrates "sitting as an appeal Court," and give right to persons "entitled to appeal" to the commissioners or magistrates to require them to state a case for the opinion of her Majesty's Judges. *Held* that the right to require a case to be stated is given to third parties complaining as well to those objecting to the valuation of their own property. *Ferrier v. Assessor for Edinburgh*, June 17, 1892, p. 882.

Proof—Valuation-roll—Lease—Reduction of rent.

6. *Opinion* that a return by a landlord to an assessor under the Valuation Act of the rent of a farm is not conclusive evidence as between landlord and tenant of an agreement to reduce the rent fixed in a written lease. *Rattray v. Leslie's Trustee*, June 11, 1892, p. 853.

WRIT. *Improbative writ—Rei interventus—Cautioner.*

1. A bank agreed to make advances to A on his obtaining B's guarantee. A formal letter of guarantee, ending with the words "In witness whereof," was then prepared by the bank and handed to A for execution by B. A obtained B's signature and afterwards got two persons to sign as witnesses who had not seen B subscribe nor heard him acknowledge his subscription. A returned the document to the bank with the names and designations of the witnesses, the testing-clause was filled up by the bank, and the bank made an advance to A upon the faith of the guarantee. In an action by the bank upon the letter of guarantee against B the defender pleaded that he was not bound, as the deed was not tested. The above facts were admitted or proved. *Held* that the defender having signed the deed and delivered it to A, who was *in hac re* the bank's agent, he had delivered it to the bank as a guarantee for advances to be made to A, and that the bank having made advances upon the faith of it, the defender's imperfect obligation had been validated by *rei interventus*. *National Bank of Scotland, Limited, v. Campbell*, June 17, 1892, p. 885.

Cautionary obligation.

2. *Question*, whether a letter of guarantee is a writing *in re mercatoria*. *National Bank of Scotland, Limited, v. Campbell*, June 17, 1892, p. 885.

Assignment of lease—Docquet—Holograph of Justice of Peace—Conveyancing Act, 1874, sec. 41.

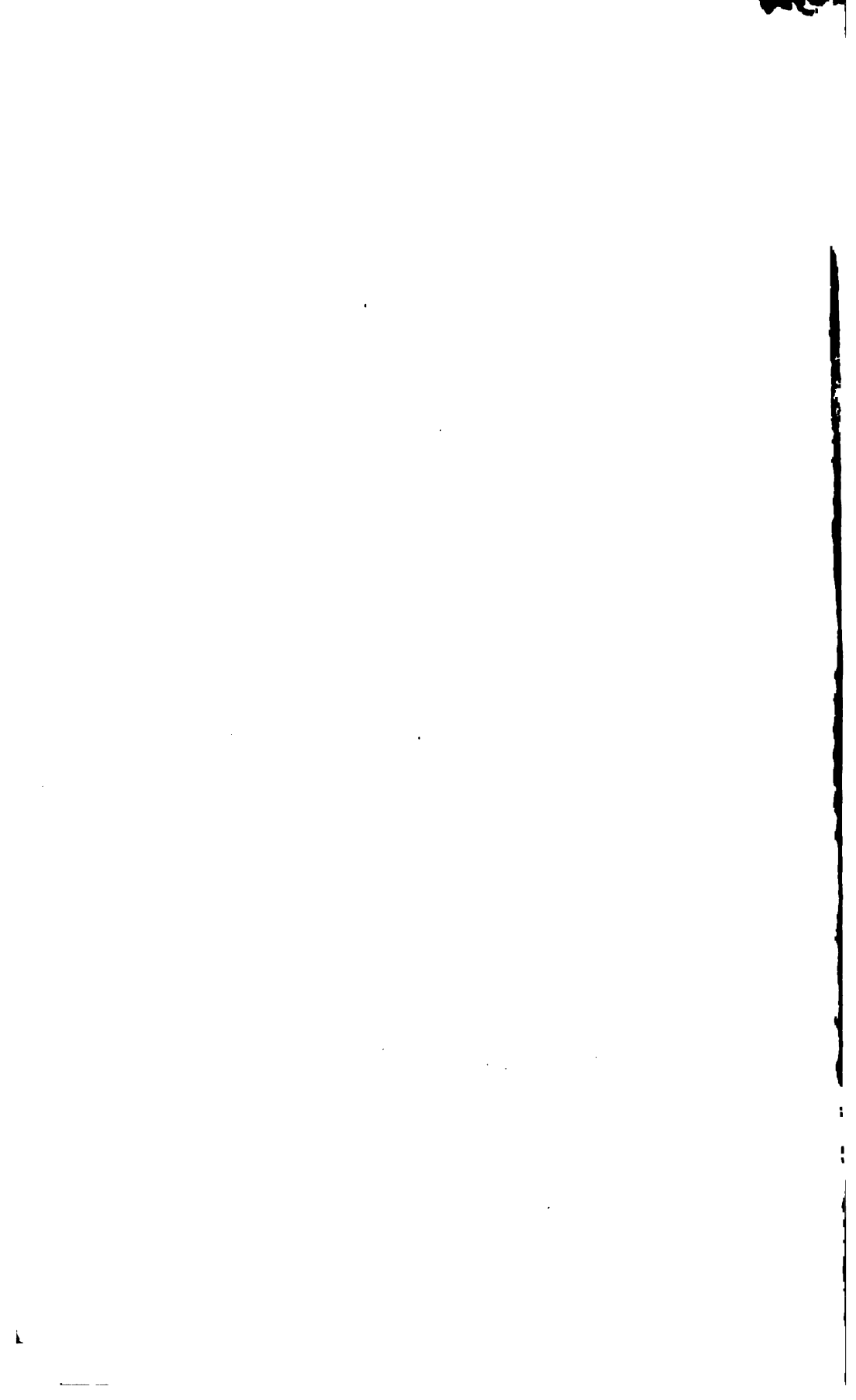
3. *Held* that the necessity for a notarial docquet being holograph was not removed by the provisions of the 41st section of the Conveyancing Act, 1874, and that a deed bearing to be signed for the granter by a Justice of the Peace was invalid in respect that the docquet signed by the latter was not holograph. *Irvine v. McHardy*, Feb. 5, 1892, p. 458.

Partnership—Power of partner to borrow money—Proof.

4. A partner of a mercantile firm borrowed, as for his firm, a sum of £100 from his wife. She requested an acknowledgment from the firm, and, in compliance with that request, he handed her an acknowledgment which bore that the money had been received from her by the hands of her husband "on temporary loan." The acknowledgment was written by a clerk of the firm and was signed by their cashier *pp.* of the firm. It was proved that the cashier had so signed on the verbal instructions of the husband; that the money was paid to the cashier and put to the credit of the husband in the books of the firm. In an action by the wife against the firm for repayment of the loan, *held (diss. Lord Young)* (1) that the husband, as partner of a mercantile firm, had power to borrow money and to bind the firm for the debt; (2) that the writ having been signed by the cashier on the instruction of such a partner was writ of the firm; and (3) might be used *in modum probationis*, although it was neither holograph nor tested, and that therefore the loan to the firm had been established. *Bryan v. Butters Brothers & Co.*, Feb. 23, 1892, p. 490.

See *Building Society—Election law*, 6—*Succession*, 20.

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